

Rödl & Partner

SEIZING OPPOR- TUNITIES

MERGERS & ACQUISITIONS (M&A)
INDIA



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We in India

In 2007 Rödl & Partner opened the first branch in India. The most populous democracy in the world remains one of the key growth engines for internationally operating companies. For much needed Infrastructure improvements there are just as interesting entry opportunities as for the traditional industrial sector, like spectacular large-scale projects of the German economy have recently proven.

At our offices in Delhi, Mumbai and Pune and our working points in Chennai, Bangalore and Ahmedabad and in our own India team in Germany, multilingual specialists for foreign investments in India work together to provide holistic advice on all aspects of law, taxation, BPO and auditing.

Investment Location India

The positive spirit of recent years continues. The number of foreign direct investments – „Foreign Direct Investment“ (FDI) – is growing in India, reflecting the country's perception of the international arena as an interesting and future-oriented location for new investments, as well as the further expansion of existing enterprises in India.

The attractiveness of India, especially for German investors, is due to, among other things, the low production and operating costs, the well-qualified workforce, tax benefits and last but not least the successful steps taken by the Government of India to simplify the rules governing trade and direct investment by foreign companies. The „Ease of Doing Business“ continues to be driven forward.

Our brochure „Mergers & Acquisitions“ informs you about options and procedures for company acquisitions in India.

Although joint ventures in India are often very controversial, the participation in an Indian joint venture remains a form of investment that should not be forgotten. The risks inherent in joint ventures can be surpassed by the benefits by proper planning and implementation of the joint venture structure.

Corporate acquisitions have recently become increasingly important in India, as they provide a quick market access through good basic economic infrastructure. This trend is reinforced by the growing number of innovations and technically strong Indian start-ups.

Forms of Acquisition in India

In contrast to a merger, in which at least two companies merge into one, in case of acquisition the individual companies remain existing. A company acquires the majority or even all of the shares or assets of a target company in order to acquire control over them.

The participation in partnerships is legally not possible, unless it is a Limited Liability Partnership (LLP), comparable to a German limited partnership „Kommanditgesellschaft (KG)“. The following forms of acquisitions are available:

SHARE DEAL

This is the purchase of majority or all of the shares of the target company. It is advantageous for the seller as double taxation can be avoided and all liabilities are transferred to the buyer.

Reasons for a share deal are for example, the transfer of certain contracts (unless „change of control“ clauses allow the counterparty of the target company to terminate the contract, if a transfer of shares in the target company takes place) or of approvals / intangible assets associated with the target company.

Advantages

- Generally more favorable from tax point of view
- Transaction usually faster and easier to implement
- Due to the universal succession, the company can continue seamlessly

Disadvantages

- Buyer takes over all rights and liabilities, thus high liability risk
- This transaction type is only for corporations and (basically) limited partnerships allowed

ASSET DEAL

In addition, the buyer has the option of acquiring a company through the purchase of assets and liabilities, i.e. individual assets. Thus, the buyer can cherry-pick the assets and limit the liabilities transferred to him.

Advantages

- Not all assets and liabilities must be taken over, thus limiting the risk for the buyer.
- Usually less compliance and reporting requirements compared to share deal.

Disadvantages

- Asset deal is usually adverse from the tax perspective
- Generally a new company must be formed that becomes a party to the asset deal
- The contractual documentation is extensive and complex, as all the assets and liabilities to be transferred must be listed in detail > As there is no universal succession, all agreements such as distribution, employment, rent etc. must be newly entered into with the new company

SLUMP SALE

In a slump sale transaction, the target company as a whole is sold for a lump sum, without assigning individual values to the assets and liabilities. All assets and liabilities of the target company are transferred.

Advantages

- If the target company is a partnership, this type of transaction can be carried out.
- Probably better under tax law than an asset deal.

Disadvantages

- Buyer assumes all rights and liabilities, thus high liability risk.
- Generally a new company has to be formed, which becomes a party to the Slump Sale
- As there is no universal succession, all agreements such as distribution, employment, rent etc. must be newly entered into with the new company.

The decision between the aforementioned forms of acquisition makes a due diligence essential, so that the prospective buyer is informed in detail before conclusion of the contract about all opportunities and risks that accompany the takeover.

Merger in India

A merger is an elaborate, very formalistic process in India. Since a merger can only take place between two Indian companies, this form of acquisition is used less in comparison to a classic takeover.

