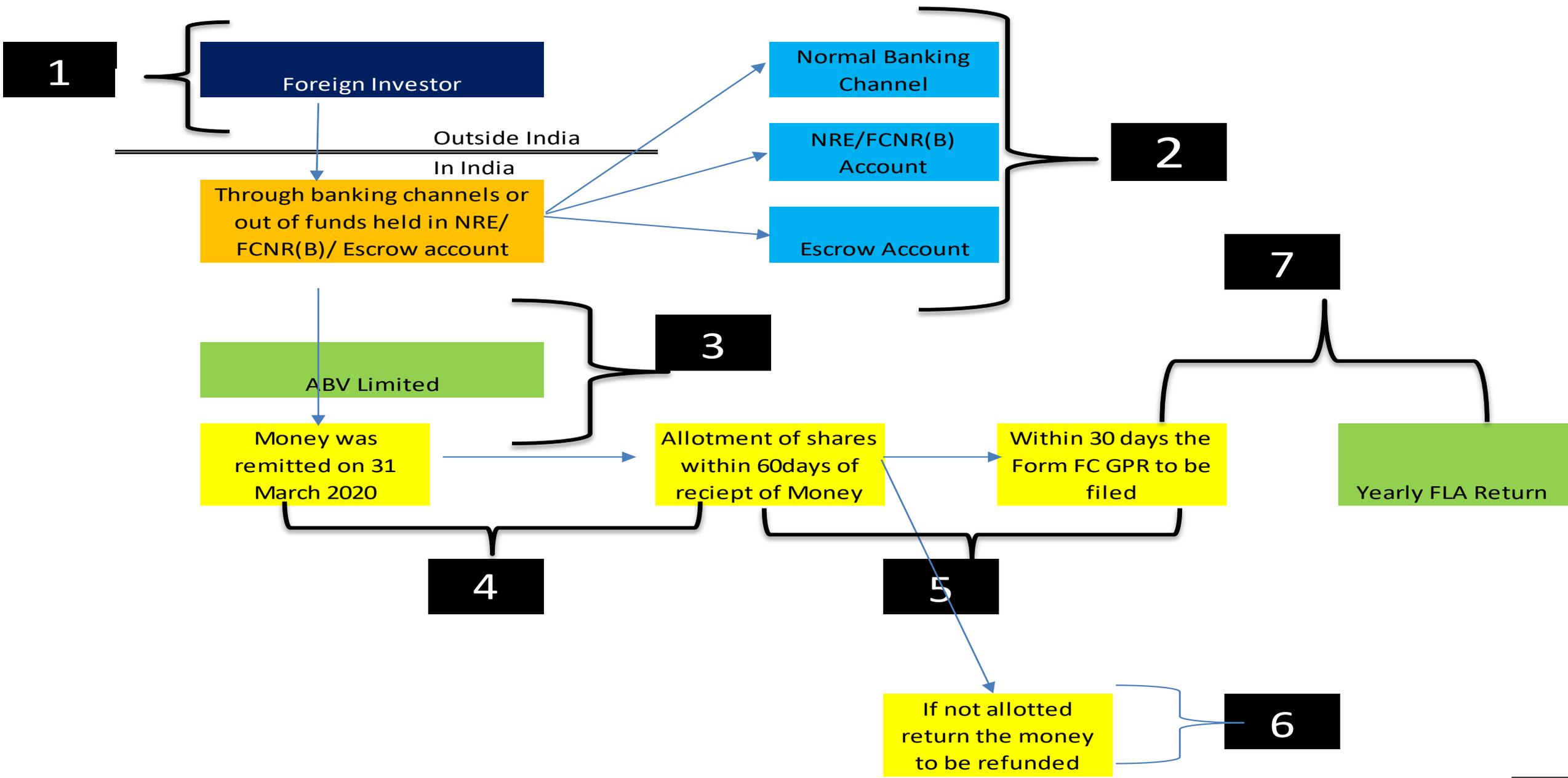




DAY 10 || Comprehensive Course on
Foreign Exchange Management, 1999

Faculty: CA. Sudha G. Bhushan
Sudha@taxpertpro.com || 09769033172



Who cannot invest?

a person who is citizen of Bangladesh / Pakistan

Can invest in Indian Company only under Government route

Entity incorporated in Pakistan or Bangladesh

Can invest in Indian Company only under Government route

Cannot invest in following sectors

- defence, space, atomic energy
- Lottery, gambling, betting, casino;
- including foreign technology collaboration in any form.
- to ensure foreign companies do not maintain their trade interests in India through the trademark or licensing route.
- chit funds, nidhi company;
- TDRs, real estate business or construction of farm house;
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes;
- Activities/ sector not open for private investment
- Atomic energy, Railways.

Who cannot invest?

The Government of India has reviewed the Foreign Direct Investment (FDI) policy for decreasing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic and amended existing FDI policy as contained in Consolidated FDI Policy, 2017.

Present Position

A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited.

A citizen/entity of Bangladesh can invest only under the Government route.

A citizen/entity of Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

Revised Position

A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited.

However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.

Further, a citizen/entity of Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of the above, such subsequent change in beneficial ownership will also require Government approval.

Case Study

- XYZ LLC wants to enter the Indian economy in the agriculture sector i.e. to grow wheat. After studying the state wise agricultural output, they decided to do business in Punjab.
- Can they make such an investment in India

Case Study

- XYZ LLC wants to enter the Indian economy in the agriculture sector i.e. to grow wheat. After studying the state wise agricultural output, they decided to do business in Punjab.

They can bring 100% FDI through the Automatic route and do not need the prior approval of the govt.

Case Study

- RMT is a weapon manufacturer and after doing a trade worth billion in Russia, wish to enter the Defence industry in India. The company is evaluating the options in India.

Case Study

- RMT is a weapon manufacturer and after doing a trade worth billion in Russia, wish to enter the Defence industry in India. The company is evaluating the options in India.
- **They can invest fully in**
 - **but only up to 74% through Automatic route**
 - **and beyond 74%, they would have to require the approval of the government.**



**Relevant part of
Form FC GPR**

- Preferential allotment/ Private placement
- Rights issue
- Bonus issue
- Merger/ demerger /Amalgamation
- Subscription to Memorandum of Association
- Conversion of Convertible notes
- Capital Instruments issued to FVCIs
- Shares issued upon exercise of ESOPs/ sweat equity shares
- Issue of participating interest /rights in oil fields



Type of Capital Instrument

Particulars Of Issue/Allotment to Each Investor

Particulars of issue (Capital instrument as issued to that foreign investor)

Type Of Capital Instrument *

-Select-

Number of Instruments *

Conversion Ratio (Number of equity shares per CCPS/CCDs) *

:

Number of Equity Shares on fully diluted basis *

Face Value *

Premium *

Issue Price per instrument *

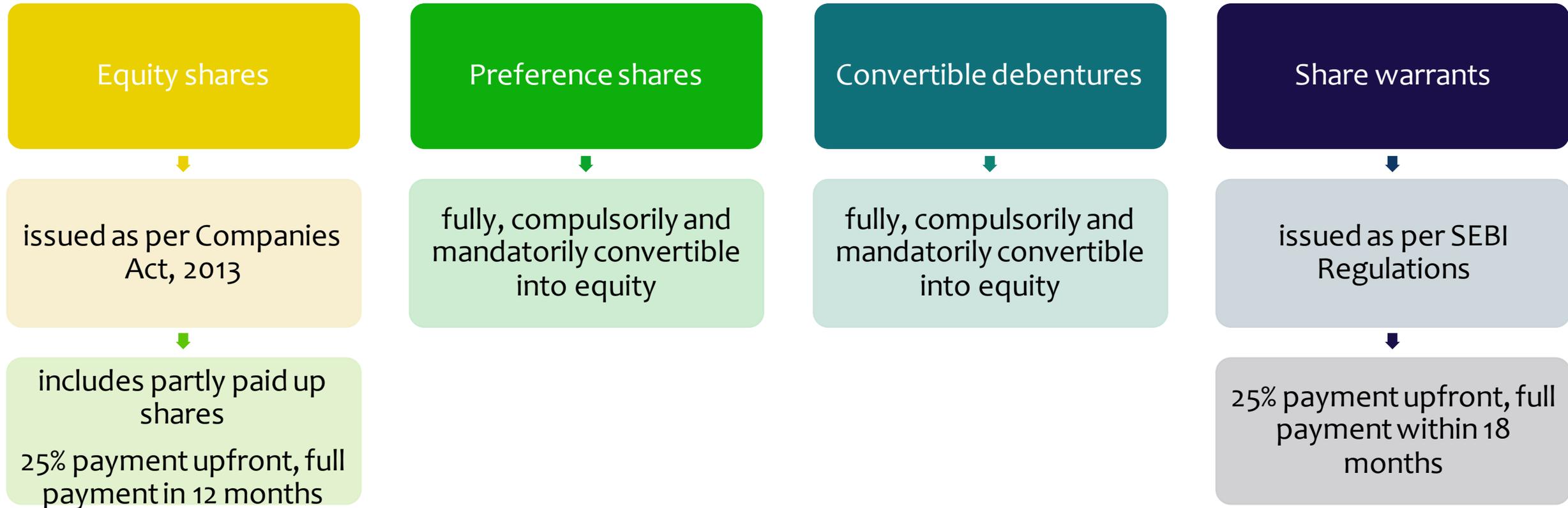
Amount Of Consideration *

+ Add Issue Particular

Type Of Capital Instrument	Number of Instruments	Conversion Ratio(Applicable in case of CCPS/CCD/Share Warrants)	Number of Equity Shares on fully diluted basis	Face Value	Premium	Issue Price per instrument	Amount of Consideration	Edit/Update
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No records found.

