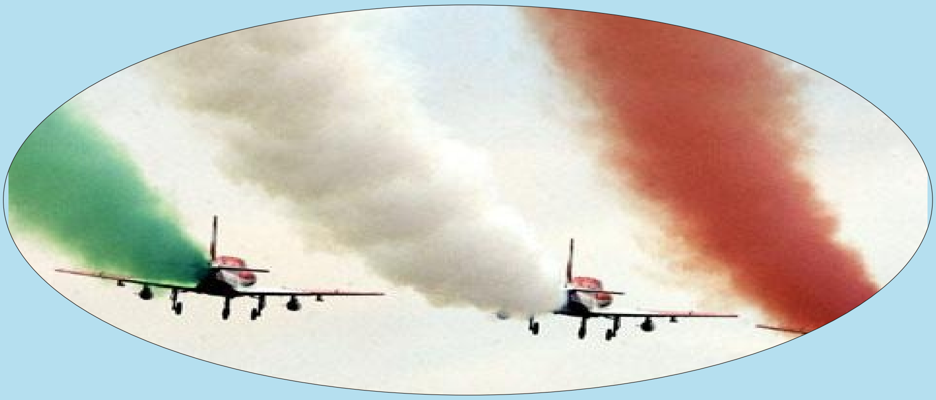
AVIATION BULLETIN

GUIDELINES FOR IMPORT AND REGISTRATION OF AIRCRAFT IN INDIA



Contents

PSA

Legal Counsellors

E-601, Gauri Sadan | 5, Hailey Road | New Delhi 110001 | India

Tel: +91.11.4350-0500 | Fax: +91.11.4350-0502 |

Disclaimer – This bulletin is for information purposes and should not be construed as legal advice. © PSA August 2009

Introduction

Importing an aircraft in any jurisdiction is not a simple process, and India is no exception. This bulletin describes a number of principal issues and considerations for importing and registering an aircraft in India. The premise of this bulletin is a transaction involving only the acquisition of a new (including pre-delivery payments ("**PDP**") for such aircraft) or a used aircraft by an Indian entity[1] permitted to do so which may be a scheduled, non-scheduled, charter service or for personal use. Of course, if foreign investors intend to be shareholders of an Indian company acquiring and importing an aircraft, prior approval of the Foreign Investment Promotion Board, Ministry of Finance ("**FIPB**") may need to be obtained by the applicant subject to the varying FDI ceilings in different air transport categories and the limitations in grant of operating permits for air transport categories to non-Indian entities.

In India, the legal, tax and regulatory environment continue to be complex while meeting procedures in the context of:

- prior to import of aircraft such as a valid Air Operator Certificate ("**AOC**");
- documents to be submitted and clearances to be obtained;
- compliances to be met subsequent to such import of aircraft including registration of the aircraft.

Additionally, the constraint of coordinating with diverse agencies is challenging. These government agencies include the Indian Directorate General of Civil Aviation (the "**DGCA**"), Ministry of Civil Aviation (the "**Ministry**"), FIPB, and Director General of Foreign Trade, Ministry of Commerce and Industry (the "**DGFT**") amongst others.

1. Procedure prior to Import of Aircraft

The bulletin does not refer to transactions involving transfer of title in India keeping in mind the threat of prohibitive taxes. As a result, we have assumed that the aircraft is located in a tax-friendly jurisdiction or international airspace at the time of title transfer. This is, of course, not relevant in the context of manufacturer deliveries, but is a significant concern if it is a title transfer for a used aircraft.

Prior to importing an aircraft, the applicant should hold a valid AOC. In the absence of any such AOC, the following procedure has to be followed in order to obtain the AOC. This procedure is not applicable to aircraft to be imported for **personal use**.

1.1 Initial NOC for operating permit: An initial No-Objection Certificate ("**NOC**") for a scheduled, non-scheduled or cargo operating permit must be obtained and a written application must be submitted to the Ministry. The intention of the Ministry is to know the applicant's plans of the proposed services, areas of operation, type of aircraft to be acquired, financial soundness, the organizational set-up, project viability, proposed main base of operations and the night stop stations.

The NOC is normally valid for **18 months**, but may be extended with prior approval from the Ministry.

