Companies Incorporated Outside India

1. Introduction

Foreign Company [Section 2(42)]: “Foreign company” means any company or body corporate incorporated outside India which-

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014, “electronic mode” means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

(a) business to business and business to consumer transactions, data interchange and other digital supply transactions;

(b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;

(c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and

(e) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

2. Application of Act to foreign companies [Section 379]

According to this section:

Where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by:

(i) one or more citizens of India; or

(ii) by one or more companies or bodies corporate incorporated in India; or
(iii) by one or more citizens of India and one or more companies or bodies corporate incorporated in India,

whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

**Note:** Chapter XXII referred to above deals with the legal provisions for companies incorporated outside India.

### 3. Documents, etc., to be delivered to Registrar by foreign companies [Section 380]

According to section 380 (1) of the Companies Act, 2013,

(i) Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:

   (a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language;

   (b) the full address of the registered or principal office of the company;

   (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the *Companies (Registration of Foreign Companies) Rules, 2014*, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

   (1) personal name and surname in full;

   (2) any former name or names and surname or surnames in full;

   (3) father’s name or mother’s name and spouse’s name;

   (4) date of birth;

   (5) residential address;

   (6) nationality;

   (7) if the present nationality is not the nationality of origin, his nationality of origin;

   (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
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(9) income-tax permanent account number (PAN), if applicable;
(10) occupation, if any;
(11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
(12) other directorship or directorships held by him;
(13) Membership Number (for Secretary only); and
(14) e-mail ID.

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
(h) any other information as may be prescribed.

(ii) According to the Companies (Registration of Foreign Companies) Rules, 2014, the above informations shall be filed with the Registrar within 30 days of the establishment of its place of business in India, in Form FC-1 along with prescribed fees and documents required to be furnished as provided in section 380(1). The application shall also be supported with an attested copy of approval from the Reserve Bank of India under the Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

(iii) Office where documents to be delivered and fee for registration of documents:

1. According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.
2. It shall be accompanied with the prescribed fees.
3. If any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and from the date on which such notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in India.

(iv) Under section 380 (2) every foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.

(v) Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed that the return containing the particulars of the alteration shall be filed in form FC-2 along with prescribed fees.

4. Accounts of foreign company [Section 381]

According to this section:

(i) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and

(b) deliver a copy of those documents to the Registrar.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

(1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.

(2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

(ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) given above shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf [Section 381(1)].
(iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]

(iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC.3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

(v) According to the Companies (Registration of Foreign Companies) Rules, 2014,

(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:--

1. Statement of related party transaction
2. Statement of repatriation of profits
3. Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

(vi) Audit of accounts of foreign company: According to the Companies (Registration of Foreign Companies) Rules, 2014,

(a) Every foreign company shall get its accounts, pertaining to the Indian business operations prepared in accordance with section 381(1) and Rules thereunder, shall be audited by a practicing Chartered Accountant in India or a firm or limited liability partnership of practicing chartered accountants.

(b) The provisions of Chapter X i.e. Audit and Auditors and rules made there under, as far as applicable, shall apply, mutatis mutandis, to the foreign company.
5. Display of name, etc., of foreign company [Section 382]

Every foreign company shall—

(a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill-heads and letter paper, and in all notices, and other official publications of the company; and

(c) if the liability of the members of the company is limited, cause notice of that fact—

(i) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situated.

6. Service on foreign company [Section 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

7. Debentures, annual return, registration of charges, books of account and their inspection [Section 384]

(i) The provisions of section 71 (Issue of Debentures) shall apply mutatis mutandis to a foreign company.

(ii) The provisions of section 92 (Preparation and filing of Annual return) shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year, to the Registrar containing the particulars as they stood on the close of the financial year.
(iii) The provisions of section 128 (Books of account, etc., to be kept by company) shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.

(iv) The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.

(v) The provisions of Chapter XIV (Inspection, inquiry and investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

8. Fee for registration of documents [Section 385]

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, fee to be paid to the Registrar for registering any document relating to a foreign company shall be such as provided in the Companies (Registration Offices and Fees) Rules, 2014.

9. Interpretation [Section 386]

For the purposes of the foregoing provisions of this Chapter, the expression:

(a) “Certified” means certified in the prescribed manner to be a true copy or a correct translation;

(b) “Director”, in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and

(c) “Place of business” includes a share transfer or registration office.

Example: Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:

(i) A company incorporated outside India having a share registration office at Mumbai.

(ii) Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.

Answer

Section 2(42) of the Companies Act, 2013 defines a “foreign company” as any company or body corporate incorporated outside India which:
(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) Conducts any business activity in India in any other manner.