Equity Instruments under Non-Debt Instrument Rules



Formerly regarded as Capital Instruments under TISPRO Regulations, 2017



Valuation Considerations

Particulars Of Issue/Allotment to Each Investor

Particulars of issue (Capital instrument as issued to that foreign investor)

Type Of Capital Instrument *

Number of Instruments *

Conversion Ratio (Number of equity shares per CCPS/CCDs) *

 :

Number of Equity Shares on fully diluted basis *

Face Value *

Premium *

Issue Price per instrument *

Amount Of Consideration *

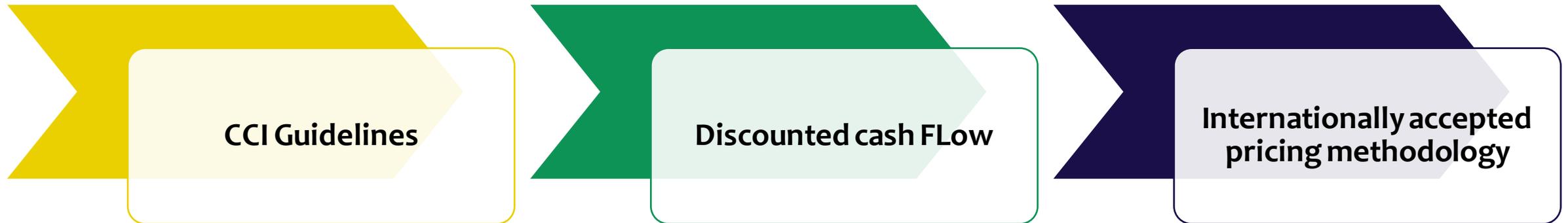
+ Add Issue Particular

Type Of Capital Instrument	Number of Instruments	Conversion Ratio(Applicable in case of CCPS/CCD/Share Warrants)	Number of Equity Shares on fully diluted basis	Face Value	Premium	Issue Price per instrument	Amount of Consideration	Edit/Update
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At what price

Progress



Pricing Guidelines

Particulars	Listed Company	Un-Listed Company
Issue by an Indian company or transferred from a resident to non-resident- Price should not be less than	The price worked out in accordance with the relevant SEBI guidelines	The fair value worked out as per any internationally accepted pricing methodology for valuation on an arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker or a practicing Cost Accountant.
Transfer from a non-resident to resident- Price should not be more than	The price worked out in accordance with the relevant SEBI guidelines	The fair value as per any internationally accepted pricing methodology for valuation on an arm's length basis, duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

Pricing Guidelines

Company going through delisting process

- as per SEBI (Delisting of Equity Shares) Regulations, 2009.

Swap of equity instruments

- valuation by SEBI registered Merchant Banker; or
- Investment Banker outside India

Shares by way of subscription to MOA

- at face value
 - subject to entry route & sectoral caps.

Share warrants

- pricing and price/conversion formula shall be determined upfront.

CCPS / CCDs

- Issue Price / Formula to be specified upfront at time of issue
- Price @ Conversion Date > FMV @ Issue Date

Pricing guidelines not applicable for investment in equity instruments by PROI on non-repatriation basis.

Pricing in case of Convertibles || Example

- CCD was issued in July 2019 when environment was good and hence the fair value was INR 100 at the date of issuance.
- The conversion is due in October 2020. Due to Covid the fair value in October is INR 40 at the time of conversion.
- However, due to the floor price being price at time of issue of convertibles, i.e. INR 100, the Investor will have to still accept the shares at a higher fair value being INR 100 and cannot be issued the shares at INR 40 thus limiting the benefit of convertible instruments

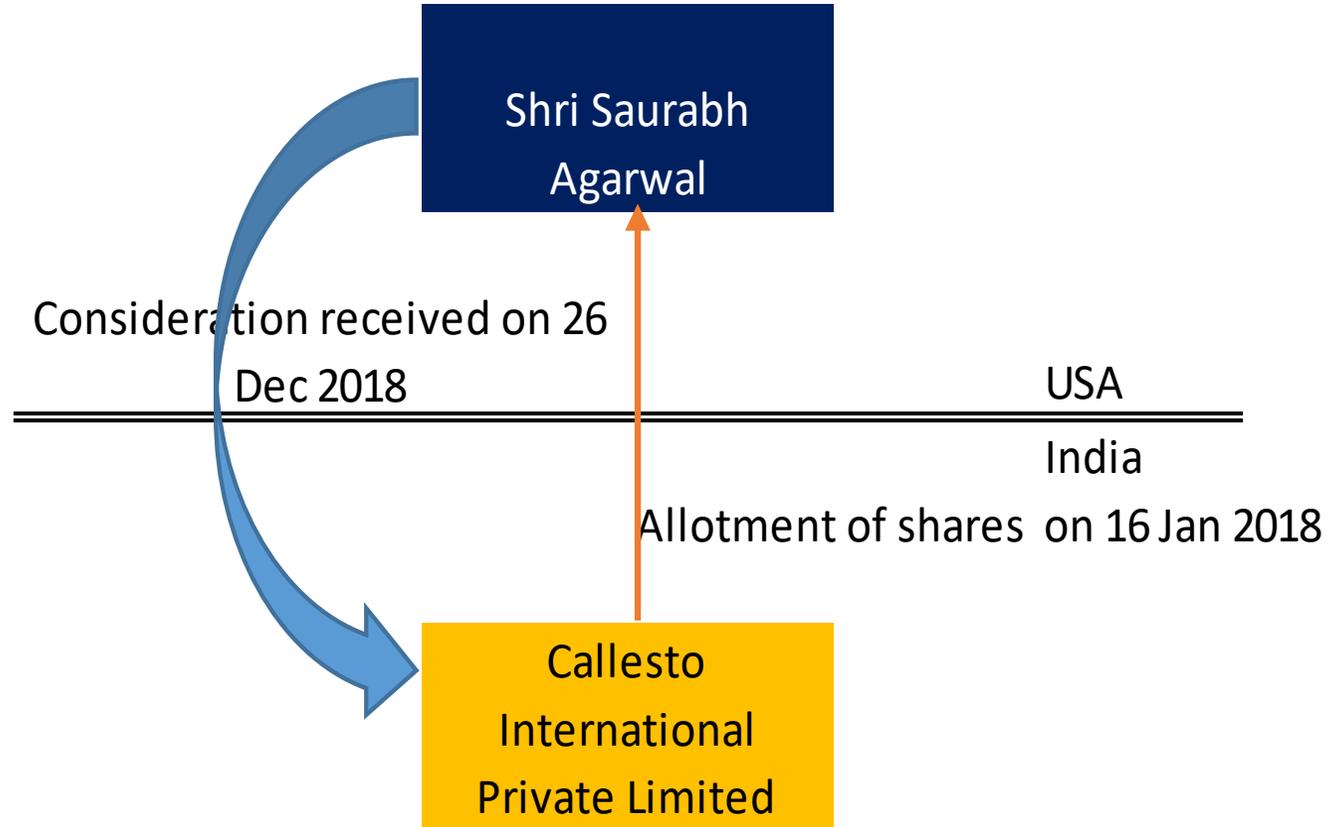
Deferred Consideration

- Rule 9(6)
- Not to exceed 25% of the total consideration
- Not exceeding 18 months from the date of transfer agreement
- Can be settled through escrow account or Indemnity

Indemnity

- 25% of the consideration
- Seller can indemnify
- Only if total consideration has been paid
- Not exceeding 18 months

Case Study



Remittance Details

Name of the AD Bank through whom remittance is received

Address of the AD Bank

Town/City

Pin Code

State

Mode of Payment *

Whether the remitter is different from the foreign investor *

Yes No

Mode of Payment

Investment Details

Total Amount of Inflow (Rs)

Total Amount for which Capital Instruments has been issued (Rs)

