



India

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Important new developments

The cap on cash remittances by persons resident in India for specified permitted offshore capital and current account transactions (including acquisition of immovable property) has been raised from USD75,000 to USD125,000 per financial year (April-March) per individual.

The 2014 Budget has proposed the following measures through *Finance (No.2) Bill, 2014*:

- It has enhanced the income tax exemption limit by INR50,000 but retained the 10 per cent surcharge on persons whose total income exceeds INR10 million.
- Capital gains exemption on re-investment in residential property can be claimed for only one residential property located in India and not offshore property.
- Money received as an advance in the course of negotiations for transfer of a capital asset is taxable as 'income from other sources' if the advance is forfeited and negotiations break down.
- Domestic company dividends (taxed at 15 per cent) are to be grossed-up for tax.
- Gains derived by foreign portfolio investors (FPIs) from the transfer of Indian securities will be taxed as capital gains and not business income.
- The holding period for unlisted securities and debt-oriented mutual funds has been extended from more than 12 months to more than 36 months to qualify for long-term capital gains.
- Distributions from a real estate investment trust (REIT) to its unitholders is taxable at 10 per cent for resident unitholders and 5 per cent for non-resident unitholders. Sale of units of REITs by the sponsor is taxable at 20 per cent for long-term capital gains and at applicable income tax rates for short-term capital gains;
- Charitable trusts are no longer eligible to claim tax exemption simultaneously under

s10 (i.e. general provision) and under specific provisions (ss11-13) are not met; such trusts also cannot claim double benefit of notional depreciation on capital assets that were acquired using tax-exempt income;

- Grounds for the cancellation of registration of a charitable trust for tax-exempt status have been replaced with wider grounds.
- Every transaction with a person located in a jurisdiction notified as a non-cooperative jurisdiction (for failure to provide information to the Government) must be separately disclosed. Individuals and Hindu undivided families (HUFs) with business/profession income must separately disclose sums paid to non-residents in revised income tax returns for 2014-15.
- An 'in-substance' *Foreign Account Tax Compliance Act* (FATCA) agreement was signed between India and US on and with effect from 11 April 2014. Financial institutions in India are now required to make FATCA disclosures (through the Central Board for Direct Taxes) to the US IRS. FATCA obligations may apply to family trusts and possibly even HUFs (if considered a trust or alternatively a non-financial foreign entity).
- From October 1 2014, listed companies must have in place plans for orderly succession for appointments to the board and senior management.
- The Supreme Court in *Commissioner of Wealth Tax, Rajkot v Estate of Late HMM Vikramsinhji of Gondal* ([2014] 363 ITR 679(SC)) has clarified

that income of an offshore discretionary trust cannot be taxed in the hands of a beneficiary unless distributed to the beneficiary.

- The Income Tax Appellate Tribunal (Mumbai bench) has ruled in *Sudhir Menon HUF v CIT* ([2014] 148 ITD 260 (Mum)) that no income tax is payable by a shareholder (an individual or a HUF) if there is a pro-rata allotment of shares to existing shareholders (who were family members).
- The Income Tax Appellate Tribunal (Allahabad bench) in *ACIT v Bilakhia Holdings P. Ltd* (MANU/IB/0289/2014) has held that if a closely held company receives shares from shareholders who belong to the family pursuant to a family arrangement among such shareholders, the receipt will not be considered a gift, but will be considered a transfer and subject to capital gains tax (CGT).
- The Delhi High Court in *Ravinder Chadha v. Govt. of NCT of Delhi* (W.P.(C) 306/2014) has directed the Registrar to accept the application for registration of marriage of a Hindu couple located abroad submitted through their powers of attorney holders in India and process the application using video conference instead of demanding them to be physically present before it.

COMMUNITY	INTESTATE SUCCESSION	TESTAMENTARY SUCCESSION
Hindus (includes Sikhs, Jains, Buddhists)	<i>Hindu Succession Act, 1956</i>	<i>Hindu Succession Act, 1956</i> and <i>Indian Succession Act, 1925</i> (certain sections)
Muslims	Customary personal law (as separately applicable to Shias and Sunnis)	Same as intestate
Christians, Parsis, Jews, inter-faith marriages or marriages registered under the Special Marriage Act, 1954 or Foreign Marriage Act, 1969	<i>Indian Succession Act, 1925</i>	Same as intestate
Others	Certain tribal groups are governed by their customary laws. All persons (regardless of religion) resident of the State of Goa or the Union Territories of Daman and Diu are governed by the <i>Portuguese Civil Code 1867</i> .	