Shareholdings in Indian companies

The acquisition of shares in an Indian company inevitably leads to a joint venture situation if not all shares are acquired.

In a joint venture situation, in addition to taking over the shares, which are governed by the Share Purchase Agreement (SPA) the rules of the future collaboration in the company must also be taken into account. These are usually agreed in a joint venture agreement.

Special attention must be paid to the following aspects

- Appointment of the Board of Directors
- Shareholder rights
- Authorisation requirements for certain legal transactions
- Termination rights
- Sale of shares
- Put and Call Options
- Information and intervention rights
- Non-compet clauses
- Non-disclosure obligations
- Technology transfer rights

Takeover of Listed Companies

Although the takeover/participation in listed companies is principally possible in India, it is extremely challenging in practical implementation. The Indian capital market is highly regulated. This overregulation is also reflected in the eventual takeover of a listed company. The high formalism coupled with regulatory requirements and spiced with short deadlines, deters foreign companies from the acquisition of such companies.

OPPORTUNITIES AND RISKS

Advantages

- Fast market entry
- Knowledge Transfer
- Sourcing of experienced employees
- Expansion of business activities

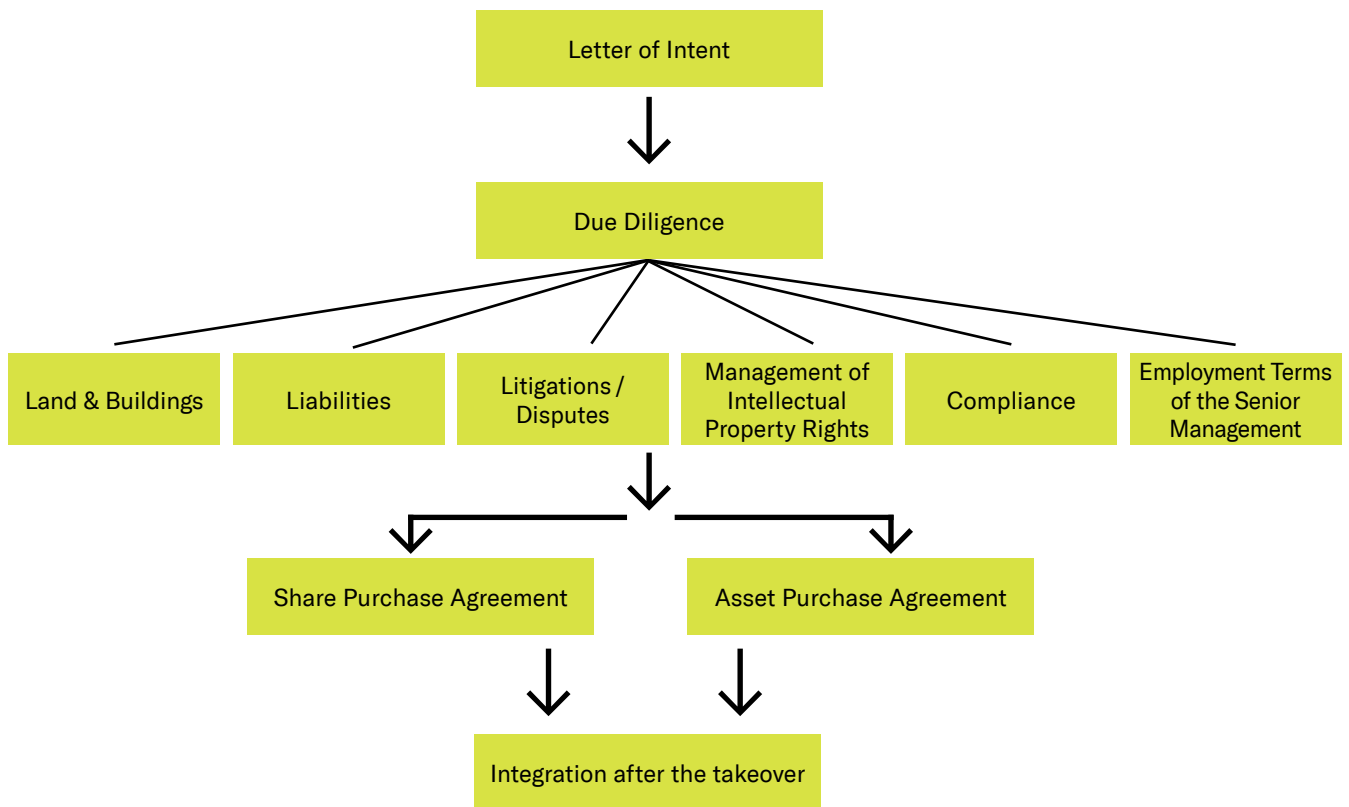
Disadvantages

- Transfer of risks and liabilities
- Integration process after the merger
- Different corporate culture
- Loyalty to former shareholders