Mode of Payment

Cash

By way of inward remittance

By debit to NRE/FCNR account

Debit to Escrow Account

Non Cash

Conversion of paybles

Share SWAP

Pre-operative / pre-incorporation expenses

Import of capital goods

Royalty / lump sum / technical know-how

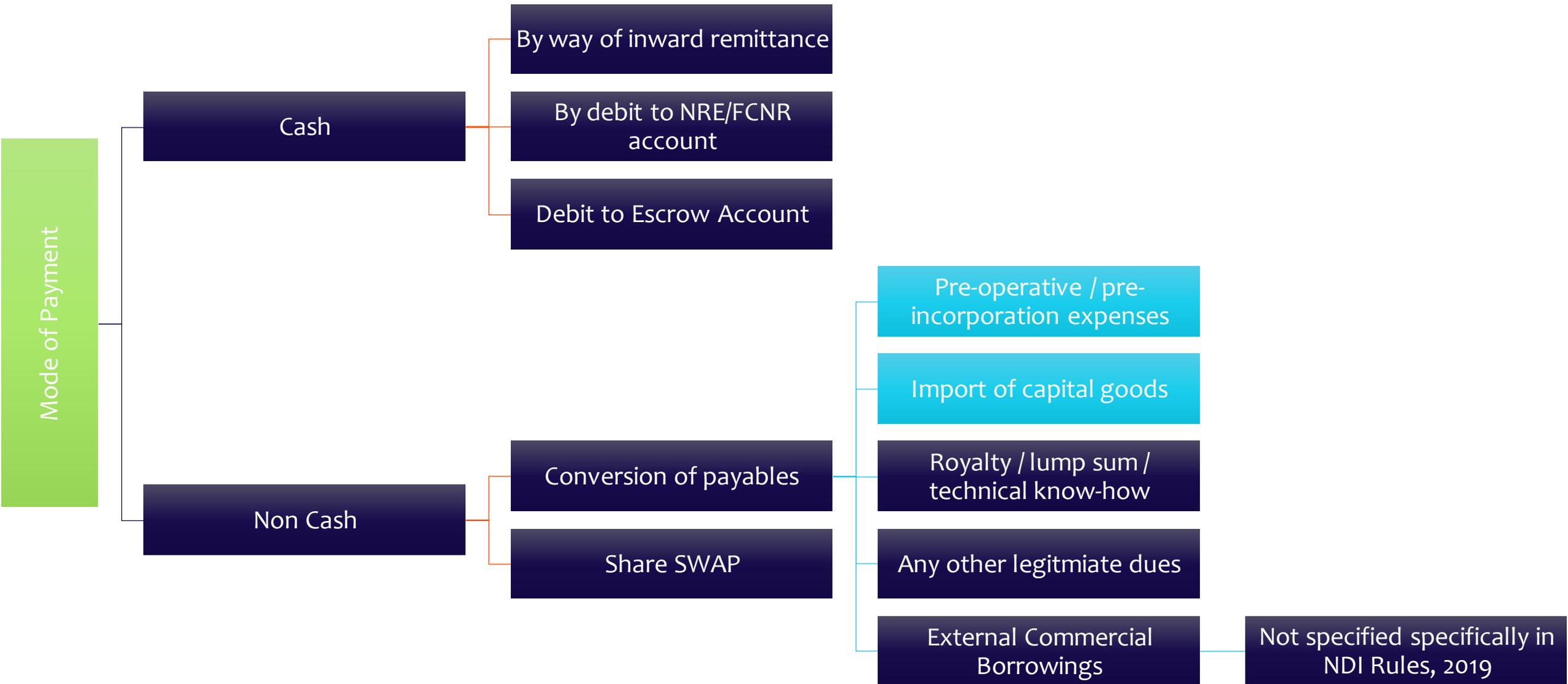
Any other legitmiate dues

External Commercial Borrowings

Not specified specifically in NDI Rules, 2019

A modern office meeting room with a large window, a white table, and a TV. The room is bright and airy, with a white wall and ceiling. A large window with a black frame provides a view of a cityscape. A white table is set up with two small potted plants. A black TV is mounted on the wall. The text "Mode of payment" is overlaid on the image.

Mode of payment



Pre-incorporation/ preoperative expense

WOS of non-resident entity

Engaged in sector under 100% automatic route; and
No FDI linked performance conditions

May issue equity instruments

Upto 5% of its authorised capital; or
USD 500000
Whichever is less

Against Pre-incorporation/ preoperative expenses

for expenditure relating to incorporation or necessary for commencement of operations

Conditions

WOS shall report in FC-GPR to RBI
Within 30 days from date of issue,
Cannot be issued later than 1 year from date of incorporation

- What about the mode of payment where there is no remittance

- If the allotment is of Rs 10 crores and the investor, lets say is an NRI, has paid the same as, Rs 5 crore through inward remittance and Rs 5 crore as NRE/FCNR.

Format of the declaration :

DECLARATION TO BE FILED BY THE AUTHORISED REPRESENTATIVE OF THE INDIAN COMPANY:

We hereby declare that:

1. We comply with the procedure for issue of capital instruments as laid down under Foreign Exchange Management (Transfer or issue of security by person resident outside India) Regulations, 2017 notified vide [Notification No. FEMA 20\(R\)/2017-RB dated November 07, 2017](#), as amended from time to time.
2. The investment is within the sectoral cap / statutory ceiling permissible under the regulations, ibid and in compliance with the attendant conditions.
3. The capital instruments issued under a scheme of merger and amalgamation of two or more Indian companies or reconstruction by way of de-merger or otherwise of an Indian company is duly approved by a court in India. *(strike- out if not applicable)*
4. The foreign investment received and reported now will be utilized in compliance with the provision of a Prevention of Money Laundering Act 2002 (PMLA) and Unlawful Activities(Prevention) Act, 1967 (UAPA). We confirm that the investment complies with the provisions of all applicable Rules and Regulations
5. We enclose the following documents in compliance with these regulations:

5. We enclose the following documents in compliance with these regulations:

(i) A certificate from our Company Secretary as in the specified format.

(ii) A certificate from SEBI registered Merchant Banker / Chartered Accountant / cost accountant or any other person as authorized under FEMA 20 (R) indicating the manner of arriving at the price of the shares issued to the persons resident outside India *(wherever applicable)*

(iii) All other necessary documents as applicable to the issue.

(Signature of the Applicant)* : _____

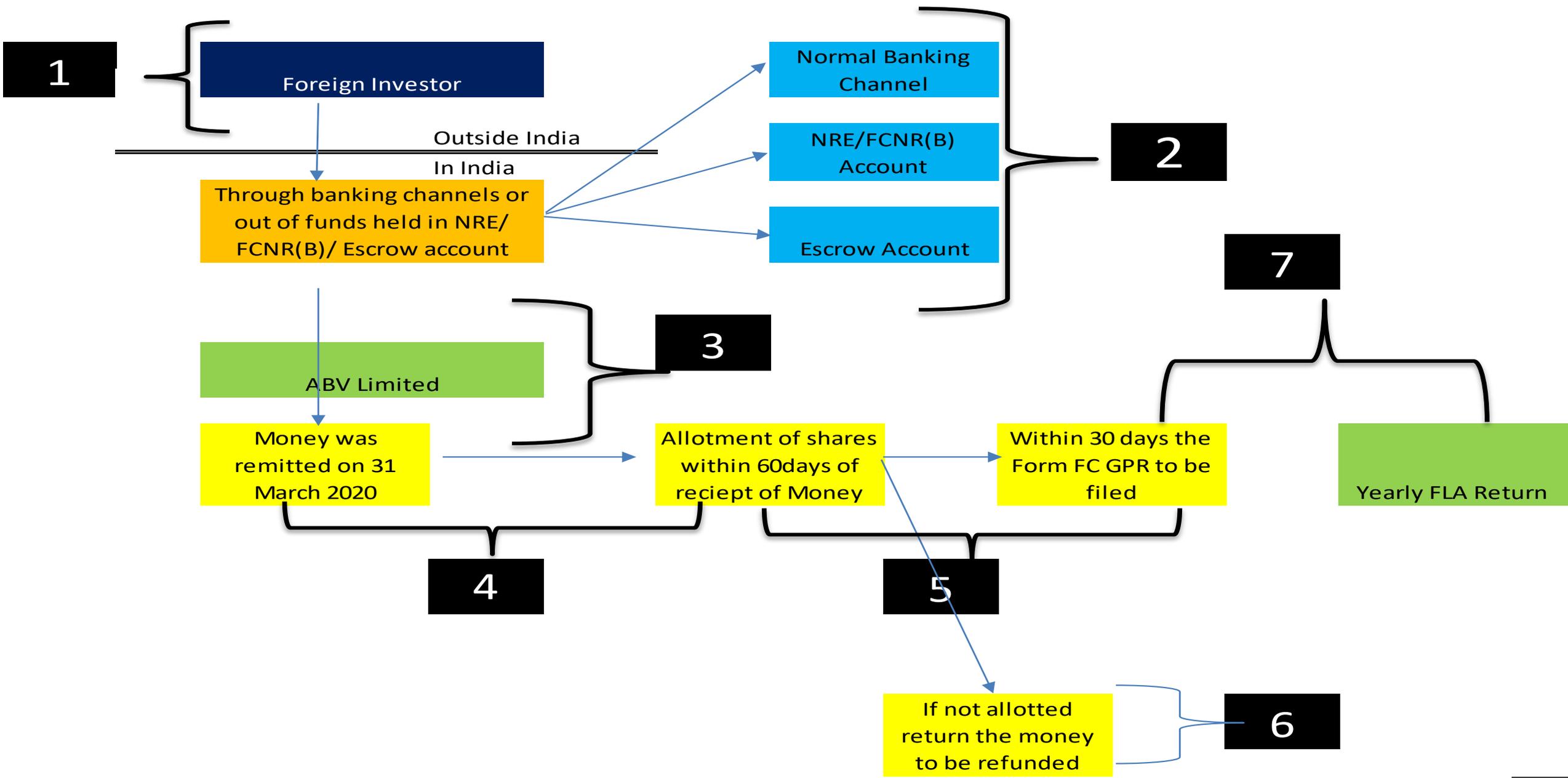
(Name in Block Letters) : _____

(Designation of the signatory) : _____

Place:

Date:

(* To be signed by Managing Director/Director/Secretary of the Company



Annual Return on Foreign Liabilities and Assets (FLA):