Legal system

Common law, with a federal Parliamentary democracy.

INHERITANCE AND SUCCESSION

Succession

Indian society has many religious communities, each of which is governed by their personal laws (which may be wholly codified or partly codified and partly customary). Please see the table on previous page.

Family law and defined inheritance rules

YES ■ NO □

Family law:

The law for Hindus, Christians and Parsis is mostly codified (in separate statutes) as to marriage, divorce, guardianship, maintenance, etc. Muslim law is largely uncoded. The *Special Marriage Act, 1954* governs inter-faith marriages and marriages registered under the Act. The *Foreign Marriage Act, 1969* relates to marriages of Indian citizens outside India.

Inheritance:

Under the *Hindu Succession Act, 1954* property of a Hindu is first inherited by Class I heirs (son, daughter, widow, mother and certain other relations) and then by Class II heirs (father, siblings and other specified relations). Class I heirs take simultaneously and to the exclusion of others. Class II heirs inherit sequentially.

Muslims are governed by customary Muslim law. For Sunni Muslims, heirs are of three classes: sharers (those with a defined share, e.g. parents, children, spouses); residuaries (those who take the residue); and distant kindred (other blood relations). For Shia Muslims, heirs are of two classes: consanguineous (blood relations divided into three classes); spouse. Consanguineous heirs inherit sequentially. The spouse is never excluded and inherits along with the nearest consanguineous heir.

For those governed by the *Indian Succession Act* (other than Parsis), the spouse inherits one-third share with the remainder to lineal descendants; or one-half share if there are no lineal descendants but other relations; and wholly if no such relations. For Parsis, the spouse and children inherit equally; and if parents are alive then each parent receives a share equal to half the share of each child.

In all cases above, if there is no qualified heir, property transfers to the state.

Probate process

Probate, not necessary for Muslims, is mandatory for persons of other communities provided the will is made in, or relates to immovable property in, the cities of Mumbai, Kolkata or Chennai. It is granted to the executor of the will (if alive and competent to contract) who must apply to the court for probate. In the absence of an executor, the inheritors must apply to the court to appoint an executor before probate proceedings are initiated.

A probate application must be made before the District Court, which will issue a notice to the next of kin to file objections. A public notice is also published in newspapers. The application

must contain the following facts:

- The time of the testator's death.
- A declaration (with proof) that the will attached is the last will and testament.
- A statement that the will was duly executed.
- The value of assets that are likely to be inherited.
- A statement that the executor making the application is named in the will.

A probate fee is payable and is a state levy linked to the value of the property.

A foreigner owning assets in India is not required to create an Indian will for their Indian assets and can have all their Indian assets covered in a foreign will. For execution of such a will in India, the will needs to be probated/certified by the appropriate foreign court and then must be filed with the appropriate Indian court for execution. Case law has held that to grant probate in common form of a foreign will, the Indian court will be satisfied with prima facie proof that a foreign court has adopted the document as a valid testament, without any regard to the form in which such adoption is signified. It does not require that the form of approval should be the same as its own grant of probate.

Letters of administration are granted when the deceased died intestate or the executor was not appointed in the will. Letters of administration entitle the administrator to all rights belonging to the intestate individual. However, they do not render valid any intermediate acts of the administrator that cause damage to the intestate's estate. To obtain letters of administration, the beneficiary must apply to the court and on receiving satisfactory proof of valid execution of the will, the court issues the letters to the beneficiary.

Mental capacity

Under the *Indian Contract Act, 1872*, a person is competent to contract if they are of the age of majority according to the law to which they are subject, and who is of sound mind, and is not disqualified from contracting by any law to which they are subject. This Act provides that a person is said to be of sound mind for the purpose of making a contract if, at the time when they make it, they are capable of understanding it and of forming a rational judgment as to its effect upon their interests. Courts have considered factors such as history of mental illness, testimony of medical witness, relations with family members, state of sobriety, etc. in determining whether a person could be said to be of sound mind. The *Indian Majority Act, 1875* provides that a minor for whom a guardian is appointed attains majority at the age of 21, while the age of majority is 18 years for all other persons domiciled in India.