According section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), expression “Place of business” includes a share transfer or registration office.

Accordingly, to qualify as ‘foreign company’ a company must have the following features:

(a) it must be incorporated outside India; and

(b) it should have a place of business in India.

(c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and

(d) It must conduct a business activity of any nature in India.

(i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.

(ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore will not fall within the definition of a foreign company. Its incorporation by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must conduct a business activity in India.

10. Dating of prospectus and particulars to be contained therein [Section 387]

According to this section:

(i) Prospectus to be dated and signed [Section 387(1)]: No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—

(a) contains particulars with respect to the following matters, namely:—

(1) the instrument constituting or defining the constitution of the company

(2) the enactments or provisions by or under which the incorporation of the company was effected;
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(3) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;

(4) the date on which and the country in which the company would be or was incorporated; and

(5) whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(b) states the matters specified under section 26 (Matters to be stated in prospectus).

Provided that points (1), (2) and (3) of point (a) above shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.

(ii) No waiver of compliance in prospectus [Section 387(2)]: Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void.

(iii) Form of application for securities to be issued along with prospectus [Section 387(3)]: No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.

(iv) Section 387(4) further provides that the provisions of section 387—

(a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and

(b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange,

but, subject as aforesaid, section 387 shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.
12.10 Corporate and Allied Laws

(v) Nothing in section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from section 387.

11. Provisions as to expert’s consent and allotment [Section 388]

According to this section:

(i) No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—

(a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or

(b) if the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of sections 33 and 40, so far as applicable.

(ii) For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

12. Registration of prospectus [Section 389]

According to this section:

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, the following documents shall be annexed to the prospectus, namely:
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(a) any consent to the issue of the prospectus required from any person as an expert;

(b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;

(c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;

(d) a copy of underwriting agreement; and

(e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

13. Offer of Indian Depository Receipts [Section 390]

For the purposes of this section, and according to the Companies (Registration of Foreign Companies) Rules, 2014, Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

(i) the offer of Indian Depository Receipts (IDR);

(ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;

(iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and

(iv) the manner of sale, transfer or transmission of IDR,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

According to the Companies (Registration of Foreign Companies) Rules, 2014, no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India.

The Rules relating to offer, disclosure requirements and manner of transfer, sale etc., related to IDR are contained in Companies (Registration of Foreign Companies) Rules, 2014.
14. Application of sections 34 to 36 and Chapter XX [Section 391]

Section 391 of the Companies Act, 2013 provides for Application of sections 34 to 36 and Chapter XX. According to this section:

According to sub-section (1), the provisions of sections 34 to 36 (both inclusive) shall apply to—

(i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;

(ii) the issue of IDR by a foreign company.

Section 34 deals with criminal liability for mis-statements in prospectus

Section 35 deals with Civil Liability for mis-statement in prospectus

Section 36 deals with punishment for fraudulently inducing persons to invest money

Sub-section (2) provides that the provisions of Chapter XX i.e. Winding up shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India.

15. Punishment for contravention [Section 392]

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII of the Companies Act, 2013 (i.e. Chapter on Companies incorporated outside India), the foreign company shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to ₹ 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000, or with both.

Thus, the punishment for contravention may be summed up as under:

1. Fine on defaulting foreign company in the range of 1 lac to 3 lac rupees.

2. In case of continuing default an additional fine on the foreign company to the tune of ₹ 50,000 per day after the first during which the contravention continues.

3. Punishment for every officer of the foreign company who is default shall be:

   (a) Imprisonment for a maximum term of 6 months, or

   (b) Imposition of a fine of a minimum amount of ₹ 25,000, or

   (c) Both - imprisonment and fine.
16. Company’s failure to comply with provisions of this Chapter not to affect validity of contracts, etc. [Section 393]

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. However, the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Companies Act, 2013, applicable to it.

RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

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| Amendment of section 379. | Section 379 of the principal Act shall be renumbered as sub-section (2) thereof and before sub-section (2) as so renumbered, the following sub-section shall be inserted, namely:—

"(1) Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies:

Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of sections 380 to 386 and sections 392 and 393 and a copy of every such Order shall, as soon as may be after it is made, be laid before both Houses of Parliament."

| | Notified till 30th April, 2018 |
|-------------------|-----------|--------|
| Amendment of section 384. | In section 384 of the principal Act, in sub-section (2), after the word and figures "section 92", the words and figures "and section 135" shall be inserted. | Notified till 30th April, 2018 |
| Amendment of section 391. | In section 391 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) Subject to the provisions of section 376, the provisions of Chapter XX shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed." | Notified till 30th April, 2018 |