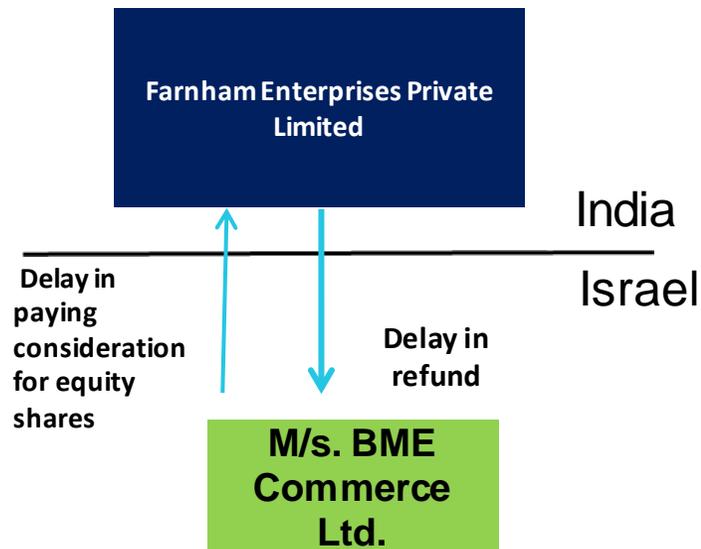
to be filed by Indian company/LLP
with RBI

which has received FDI/ capital
contribution in the previous year(s)
including the current year;

On or before July 15, every year;

Online on RBI flair portal
(<https://flair.rbi.org.in/fla/>)

CA No NDL 526/2019- Farnham Enterprises Private Limited



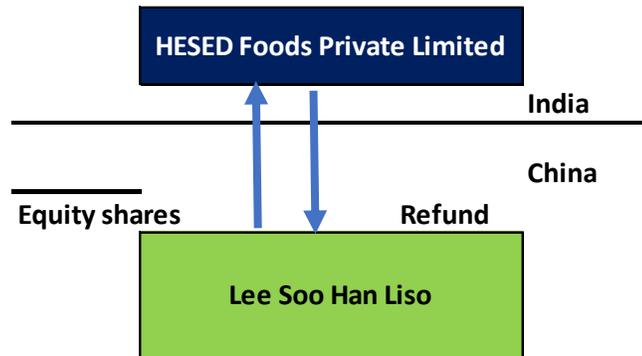
- (a) The applicant company, incorporated on January 16, 2018, is engaged in the business of other non-specialised wholesale trade n.e.c..
- (b) The applicant issued 1,48,500 equity shares on January 17, 2018 to the subscriber to its Memorandum of Association, M/s B.M.E. Commerce Ltd., Israel. The consideration for the said shares amounting to ₹14,85,000/- was received in two tranches with delay of 1 month & 6 days and 7 months & 19 days, beyond the prescribed period, as detailed below, in contravention of paragraph 2(2) of Schedule 1 to FEMA 20(R)/2017-RB, as then applicable.

Sl.No.	Date of issue	Amount (₹)	Date of receipt
1	17.01.2018	7,66,610.02	23.02.2018
2	17.01.2018	7,18,389.98	05.09.2018

• **Total 14,85,000.00**

- Contravened the provisions of paragraph 2(2) of schedule 1 to FEMA 20[®]/2017-RB, as then applicable.
- Contravened paragraph 2(3) of schedule 1 to FEMA 20[®]/2017-RB.

CA NO 111/2019 HESED FOODS PRIVATE LIMITED

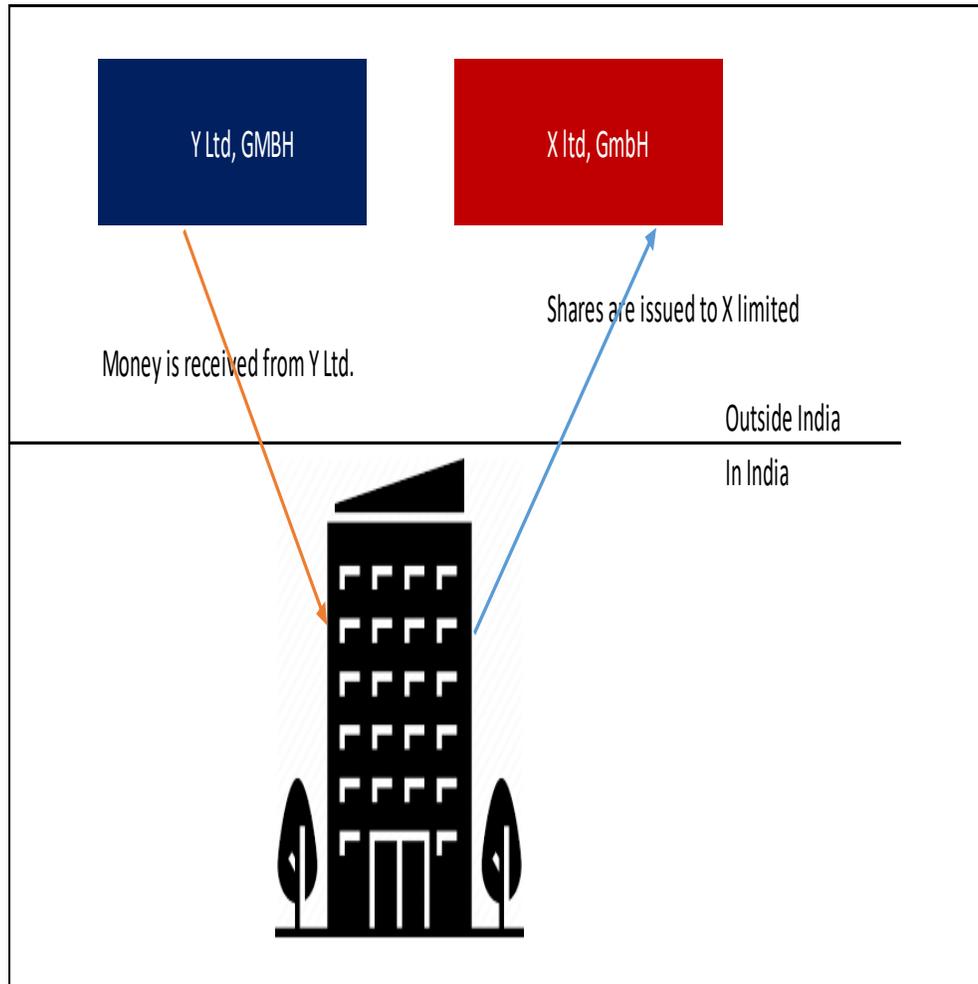


- The company had received one foreign inward remittances towards subscription to equity shares from a foreign investor, Lee So Han Liso, Hong Kong but the company had not allotted any share to the foreign investor and returned the money as given in Table 1 below:

Table 1: Allotment of shares/refund of share application money

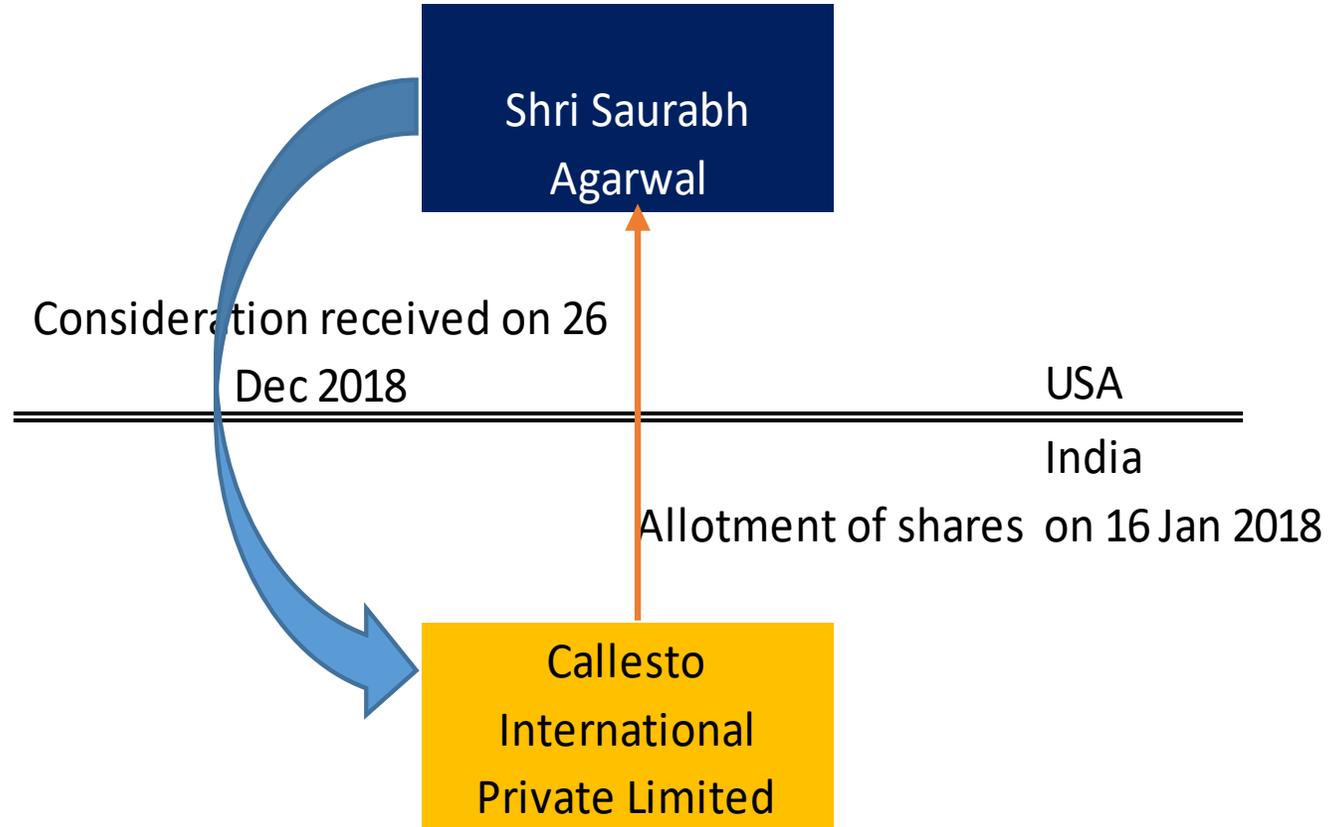
S. No.	Name of Investor	Inflow (INR)	Date of inflow	Date of allotment of shares	Amount for which shares issued (INR)	Refund Amount (INR)	Date of refund	Delay in refund beyond 75 days
1	Lee So Han Liso, Hong Kong	1,92,863.00	19-Jul-18	N.A	N.A	1,92,863.00	07-May-19	217