ESTATE PLANNING

Use of trusts in estate planning

A trust as an estate planning vehicle is very popular in India. Earlier trusts were mostly testamentary in nature to provide for distribution of assets upon the settlor's death in a bid to avoid the long probate process. However, trusts are increasingly being used to meet objectives such as accumulating value in assets, asset protection and ensuring steady stream of distribution to

beneficiaries as per the settlor's wishes (including for philanthropic purposes).

In Indian law, a trust is not a separate legal entity but an obligation. Unlike the UK, which recognises duality of ownership, the trustee of an Indian trust is the legal and the beneficial owner of the trust property. The beneficiaries (whether Indian residents or not) only have a beneficial interest in the trust property.

Family (private) trusts may be set up either during one's lifetime or under a will. However, a trust of immovable property must be declared by a registered written instrument. A trust may be a revocable or irrevocable trust and either determinate or discretionary. Public charitable trusts/endowments are governed by separate legislations, some of which are state-specific.

Trusts are fiscally transparent and the income of the trust is effectively taxed in the hands of its beneficiaries. However, the obligation to pay tax is on the trustee in the capacity of a representative assessee. For determinate trusts, the trustee is assessed to tax to the same extent that would be levied upon the beneficiary (the trustee may recover from the beneficiary). Income of discretionary trusts and trusts whose income includes profits and gains of business or profession, are taxable at the maximum marginal rate (currently a base rate of 30 per cent). Specified income of public charitable/religious trusts are tax exempt if certain substantive and procedural conditions are met and donors to such trusts are entitled to specified deductions.

India is not a party to the *Hague Convention on the Law Applicable to Trusts and on their Recognition*. There is no bar on foreigners being settlors or beneficiaries of trusts under Indian trust law but exchange control regulations would apply to restrict certain activities.

Use of foundations in estate planning NOT APPLICABLE

Types of entities

In addition to trusts, Indian law permits the following: sole proprietorship, partnership, limited liability partnership, and companies limited by shares (privately or publicly held). Companies limited by guarantee are also allowed where the liability of the members of the company is limited to the amount the members respectively undertake to contribute to the assets of the company in the event of its being wound up. Such a company may be a company limited by guarantee and with share capital or without share capital. An association formed for promoting commerce, art, science, religion, charity or any other useful object which intends to apply its profits for promoting such objects and prohibits dividends to its members may be formed as a limited company to enjoy all privileges of a limited company. Such a company is commonly called a Section 25 company.

Other popular entity choices for charitable purposes are public charitable trusts registered under state laws or a society under the *Societies Registration Act, 1860*.

TAXATION

Income tax system

India follows a world income system based on residence. A resident is taxed on global income while a non-resident is taxed on income that is received, accrues or arises in India or is deemed to be received, arise or accrue in India. An intermediate category of 'Resident but not Ordinarily Resident' (RNoR) is provided for where the income that accrues or arises to such a person outside India is taxable only if derived from a business controlled in or a profession set up in India. The heads of income are mutually exclusive. The tax year runs from 1 April of a calendar year to 31 March of the next calendar year. Previous year refers to the financial year immediately preceding the assessment year, i.e. the year in which the income is assessed to tax. The 2014 Budget has proposed the following changes in personal income tax ranges:

Personal income tax rates

INCOME RANGE (INR)	RATES OF TAX
Up to 250,000	Nil
250,001– 500,000	10% on the income exceeding INR 200,000
500,001 to 1,000,000	INR30,000 plus 20% on the excess
Exceeds 1,000,001	INR130,000 plus 30% on the excess

The above are rates for residents below 60 years. Separate slabs apply for citizens aged 61-80 years and for those above 80. For this tax year, a 10 per cent surcharge is imposed on persons whose total income exceeds INR 10 million.

Corporate income tax rates

TYPE OF COMPANY	RATES OF TAX
Domestic company	30% with a 5% surcharge if net income exceeds INR10 million
Foreign company	40% with a 2% surcharge if net income exceeds INR10 million

Capital gains tax

Taxation of capital gains depends on the residence of the taxpayer, the type of asset and the holding period of the asset.