REASONS TO SELL A COMPANY

- Financial or other difficulties
- Insolvency
- Growth potential (possible formation of a joint venture)
- Fundraising
- Succession of a family-owned company
- Access to technologies
- Simplified / faster market access

Overview



LETTER OF INTENT (LOI) OR TERM SHEET

- Type of transaction (asset or share deal or slump sale) is defined
- Valuation of assets or shares.
- Defining the time frame of the transaction.

DUE DILIGENCE

- Land and buildings of business - the premises should be purchased or leased for long term to exclude third party claims.
- Liabilities – If there are trade credits, the seller must obtain written approval from the bank before the sale.
- Pending or announced litigations.
- Handling and managing intellectual property rights, especially in the event of future transfer of own intellectual property rights.
- Adherence to Compliance – in case of non-compliance deadline for correction and warranties for the same.
- Contract terms for employees in key management positions.

Contractual warranties offer only additional protection. A Legal, Financial and Tax due diligence is essential!

SIGNING OF CONTRACT

- Share Purchase Agreement or Asset Purchase Agreement
- Earn-out provision - the seller retains a minimum share of the company or part of the purchase price can be made dependent on the economic success of the company in the following financial years and paid out only after the end of these financial years. Thus, an incentive is created for the seller to act after the acquisition of the company in favor of the company; Foreign exchange limits must be observed

INTEGRATION AFTER THE TAKEOVER

Long-serving senior employees of the company, such as CEO and Director, should be involved in decision-making processes in order to avoid their resignation.

Integration is often a challenge, especially for family-owned companies, since such companies are management patriarchally and seldom have a professional management.

Legal Regulations

What are the governing laws for an acquisition?

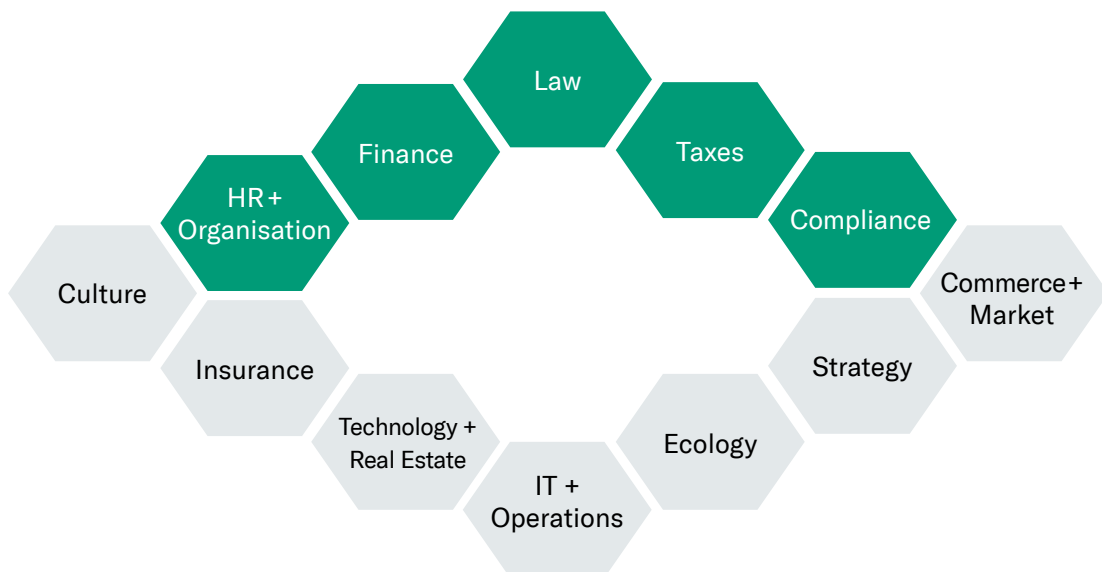
- Company Law
- Foreign Exchange Law
- Tax Law
- IT Law
- Industrial property rights
- Labor Law
- Contract Law
- Commercial Law
- Competition and antitrust Law

Before signing the contract

What is relevant for the potential buyer?