Issuance of shares to third party

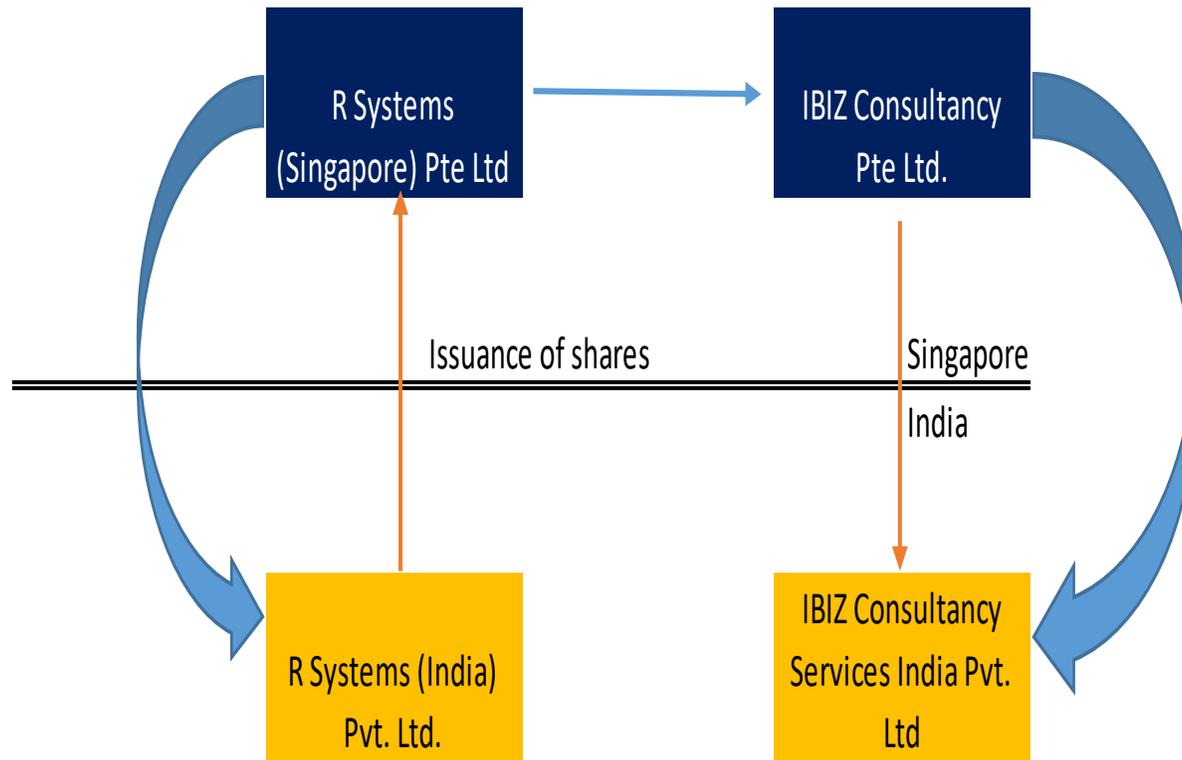


- In case the Indian company issues shares to a person resident outside India other than to the person resident outside India from who the inward remittance has been received, the form FC-GPR has to be filed along with the following documents:
- (a) KYC reports of both the remitter and the beneficial owner.
- (b) A no-objection certificate (NOC) from the remitter for issuing capital instruments to the beneficial owner mentioning their relationship.
- (c) A letter from the beneficial owner explaining the reason for the remitter making remittance on its behalf.
- (d) A copy of agreement / board resolution from the investee company for issuing capital instruments to a person other than from who the remittance has been received.

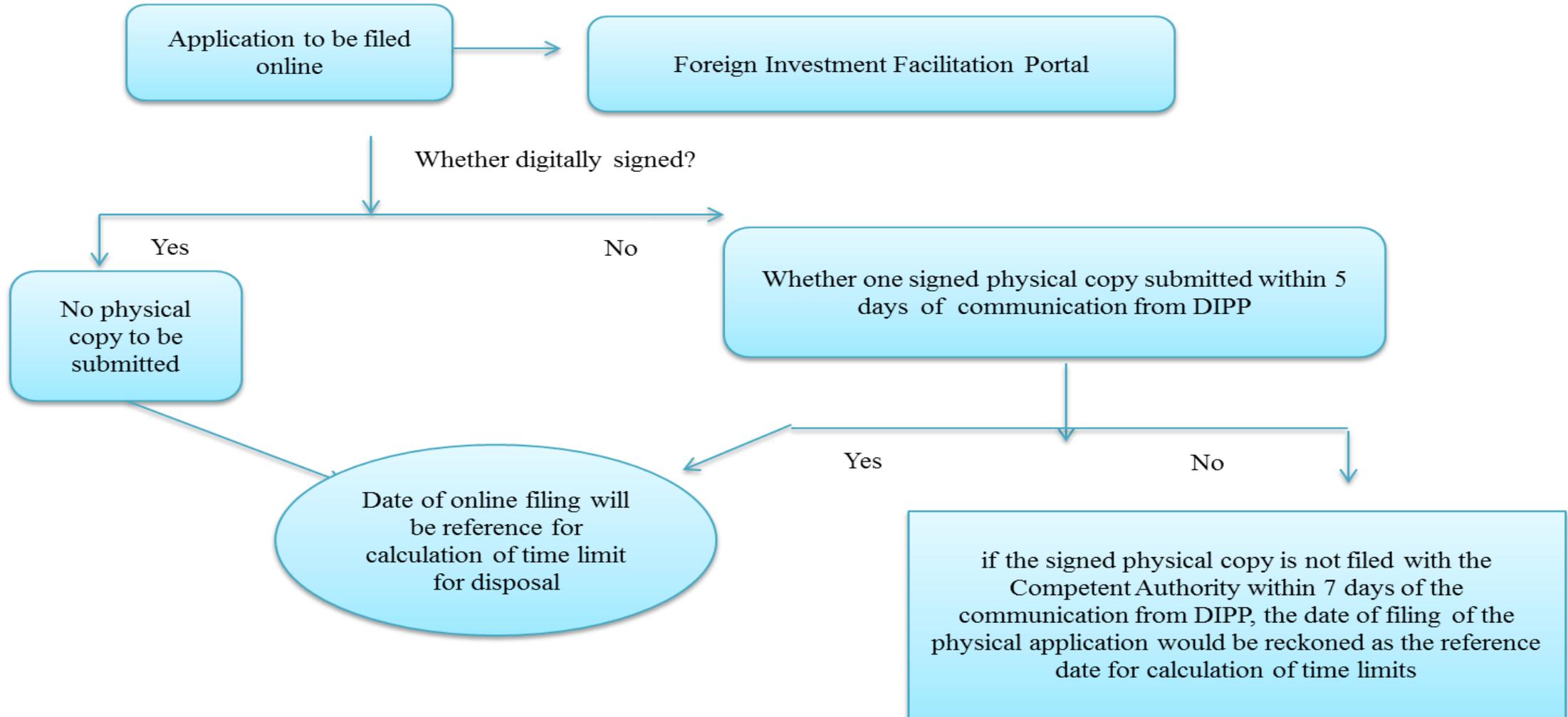
Case Study



Case Study



Procedure under Approval Route

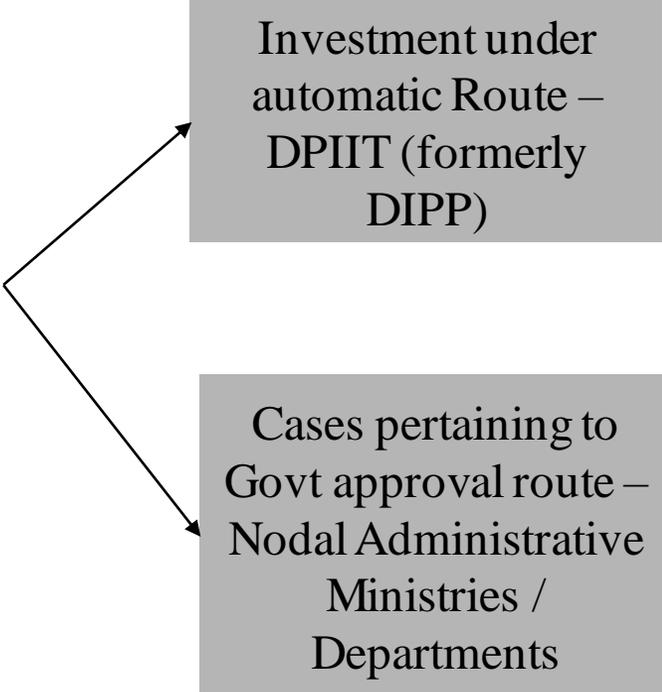


Competent Authorities

Sr.No	Activity / Sector	Administrative Ministry / Department
1	Mining	Ministry of Mines
2	Defence	
	a) Items requiring Industrial Licence under the industries (Development & Regulation) Act, 1951, and/or Arms Act, 1959 for which the powers have been delegated by Ministry of Home Affairs to DIPP	Department of Defence Production, Ministry of Defence
	b) Manufacturing of small Arms and Ammunitions covered under Arms Act 1959	Ministry of Home Affairs
3	Broadcasting	
4	Print Media	Ministry of Information & Broadcasting
5	Civil Aviation	Ministry Of Civil Aviation
6	Satellites	Department of Space
7	Telecommunication	Department of Telecommunications

Sr. No	Activity / Sector	Administrative Ministry / Department
8	Private Security Agencies	
9	Applications involving investments from countries of concern which presently include Pakistan and Bangladesh, requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time	Ministry of Home Affairs
10	Trading (Single, Multi brand and Food Product Retail Trading)	
11	FDI proposals by Non-Resident Indians (NRIs) / Export Oriented Units (EOUs) requiring approval of the government	Department of Industrial Policy & Promotion

Amended vide P.N.
01/2018 (not effective yet)



Proposals requiring security clearance

Investments in

- Broadcasting
- Telecommunication
- Satellites - establishment and operation
- Private Security Agencies
- Defence
- Civil Aviation
- Mining & mineral separation of titanium bearing minerals and ores, its value addition and integrated activities.