Residents are subject to income tax on capital gains derived in India or offshore. RNoRs are subject to such tax on Indian-sourced capital gains and on offshore capital gains derived from a business controlled in India. Non-residents are subject to such tax only on Indian-sourced capital gains.

Long-term capital gains (LTCG) are gains on the transfer of capital assets that have been held for more than 12 months (for specified securities) or more than 36 months (for other types of capital assets). Short-term capital gains (STCG) are gains on the transfer of capital assets where held for less than the time period specified above. Some capital gains are tax exempt if the gains are reinvested in specified assets.

LTCG on transfer of equity shares in a company or units of an equity-oriented fund are tax exempt if the sale transaction takes place on a recognised stock exchange in India and Securities Transaction Tax (nominal rate) has been paid while STCG on listed shares is taxable at 15 per cent.

Non-residents taxable on

Please see above.

Withholding tax rate (non-treaty)

Residents must withhold tax at the rates specified below while making payments to non-residents:

Dividends	No withholding tax but a final dividend distribution tax of 15% on the paying company
Interest	10% for interest paid to non-residents on specified securities Payments by resident corporate entities involve rates of 5%, 10%, 20%, 40% depending on the type of loan
Royalties	25%
Fees for technical services	25%

Withholding tax rate (treaty)

Residents must withhold tax at the rates specified while making payments to non-residents.

The numbers in the following table indicate the range within which typical treaty rates tend to fall.

Dividends	Same as previously
Interest	10%–15%
Royalties	10%–25%
Fees for technical services	10%–25%

Taxation at death

India does not impose an inheritance tax. Reintroduction of estate tax (in effect from 1953-1985) was discussed by the government in the run-up to Budget 2013 but was not introduced. Transfer of an asset under a will, gift or irrevocable trust is not considered a 'transfer' for the purposes of CGT. However, when such asset is sold by the receiver then for the purpose of computing capital gains, cost of acquisition is deemed to be the cost of acquisition incurred by the last previous owner who acquired it by a mode other than those specified above, that is through purchase.

Other taxes

Currently, there is no gift tax (earlier imposed from 1958-1998). However, under the *Income Tax Act, 1961* the entire value of any sum of money (greater than INR50,000 in aggregate value) received by individuals or a Hindu Undivided Family (HUF) without consideration from any person, would be chargeable to tax as income of the recipient. A similar provision also covers properties received for nil or inadequate consideration. However, monies/properties received from a relative (as defined statutorily), or under a will or by way of inheritance are exempt from these provisions. Under the *Wealth Tax Act, 1957*, specified non-

business assets of a company, an individual or an HUF are chargeable to wealth tax at 1 per cent of the asset value above INR3 million. Stamp duties are levied (by either the federal or state tax authorities) on certain 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.

Tax treaties

Of 88 tax treaties concluded, 85 are in force, accessible at law.incometaxindia.gov.in/DIT/intDtaa.aspx

Tax information exchange agreements

India has entered into ten TIEAs, accessible at law.incometaxindia.gov.in/DIT/intDtaaTIEA.aspx

India recently concluded a TIEA with Liechtenstein (March 2013). Around 45 Indian tax treaties have been renegotiated to include/enhance provisions on exchange of information.

RESIDENCE AND DOMICILE

Special rules on becoming resident

The test of residence for individuals is a day-count test of physical presence in the given fiscal year (182 days+) and/or over a specified number of past fiscal years (depending on the circumstance). For persons of Indian origin to be considered resident in India, the number of days of physical presence has been increased. A company is resident if it is incorporated in India or its control and management is wholly in India for the relevant fiscal year. An HUF, a firm, an association of persons or a trust (on account of the trustee) are considered resident in India if their control and management is partly within India for the relevant fiscal year.

Special rules on ceasing residence

India does not impose an exit tax. However, if an individual leaves India without the intention to return, the *Income Tax Act* provides for making an assessment on such person outside the normal assessment calendar. Income of the specified duration is taxable in the current assessment year at the current rates in force. This is different from an exit tax that is imposed to tax the latent gain arising on assets that an individual transfers to another jurisdiction in the process of migrating tax residence.