- Overall overview of the company
- Financial situation of the company
- Risks and liabilities that are transferred along with the acquired company, in particular with regard to taxes, legal and financial matters
- Is the required purchase price reasonable and justified?
- Are the expected opportunities from the acquisition realistic?

Legal Regulations



Due Diligence

<p>LEGAL DUE DILIGENCE</p> <ul style="list-style-type: none">- Examination of corporate law- Examination and presentation of the entrepreneurial situation- Contractual relationships- Personnel matters- Litigation- Protection of intellectual property- Real Estate - Due Diligence	<p>FINANCIAL DUE DILIGENCE</p> <ul style="list-style-type: none">- Examining the revenue to identify key performance factors and establish sustainable business results- Audit of net assets to identify accounting risks- Checking the financial position to ensure a sustainable flow of capital- Checking the business accounting
<p>TAX DUE DILIGENCE</p> <ul style="list-style-type: none">- Examination of the previous tax periods to determine tax risks (e.g. provision of tax obligations for previous transactions)- Checking future accounting periods to recognise tax benefits from the acquisition (e.g. depreciation of the purchase price, use of tax loss carry-forwards)	<p>OTHER DUE DILIGENCE</p> <ul style="list-style-type: none">- Commercial Due Diligence- Technical Due Diligence- Environmental Due Diligence- IT Due Diligence

WITH WHAT INTENTION IS A DUE DILIGENCE CARRIED OUT?

The due diligence serves the buyer to obtain a complete overview of the economic situation of the target company. Only in this way can the buyer make the relevant decisions, taking into account all opportunities and risks.

The result of a full due diligence includes the following factors:

- Overall picture of the entrepreneurial processes as well as the type and amount of revenue
- All liabilities of the target company
- Collateral / warranties / assurances
- Thresholds, Limits of Liability and Purchase Options
- Indemnifications (eg. from tax obligations)
- Deposit (partial retention of the purchase price)
- Bank and personal securities
- Actual value of the target company
- On the part of the seller, it also serves the purpose to fulfill its pre-contractual information requirements

→ The purpose of due diligence is the disclosure and liquidation of liabilities.

Typical acquisition process

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

PREPARATION & RESEARCH

- First of all, the budget for the planned acquisition must be determined by the buyer
- Subsequently, the key criteria for a potential target company must be determined
- The search for the right target company begins
- A feasibility study considers the feasibility of the venture when the potential target company is found
- Final point of this phase is to give the seller a reason for interest.

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

LETTER OF INTENT / PRELIMINARY OFFER

- Usually, a non-binding expression of interest is presented to the prospective seller by way of letter of intent (LOI)
- If the seller agrees, the letter of intent is signed by the buyer and representatives of the target company
- As a rule, additionally a NDA (Non-Disclosure Agreement) is agreed upon and signed
- Under certain circumstances, a non-binding purchase price indication based on the company valuation already takes place

LOI							
Purchase price factors / -indication		>	Exclusivity		>	Confidentiality Agreement	∨
∧	Legal Commitment / non-commitment	<	Possible transaction structure		<	Valuation method	

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

Most important due diligences



LEGAL	FINANCIAL	TAX
<ul style="list-style-type: none"> - Corporate Law - Legal obstacles regarding the acquisition and due to significant legal risks - Important contracts (external and internal) - Licenses, patents - Litigation - Employment Law - Property Due Diligence 	<ul style="list-style-type: none"> - Operational & organisational - Products & Markets - Customer- & supplier structure - Historical & budgeted - Balance sheets, profit & Loss, cash flow - Accounting & Controlling 	<ul style="list-style-type: none"> - Tax Assessments - Tax Audits - Restructuring / reorganisations - Intercompany Relationships / Transfer pricing - Transaction Taxes

COMMERCIAL	TECHNICAL
<ul style="list-style-type: none"> - Salary structure - Qualification structure - Pension scheme - Information about the management 	<ul style="list-style-type: none"> - Evaluation and record of product lines and technical systems - Investment needs

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

STRUCTURING

- First of all, it has to be examined which form of transactions are to be given preference in the specific case (share deal compared to asset deal or slump sale)
- Guarantees and warranties must be determined taking into account the results of the due diligence process
- In the event of a breach of contract, the liability sum must be determined (so-called de minimis thresholds and / or ceiling or tipping basket)
- Deposit, security and set-off rights must be considered
- It should be determined whether a termination without penalty or compensation takes place, in case the business could not be concluded
- The purchase price is determined by the Locked Box mechanism or the purchase price adjustment. Accordingly, both models are to be compared
- Company law and tax aspects of the transaction