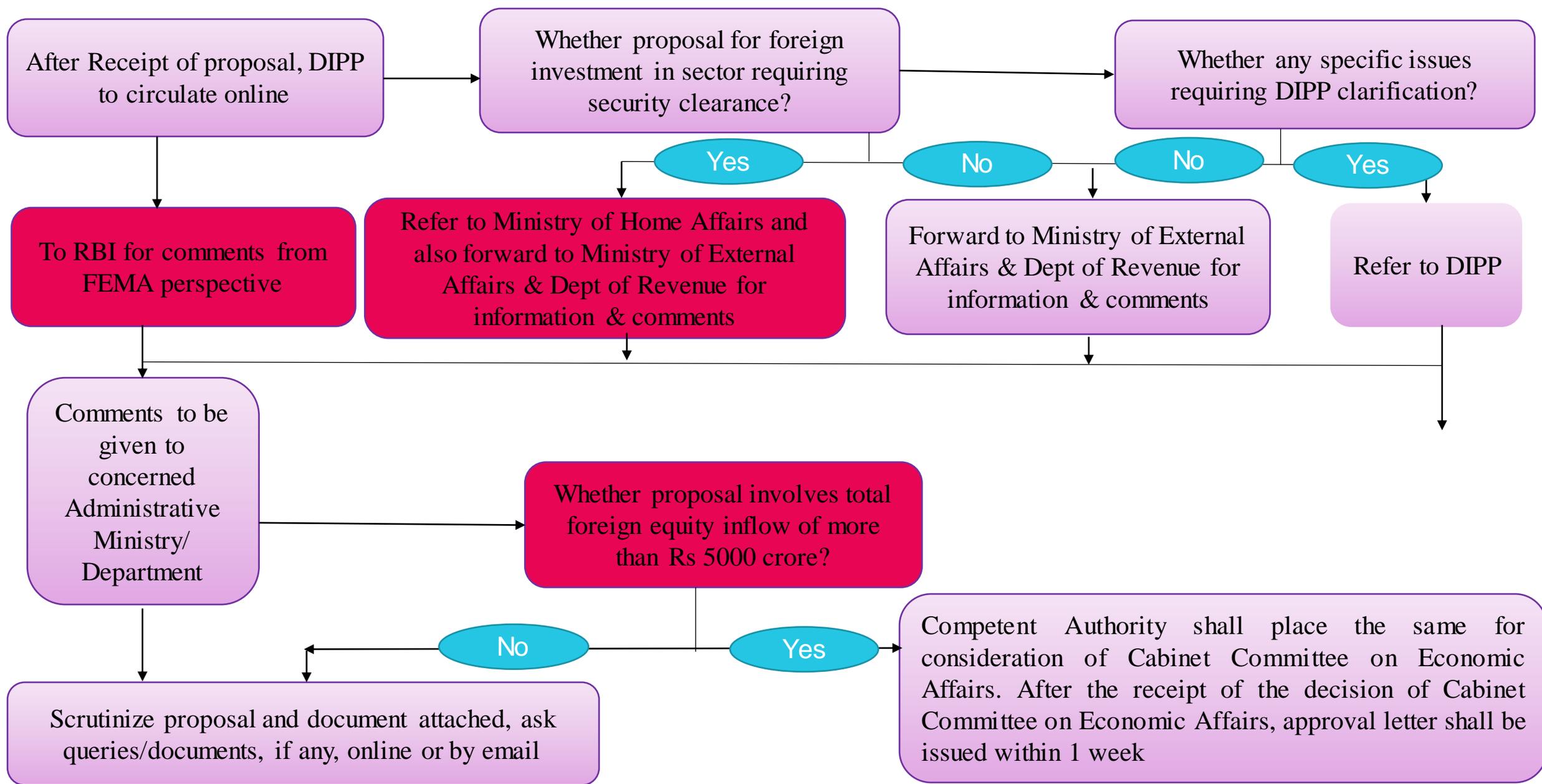
Investments from Pakistan and Bangladesh

In respect of applications in which there is a doubt about the Administrative Ministry/Department concerned, DPIIT shall identify the Administrative Ministry/Department where the application will be processed.

Security clearance and comments from Ministry of Home Affairs (MHA)

within 6 weeks of online receipt of the proposal

If not in position to revert in 6 weeks, will inform concerned administrative Ministry/Department of the expected time frame



Approval/rejection letters will be sent online by the Competent Authority to the applicant, consulted Ministries/Departments and DIPP.

Timelines for approval

Sr. No	Action Points	Time Period	Cum Time Period
1	Dissemination of Investment Proposal by DIPP to Concerned Ministry/Department	2 days	
2	Time for submission of signed physical copy of the proposal to the Competent Authority, if needed	5 days	1 Week
3	Initial scrutiny of the proposal and documents attached therewith, and seeking relevant additional information/documents from the applicant	1 Week	2 Week
4	Submission of clarification by DIPP on specific issues of FDI policy	2 Weeks	4 Week
5	Submission of comments by Consulted Ministry/ Department/ RBI/ Any Other Stakeholder	4 Weeks	6 Week
6	Submission of Comments by Ministry of Home Affairs on proposals requiring security clearance	6 Weeks	8 Week
7	Approval on proposals by Competent Authority for grant of approval	2 Weeks	
	Proposals not requiring security clearance		8 Week
	Proposal Requiring security clearance		10 Week

Note:

- i) Additional time of 2 weeks will be given to DIPP for consideration of those proposals which are proposed for rejection or where additional conditions which are not provided in the FDI policy are proposed to be imposed by the Competent Authority.
- ii) Time limits allocated exclude the time taken by applicants in removing deficiencies in the proposals/supplying additional information as may be required by the Competent Authority.

Rejection of proposal

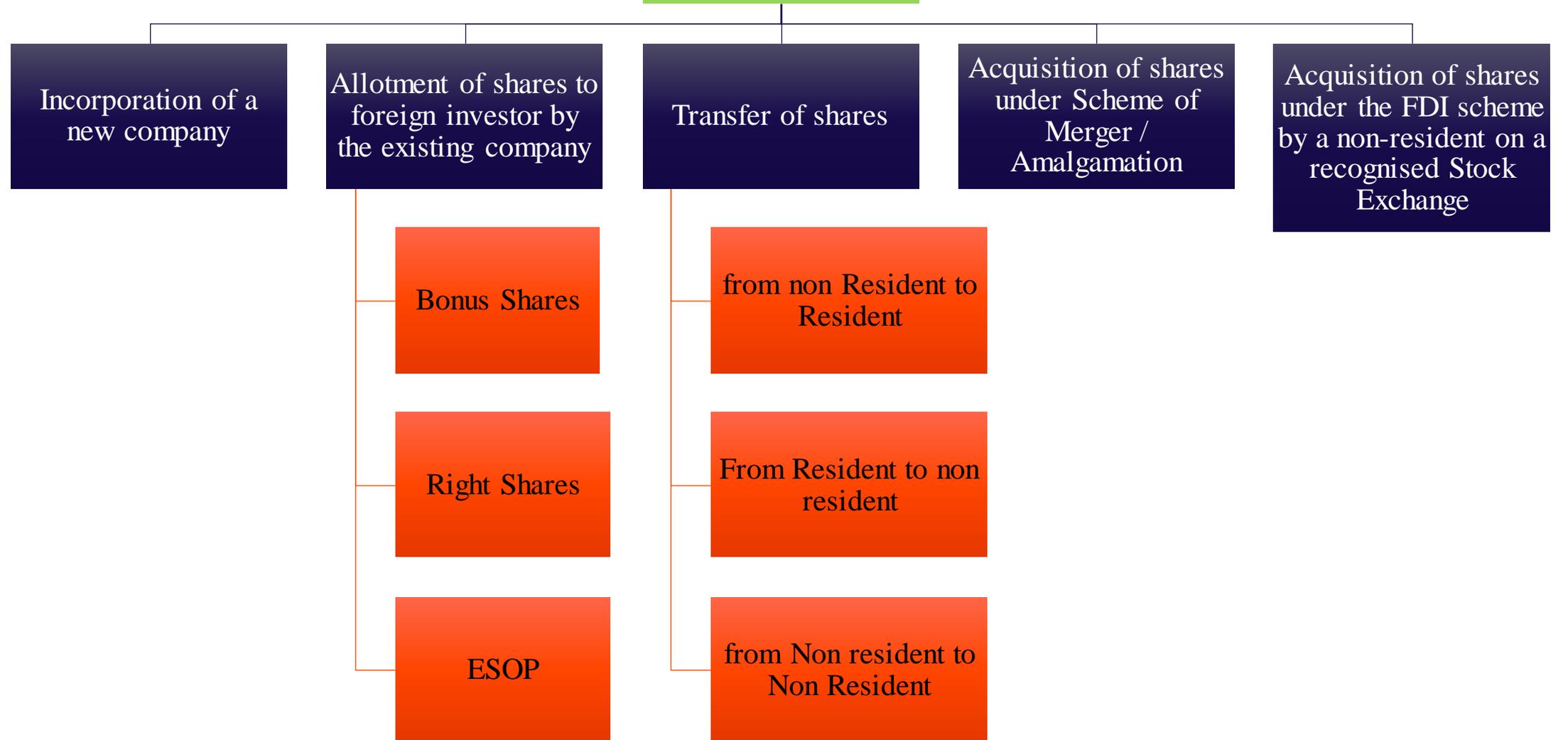
In respect of proposals where the Competent Authority proposes to reject the proposals or in cases where conditions for approval are stipulated in addition to the conditions laid down in the FDI policy or sectoral laws/regulations, concurrence of DPIIT shall compulsorily be sought by the Competent Authority.