Domicile concept for gifts and inheritance

For intestate succession, inheritance of movable property is governed by the law of the deceased's domicile, while inheritance of immovable property is governed by the law of the place where the property is situated. Therefore, on the demise of a foreign citizen domiciled in India or an Indian citizen domiciled abroad the following rules should be applicable:

DOMICILE	IMMOVABLE PROPERTY		MOVABLE PROPERTY	
	India	Abroad	India	Abroad
INDIA	Indian law	<i>Lex situs</i>	Indian law	PIL Rules applicable
OUTSIDE INDIA	Indian law	Law of domicile	Law of domicile	Law of domicile

Where the law of the nation to which the deceased foreigner belonged at the time of death refers the inheritance issues back to India (i.e., place where his or her estate is situated), then the applicable law that governs the deceased's estate in India takes precedence.

Taxation of holdings by non-residents on gifts and death

- Gifts: there is no gift tax. Please also see above.
- Death: there are no inheritance taxes in India.

Reporting/auditing requirements

YES ☒ NO ☐

All individuals and entities must file annual tax returns. Recipients of any income must obtain a tax identification number, Permanent Account Number (PAN) else face the risk of being subject to a higher withholding tax rate. Specific reporting obligations will depend on the particular asset involved and on the relevant exchange control regulation. It is mandatory for residents to disclose certain details of foreign and domestic assets such as financial interest in any entity, signing authority in offshore bank accounts and peak balance or investment during the year. In addition, details of movable domestic assets such as art, jewellery, luxury vehicles, etc. must also be disclosed in the tax returns.

OTHER RELEVANT INFORMATION

Asset protection laws

YES ☒ NO ☐

Under the *Trusts Act*, a trust can serve as a bankruptcy remote vehicle protecting assets from creditor's (actual and potential) claims, provided the assets have been transferred two years prior to the bankruptcy being declared.

Foreign currency restrictions

YES ☒ NO ☐

India has an exchange control regime primarily contained in the *Foreign Exchange Management Act* (FEMA), which permits specified capital and current account transactions to take place. Capital account transaction means those transactions that affect the assets and liabilities in India of a person resident outside India or assets and liabilities outside India of a person resident in India. Current account transactions are transactions other than capital account transactions such as payments due as interest on loan or payments for living expenses of family members staying abroad etc.

FEMA prohibits dealings in foreign currency except through authorised dealers and through separate rupee and foreign currency accounts, as prescribed. Under a specific scheme allowing resident individuals to undertake permissible capital and current account transactions, cash remittances are restricted to up to USD75,000 per individual per financial year.

Foreign ownership restrictions

YES ☒ NO ☐

India still has very restrictive capital account convertibility due to the FEMA and transactions not specified under FEMA require prior regulatory approval. FEMA prohibits or imposes limits on foreign direct investment into India depending upon the industry sector. FEMA also regulates the types of entities who may be portfolio investors in permitted asset classes. Citizenship and residence status also determine the severity of restrictions. For instance, greater restrictions apply to foreign nationals of non-Indian origin on acquisition and transfer of

Indian immovable property as compared to non-resident Indians and persons of Indian origin.

AML/due diligence and other requirements and regulatory procedures for advisors

- To establish a trust.
- For incorporation.
- To open a bank account.

The *Prevention of Money Laundering Act, 2002* (PMLA), criminalises money laundering and provides for confiscation of property derived from, or involved in, money laundering. The PMLA, imposes obligations on banking companies, financial institutions and intermediaries (including trustees) to verify and maintain records of the identity of all clients and of specified transactions and provide information on certain transactions to the specified authority.

India's central bank, the Reserve Bank of India has issued guidelines, requiring all banks to frame know-your-customer policy that must include four key elements: Customer Acceptance Policy, Customer Identification Procedures, Monitoring of Transactions and Risk Management.

Key resources for further information

WEBSITES

- Income Tax Department:
www.incometaxindia.gov.in
- Ministry of Finance:
www.finmin.nic.in
- Ministry of Law and Justice:
lawmin.nic.in

More details

- See full jurisdiction report at
www.step.org/jr-india