NEGOTIATIONS

- The contract structure has been negotiated and the exact amount decided considering the risks and liabilities
- The prepared company valuation is also an important negotiation criteria
- The findings, especially from financial due diligence, either increase or (mostly) decrease the company valuation.
The basis of the company valuation is in India also the internationally approved valuation methods such as the Discounted Cash Flow Method (DCF)
- It should be noted that the company valuation is required in addition to the pricing also for regulatory purposes (foreign exchange and tax law)
- Purchase contract for shares: The final agreement between the Buyer and seller about the company sale.

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Closing

CLOSING

In this phase, compliance with all the preferential conditions (Conditions Precedent) has to be checked. At the end of the closing there is material transfer of the Company shares or assets.

Examples for this are:

- New appointment of the management
- Elimination of any legal obstacles identified in the course of due diligence
- Preparation of the material transfer of shares
- Part or full payment of the purchase price
- Obtaining antitrust approvals, wherein in the rarest cases the merger control provisions are applied due to the very high antitrust thresholds
- It should be noted that following the payment of the purchase price a corresponding foreign exchange and tax law (on the seller side) compliance must be carried out

Phase 1	Phase 2	Phase 3	Phase 4	Phase 5	Phase 6	Phase 7
Preparation / research	Letter of intent / preliminary offer	Due Diligence	Structuring / negotiation	Execution	Closing	M&A Implementation

Excursus: Negotiations with Indians

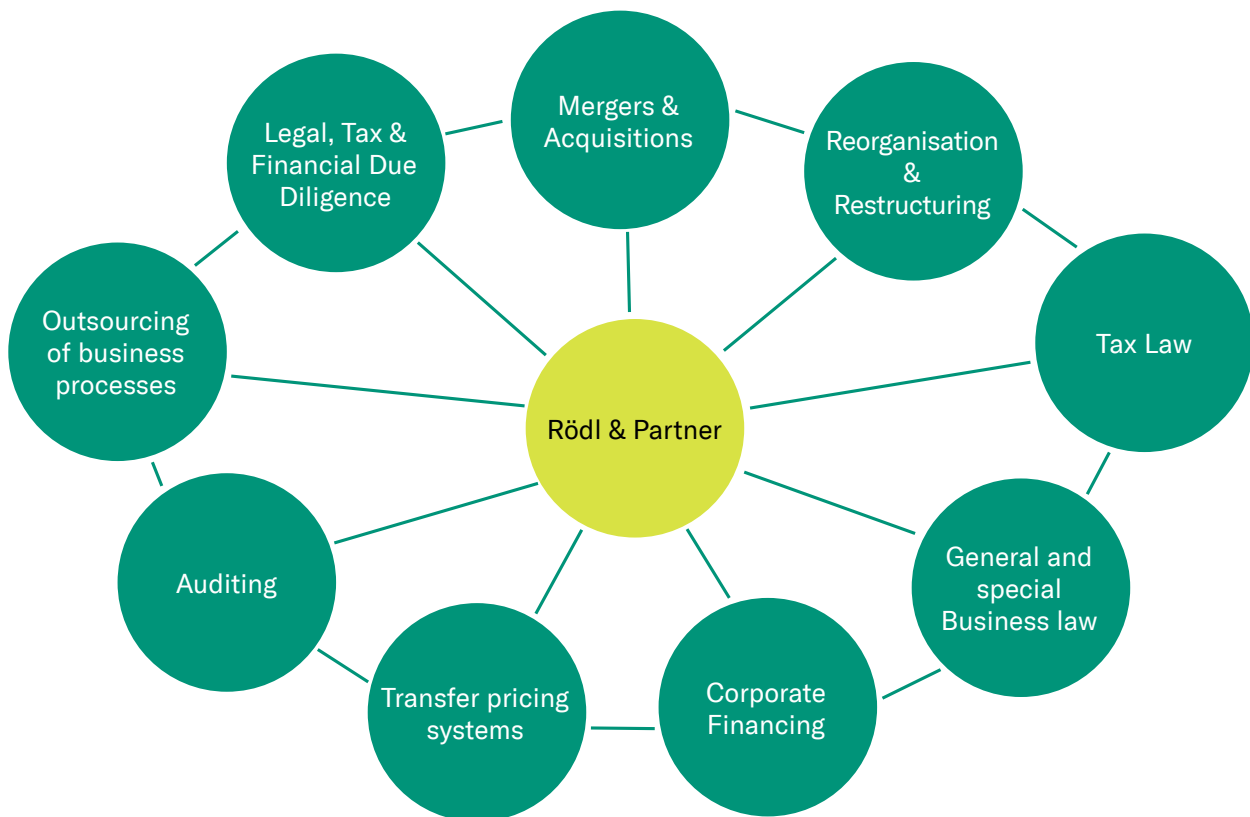
It's no secret that Indians negotiate intensive and sometimes very emotional. The frequently occurring contrast of rational and emotional negotiation can confuse experienced European negotiators.