1.2 Security clearance of the Board of Directors: The application to the Ministry must contain all the names of the directors and the Chief Executive, their nationality, passport details, addresses and other details as required for necessary security clearance.

1.3 Importer-Exporter Code ("IEC"): The importer of an aircraft requires an IEC number, and though a minor practicality, it needs to be factored in when considering the import processes. Usually, any importer would have secured its IEC prior to initiating the process.

www.psalegal.com

1. (1) Citizen of India; or (2) a registered Indian company whose chairman and at least 2/3rds of the directors are citizens of India and its substantial ownership and effective control is vested in Indian nationals

2. Documents and clearances for Import of Aircraft

2.1 NOC for acquisition/import: The applicant has to apply for import of aircraft within a certain time-frame i.e. a period of **6 months** from the issue of the NOC for AOC for any used aircraft. Alternatively, if a proposed new aircraft is expected to be delivered based on a definite delivery schedule from the manufacturer, the NOC would be valid up to such definite delivery date.

The application[2] must contain details of the proposed acquisition of aircraft, some of which are described below and considered by the Ministry:

- The maximum permissible age[3] and the number of cycles/hours of the aircraft - The norm is a maximum of 25 years (for freighters) and 15 years (for all other aircraft) or 75% of the economic cycle or 45,000 cycles, whichever is earlier. The DGCA would normally allow an aircraft more than 20 years old only subsequent to detailed inspection.
- Type Certification[4] - It is better to inform the DGCA of the design standards so that its acceptability is guaranteed prior to importing. Typically, DGCA accepts the design standards specified in CS/JAR 23 and CS/JAR 25 of EASA and FAR 23 and FAR 25 of FAA.
- The stipulated equipment and accessories must be fitted[5] - The DGCA follows requirements of FAR/EASA 21 and these are listed in the CAR.[6]
- Component history cards or other data with up-to-date information and compliance with the Airworthiness Directives, Service Bulletins and modifications (such information is to be provided to the DGCA).
- Confirmation that no major checks are due within 3 months/300 flight hours including for used aircraft.

The DGCA grants permission based on the recommendations of the Ministry and its standing committee. The NOC is normally valid for **1 year** subject to an extension of **3 months** with prior approval from the Ministry. Alternatively, if a definite delivery schedule of a proposed new aircraft from the manufacturer is available, the NOC would be valid up to such definite delivery date.

2.2 Import License, Permissions and Exemptions: The import of aircraft involves procurement of an import license from the DGFT or, alternatively, permission from the Ministry. While import license is exempted for:

- numerous public enterprises such as Air India, Indian Airlines, Airports Authority of India etc.;
- private scheduled or non-scheduled services (including air-taxi service) for import of aircraft; and
- aircraft to be used for specific national projects approved by the Indian Government

permission by the Ministry would still be required. For public sector enterprises (as mentioned above), an NOC may be issued by the DGCA after certification by the Ministry, and in the case of private scheduled or non-scheduled services (including air-taxi service and aerial work) the permission is granted upon an application[7] for import of aircraft to the Ministry.[8]

However, other than above exceptions, import of aircraft requires an **import license** to be granted by the DGFT. Such aircraft must be imported for **personal use by companies and individuals** and **not be utilized for hire and reward** unless specifically permitted by the Ministry. The application[9] to the DGFT is on the same lines as the application for grant of NOC for import to the Ministry as the DGFT also has the authority to ascertain the justification for import, foreign exchange resources and suitability of the aircraft (type, make, age, accident history and hours/cycle of the aircraft) for its intended operation.

www.psalegal.com

2. As per the Performa provided at Annexure V of the Air Transport Advisory Circular 1 of 2009
3. CAR Section 2 Series F Part XX
4. Supra Footnote 2
5. CAR Section 2 Series I and Series O
6. CAR Series F Part III Annexure D
7. As per form in Appendix I of CAR Section 2 Series F Part XXI
8. The procedure is described in CAR Section 3 Series C
9. The form of the application is prescribed under Appendix II in CAR Section 2 Series F Part XXI

© PSA August 2009

2.3 Customs Duty: Import of aircraft attracts customs duty and detailed customs clearance formalities have to be followed. The customs duty of 3%, additional customs duty of 4% and 16% countervailing duty is imposed on import of aircraft. There are certain exemptions too;[10] significantly being if the aircraft is imported for non-scheduled passenger or charter service, wherein the custom duty is completely exempted. As such, this differential custom duty for non-scheduled or charter service provides an impetus to import an aircraft under a non-scheduled operator permit. The import of aircraft by government and scheduled airlines are also exempt from all custom duties.