The monitoring of the compliance of conditions under the FDI approvals, including the past cases approved by the Government, shall be done by the concerned Administrative Ministries/Departments.

A modern office meeting room with a large window, a white conference table, and a TV. The room is bright and airy, with a white wall and ceiling. A large window with a black frame provides a view of a cityscape. A white conference table is set up with several black chairs. A small potted plant sits on the table. A large TV is mounted on the wall. The text "MODES OF INVESTMENT" is overlaid on the image in a white box with a blue border.

MODES OF INVESTMENT

Mode of Investment



Rights Issue or Bonus Issue[Rule 7]

Sectoral cap

Offer made by Indian company is in compliance with the provisions of Companies Act, 2013

Initial acquisition as per Rules

Rights issue [Rule 7]

Rights issued when shareholder was PRII shall hold equity instruments on non-repatriation basis

Rights renounced by a resident shareholder in favor of PROI shall hold equity instruments on non-repatriation basis

Valuation of Rights issue [Rule 7]

Pricing for rights issue Listed company – price determined by company

Unlisted company – shall not be less than the price offered to Person resident in India

The Department of Economic Affairs, Ministry of Finance, on **April 27, 2020** notified the Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2020,

a new Rule 7A has been introduced which states that

'a person resident outside India who has acquired a right from a person resident in India who has renounced it may acquire equity instruments (other than share warrants) against the said right as per pricing guidelines specified under Rule 21 of the NDI Rules'

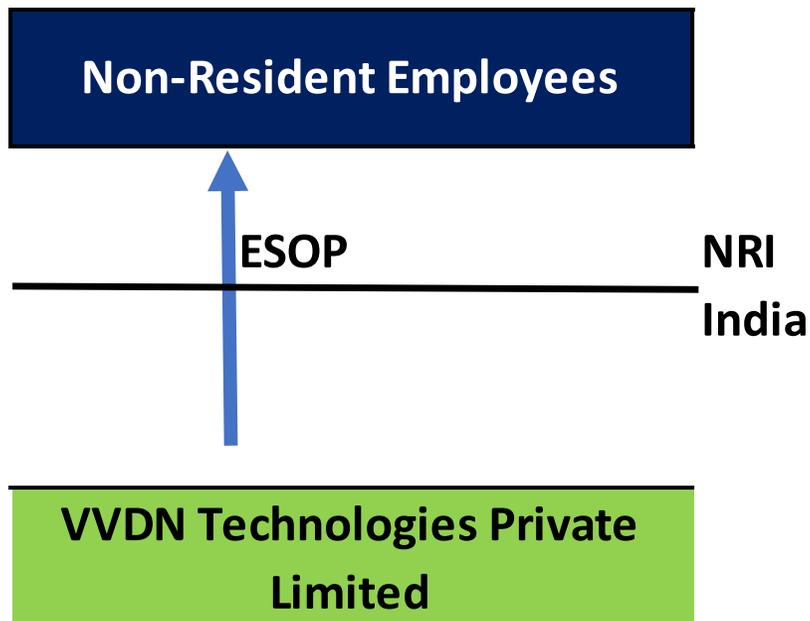
Valuation || Rule 21

- As per Rule 21(2)(a)(ii) of the NDI Rules, unless otherwise prescribed in the NDI Rules, the price of equity instruments of an unlisted Indian company issued by such company to a person resident outside India shall not be less than the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the Securities and Exchange Board of India or a practising Cost Accountant. Further, in case of equity instruments of a listed company, the price of such instruments has to be worked out in accordance with the guidelines prescribed by the Securities and Exchange Board of India or as per the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 in case of a company going through the delisting process.

ESOP || Rule 7

stock options/ sweat equity shares	Scheme	Sectoral cap	Government approval	employee was PRII at the time of grant
to employees/ directors resident outside India of the company, holding company, JV, WOS, subsidiaries	as per Act, 2013 or SEBI (SBEB) Regulations, 2014	As applicable	if investment by PROI in company is under approval route employee is citizen of Bangladesh/ Pakistan	Shares acquired on exercising shall be held on non- repatriation basis.

C.A. 5016 / 2019 – VVDN Technologies Private Limited



- The applicant company was incorporated as E-Con Infotech Private Limited in April 2007 was changed to VVDN Technologies Private Limited in August 2008.
- The applicant had granted 637000 ESOP options at face value of Rs. 2/- per equity share by way of grant letter dated to its Non-Resident employees.
- The applicant filed the Form ESOP through FIRMS portal only on in June 2019 resulting in delay.
- The applicant had contravened Regulation 8(2) of Notification No. FEMA 20/2000-RB and Regulation 13(5) of Notification No. FEMA 20R/2000-RB