It is important that you keep the lead of the negotiation with you, and put across your points calmly and negotiate acceptable compromises. The solution of „dramatic“ problems is often easier than one may believe.

Frequently discussed “Do's and Don'ts“ may be a good indication but certainly not the sole truth. Be very patient and flexible. An apparent end does not have to be an actual end.

Our services

- Detailed analysis of the various project risks before the start of the project
- Individual site selection for the implementation of the project
- Providing the right consultants and specialists for individual Questions and topics
- Establishment of a joint venture with an Indian partner
- Assistance in the selection of local senior executives
- Supporting with the project, from the planning to the implementation and Management of the ongoing business



In our offices in Delhi, Mumbai and Pune as well as in our offices in Chennai and Bangalore we provide the following consulting services in German and English language:

LEGAL ADVICE *

- Company Law
- Incorporation of subsidiaries, representative offices and branches
- Joint Ventures, M&A
- Due Diligence
- Mergers, splits, conversions
- Commercial, distribution and customs law
- Franchising
- Public-Private-Partnership
- Concessions and procurement law
- Industrial property rights: patents, trademarks, copyright, know-how and licenses
- Special economic zones, investment contracts
- Strategic Industries, Foreign Investment and Foreign exchange
- General and special contract and Commercial law for investments
- Competition and antitrust law
- Labour and immigration law
- Employee secondments
- Process and arbitration
- Business Criminal Law
- Liquidations and insolvency law
- Real estate and construction law, production sites (Greenfield / Brownfield), environmental law
- Mortgages and lien
- General and Special Administrative Law

TAX LAW, BANKING AND FINANCIAL SERVICES LAW *

Tax Planning / international tax law

- Tax-Indicated Project Design
- Advise on Tax structure / Optimisation of Corporate and Business Group structures
- Tax Due Diligence
- Tax advice on M&A transactions
- Transformation tax law

ONGOING TAX ADVISORY

- Tax advice on real estate acquisition
- Tax advice on financing
- Taxation of permanent establishment
- Assistance with tax audits
- Tax administration and tax law
- Transfer prices
- Tax advice on the development of sales structures and productions

BANKING AND FINANCIAL SERVICES LAW

- Banking Supervisory Law
- Financial leasing, structuring of leasing products including cross-border leasing
- Tax-based structuring of financial products
- International Trade Finance
- Insurance law

AUDIT *

- Statutory and voluntary audit of annual and consolidated financial statements of stock corporations and partnerships according to the Indian (HB I) or German law as well as in accordance with IFRS and US GAAP (HB II)
- Statutory and voluntary special audits
- Financial Due Diligence
- Company Reviews
- Support with the introduction of new accounting systems
- Conversion to international accounting standards (IFRS and US GAAP)

BUSINESS PROCESS OUTSOURCING

External accounting

- Regular Financial Accounting: Accounting and preparation of Financial statements as per Indian GAAP, payments, document management
- Payroll accounting: personnel management, tax and social security returns
- Preparation of annual financial statements according to international standards
- Special balance sheets, interim balance sheet, consolidated financial statements
- tax compliance

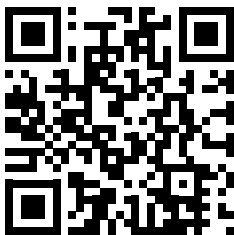
Internal accounting

- Controlling and Management Information Systems
- Ongoing internal reporting, outsourcing of internal audit functions
- Budget planning and control, financial analysis

About us

Rödl & Partner – The agile caring partner for Mittelstand shaped world market leaders

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* Consulting Services are rendered by Rödl & Partner together with Indian professionals

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STAY INFORMED

For updated information about law and taxes in India as well as information about events please refer www.roedl.de/indien

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