It is pertinent to note that the foregoing are standard custom duties payable upon import of an aircraft; however, there could be a range of tax issues applicable depending upon the owner and operator of the aircraft who may be different entities and located in different states. Such tax issues need to be assessed on a case-by-case basis.

The time required to obtain final customs clearance varies widely depending on the workload of the particular inspector. It can sometimes be obtained in as little as a day, but can also require more than a week.

2.4 Deregistration of the aircraft from the previous registry and Temporary Certification of Registration (C of R): Similar to all countries, the aircraft should either be imported on the *C of R* from the previous registering authority and upon import, a Certificate of deregistration submitted to the DGCA or a ferry flight may be performed into India for which a temporary *C of R* may be granted to the new owner by the DGCA. Such temporary *C of R* requires an aeromobile station license. A short term license is applied by application[11] to the Wireless Advisor, Ministry of Communications who will forward the same to the DGCA along with a communication check report.

The temporary *C of R* will be valid only until the first landing at a customs authority in India and shall be surrendered to the DGCA along with the application for registration.

2.5 Export Certificate of Airworthiness (C of A) and Short Term C of A: The aircraft may be imported under the *C of A* of the country of export. Alternatively, an Export *C of A* be applied for to the foreign registering authority and a Short Term *C of A* may be applied for to the DGCA prior to import.[12] Typically, the DGCA requests the registering authority of the country of export to issue such Short Term *C of A* and ensures certain requirements.[13]

3. Other considerations

3.1 RBI Exchange Control Approval: When an acquisition is being financed in part by non-Indian lenders, the finance lease would involve approvals for lease rental payments to import aircraft in to India. RBI issues approvals for finance leases on a case-by-case basis. On the other hand, a PDP financing might not always satisfy the external commercial borrowings ("**ECB**")[14] guidelines automatic route and as such RBI's prior approval will normally be required. The application to procure RBI's approval should be made as soon as any "*letter of intent*" is effected to acquire the aircraft to avoid any delay in grant of such approval(s).

3.2 Stamp Duty: While it is customary to enter into purchase agreements out of India in tax-friendly jurisdictions to avoid excessive duties and taxes, stamp duty might be payable in respect of the sale and purchase agreement, finance lease and/or bill of sale as a condition to its enforceability in India. The stamp duty in the state of incorporation of the applicant company shall apply as stamp duty varies from state to state. However, if the stamp duty is excessive, financers may decide alternate methods of enforcement.

www.psalegal.com

10. Exemption is available to only (a) Aero Club of India, (b) if the aircraft is purchased for a registered training school, and (c) if the aircraft is purchased for non-scheduled passenger or charter service duly approved by the DGCA
11. The prescribed form is at Appendix A to CAR Section 2 Series R Part II
12. The prescribed form is CA25 Appendix A and B to CAR Section 2 Series F Part II
13. As vested in Paragraph 5.2 of CAR Section 2 Series F Part III which includes design standards, Ads, all required instruments, weight schedule etc.
14. ECBs are a source of funds to corporates and public sector undertakings to aid finance their existing capacity and enlarge their existing resources. Borrowers can avail these ECBs in the form of commercial loans such as bank loans, buyer's credit and securitized instruments from banks, export credit agencies, suppliers of equipment, foreign collaborators, foreign equity holders, etc. These are acquired from non-resident lenders

4. Compliances subsequent to import of aircraft

4.1 Indian C of R and C of A for the Aircraft:

The process of registration normally takes 4-5 days and the application for registration should, as a result, be submitted at least 5 days prior to expected date of issue of *C of R* and *C of A*. The application for *C of R*, *C of* A and other certificates such as the Noise Certificate should be accompanied with:[16]

- Customs clearance certificate/bill of entry of the aircraft;
- Certificate of deregistration from the country of export;
- Export *C of A*;
- Registration Fee - There is a nominal fee payable in respect of a *C of R* varying on the maximum permissible take-off weight i.e. for 15,000 kgs or less it is INR 20,000 *(USD 444)* and exceeding 15,000 kgs, it is INR 5,000 *(USD 111)* for every 1,000 kgs or part thereof;
- Evidence of rightful ownership or possession (e.g. Bill of Sale);
- Affidavit declaring a purchase from a prior owner, if applicable;
- Document of registration of the company and the names, addresses and nationalities of the directors, if the aircraft is owned by a company or corporation;
- Import license issued by the DGFT or permission for import by the Ministry/DGCA;
- Consent letter of the owner/operator if the aircraft is mortgaged/hypothecated;
- Certain additional documents required[18] in case of a first aircraft type imported into India;
- Current insurance coverage which are industry standard;
- Deregistration Power of Attorney, in case of a financer - While the DGCA has in the past refused to recognize such powers of attorney, it is a customary requirement of all financers internationally and once India is Cape Town compliant, such requirements enabling a financer to deregister an aircraft and export it outside of India will be accepted without interference from DGCA or court orders;
- Notice of an English law mortgage or otherwise[19] - This is only for protective purpose as no annotation of the mortgagee's interest is usually made on the *C of R*;
- Contract agreement or "*letter of intent*" between financer and operator if owner and operator are different (i.e. a copy of the lease agreement);
- One set of all manuals and other documents of a technical nature along with their amendments from time to time;[20]

The DGCA issues/validates the *C of A* on the basis of the Export *C of A*, physical inspection of the aircraft and scrutiny of the other related documents.

While the DGCA does not operate as a title register, it is possible to record a financer's proprietary interest with the DGCA and on the aircraft *C of R*. Apart from the DGCA it is not necessary to take any other steps with any other Indian public authorityso as to record and/or perfect a financer's interest.

www.psalegal.com

15. The prescribed form for registration is CA-28 at Appendix 'A' in CAR Section 2 Series 'F' Part I and for C of A is CA-25 at Appendix 'A' and 'B' in CAR Section 2 Series 'F' Part III
16. While we have tried to make the above list of documents all-encompassing, one must always be ready to provide the DGCA with any additional documents which are not listed in any Ministry or DGCA guidelines for registration purposes
17. 1 USD = 45 INR
18. These include copy of the Type Certificate and/or its Data Sheets, Maintenance Planning document/Manufacturers recommended inspection document, MMEL, Airplane Flight Manual/Pilots operating handbook, Crew operations manuals, one set of all manuals with respect to up-to-date amendments such as aircraft and engine maintenance manuals, overhaul manual etc (hard copy or electronic), all amendments to the above documents and all log books, certificates, documents listed in CAR Section 2 Series 'F' Part III
19. Since Indian statutory law does not make provision for mortgages over moveable assets including aircraft, an English law mortgage may be created as the Indian courts will generally recognize the effectiveness of an English law mortgage to create a security interest in an Aircraft
20. As set forth in CAR Section 2 Series 'F' Part III

Conclusion

The aircraft import and registration process in India remains complex. At present, a simple registration can be accomplished in as little as two weeks; however, some owners/operators have waited for longer periods depending on particular Circumstances.

.

Further, the differential import duty regime for non-scheduled operations/charters on one hand and aircraft for personal use on the other has brought about greater confusion with the Indian customs authority coming down hard on companies with non-scheduled operator permits allowing the promoters of the company to utilize the aircraft for their personal use. This has also created uncertainty over the customary practice of private individuals and companies importing aircraft and entering into a management agreement with non-scheduled operators to utilize the aircraft on a block charter basis. The operator thereafter charters the aircraft apart from the owner's block hours for its own revenue. However, it is possible to effectively structure the management agreements or the block charter agreements to indicate payments for the utilization by the owner of its maximum block hours to avoid any excessive import duties being paid by non-scheduled operators.

Authored by:

Pooja Yadava
E-mail: p.yadava@psalegal.com
Tel: +91 11 4350 0512