Mode of Investment

Transfer of shares

from non Resident to Resident

From Resident to non resident

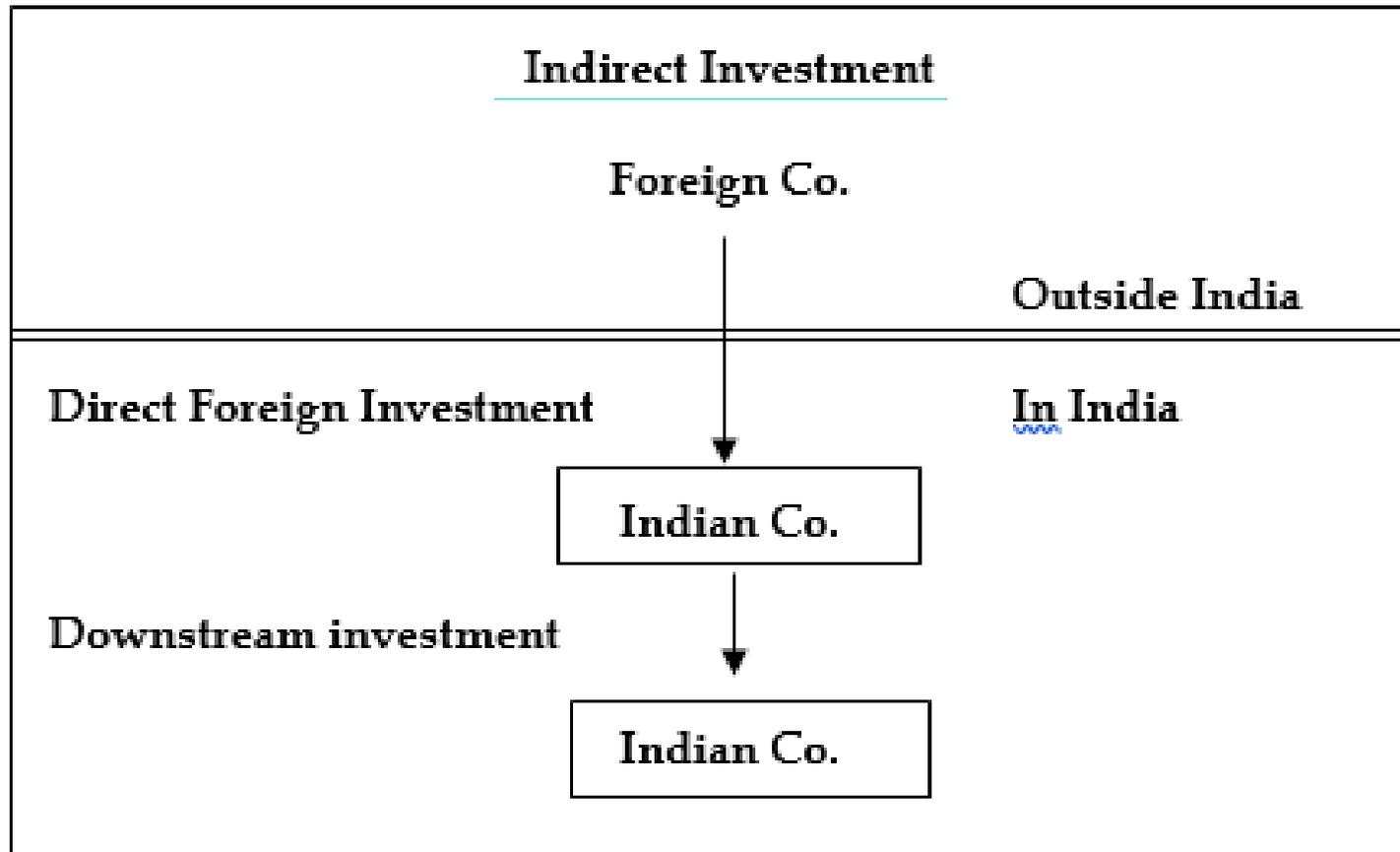
from Non resident to Non Resident

Sl. No.	Transferor	Transferee	Compliance/Conditions
1	Person resident outside India other than NRI/OCB/OCI	Person resident outside India	<ol style="list-style-type: none"> 1. Transfer of equity instruments/units by sale/gift allowed; 2. Includes transfer pursuant to liquidation/merger/demerger and amalgamation of entities/companies incorporated or registered outside India; 3. Prior approval required for companies under approval route.
2	NRI/OCI holding capital instrument on repatriation basis	PROI	<ol style="list-style-type: none"> 1. Transfer of Capital instruments/units by sale/gift allowed; 2. Prior approval required for companies under approval route. 3. In case NRI/OCI breaches the aggregate NRI/OCI limit or sectoral limits, the NRI/OCI may sell capital instrument to PRI within limit as stipulated by RBI and such breach shall not be reckoned as a contravention of FEMA 20.
3	Person resident outside India	Person resident in India	<ol style="list-style-type: none"> 1. Transfer of equity instruments/units by way of sale/gift or by way of sale on stock exchange; 2. Sale on Stock exchange shall be as per the manner as specified by SEBI; 3. Transfer and pricing shall be in compliance with RBI Guidelines; 4. Where Equity Instrument is held on non-repatriation basis aforementioned conditions shall not apply;
4	PRI Holding Equity Instruments	PROI	<ol style="list-style-type: none"> 1. Transfer by way of Sale; 2. Adherence of entry route/Sectoral cap/Investment limits/pricing guidelines and other attendant conditions; 3. Documentation and reporting requirements as specified by RBI;
5	PRI Holding equity instruments/units on non repatriation basis	PROI	<ol style="list-style-type: none"> 1. Transfer by way of gift; 2. Prior Approval of RBI required; 3. Donee is eligible to hold such security under relevant schedule; 4. Gift does not exceed 5% of the paid up share capital of Indian company or each series of debenture/Mutual Fund scheme; 5. Adherence of sectoral cap; 6. Donor and donee shall be relative as per Companies Act, 2013; 7. Value of security transferred together with transferred to any other PROI in a FY does not exceed USD 50,000

Sl. No.	Transferor	Transferee	Compliance/Conditions
6	NRI/OCI Holding equity instruments or units on repatriation basis	PROI	<ol style="list-style-type: none"> 1. Transfer by way of sale/gift 2. Prior approval of Government is required If company engaged in approval route Sector; 3. If acquisition by NRI/OCI has resulted in a breach of the applicable aggregate sectoral limit, the NRI/OCI shall sell such equity instruments to a PRI eligible to hold such instruments within the time stipulated by the RBI. If the sale is within the prescribed time, shall not be reckoned as a contravention under these rules.
7	NRI/OCI or an eligible investor holding equity instruments or units on non repatriation basis	PROI	<ol style="list-style-type: none"> 1. Transfer by way of sale. 2. Adherence of entry route/Sectoral Cap/Investment Limit/pricing guidelines and other attendant conditions. 3. Documentation and reporting requirements as specified by RBI;
8	NRI/OCI or an eligible investor holding equity instruments or units on non repatriation basis	PROI	<p>Transfer by way of gift with the prior approval of RBI:</p> <ol style="list-style-type: none"> 1. Gift does not exceed 5% of the paid up share capital of Indian company 2. Applicable Sectoral cap in the Indian Company is not breached; 3. Donor and donee shall be relative as per Companies Act, 2013; 4. Value of security transferred together with transferred to any other PROI in a FY does not exceed USD 50,000
9	NRI/OCI or an eligible investor holding equity instruments or units on non repatriation basis	NRI/OCI/eligible Investor	Transfer by way of gift and the transferee shall hold it on non repatriable basis.



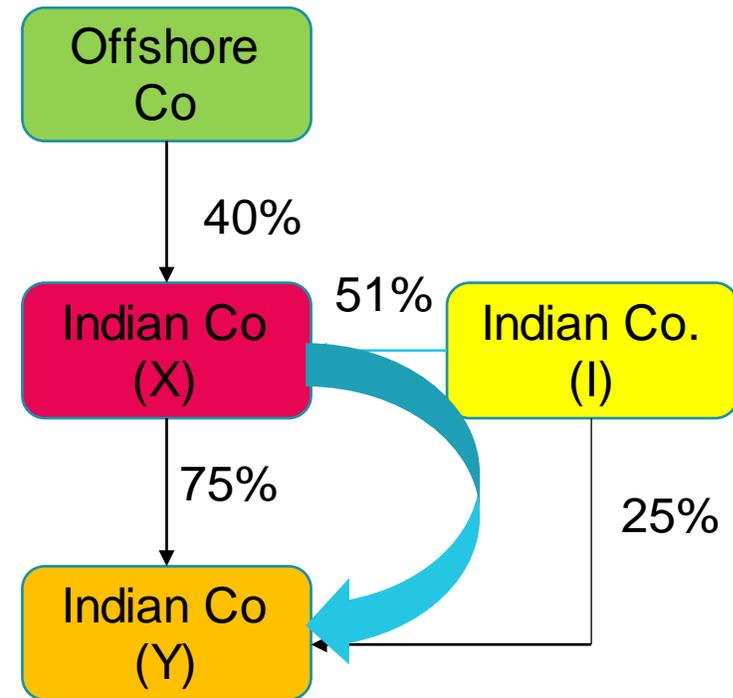
Indirect Foreign Investment



Indian entity which has received Indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as are applicable for foreign investment

Case Studies

A

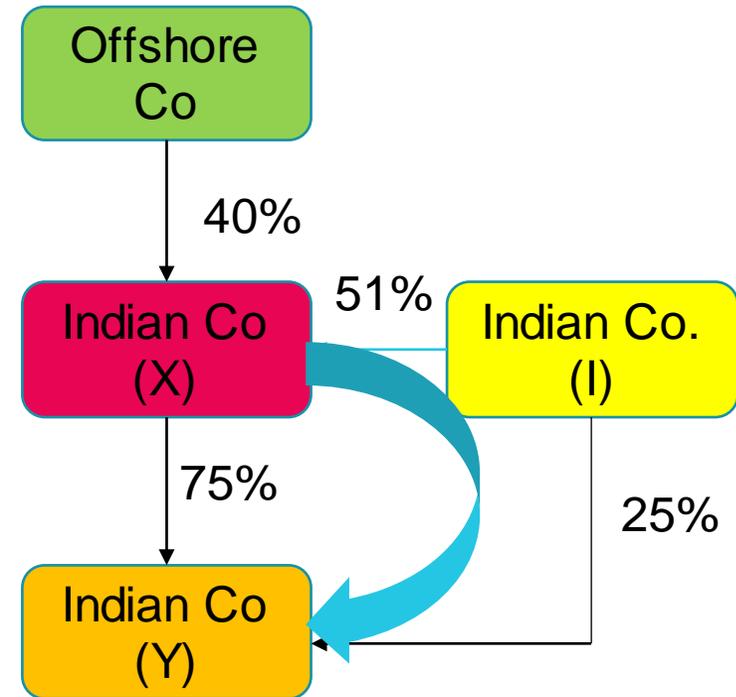


The investment from Indian co. X to Indian co. Y is Downstream Investment in all cases:

"downstream investment" shall mean investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity;

Case Studies

A



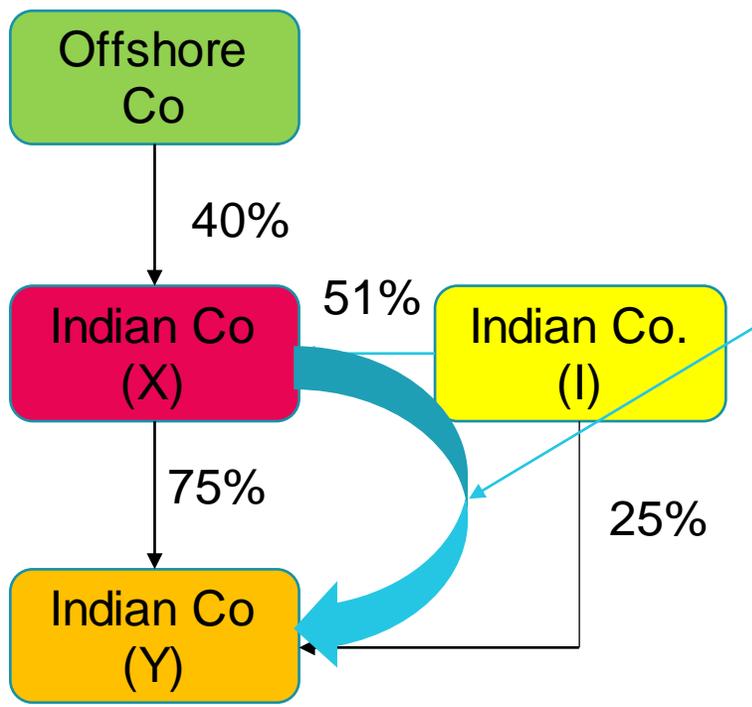
The investment from Indian co. X to Indian co. Y is Downstream Investment in all cases:

"downstream investment" shall mean investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity;

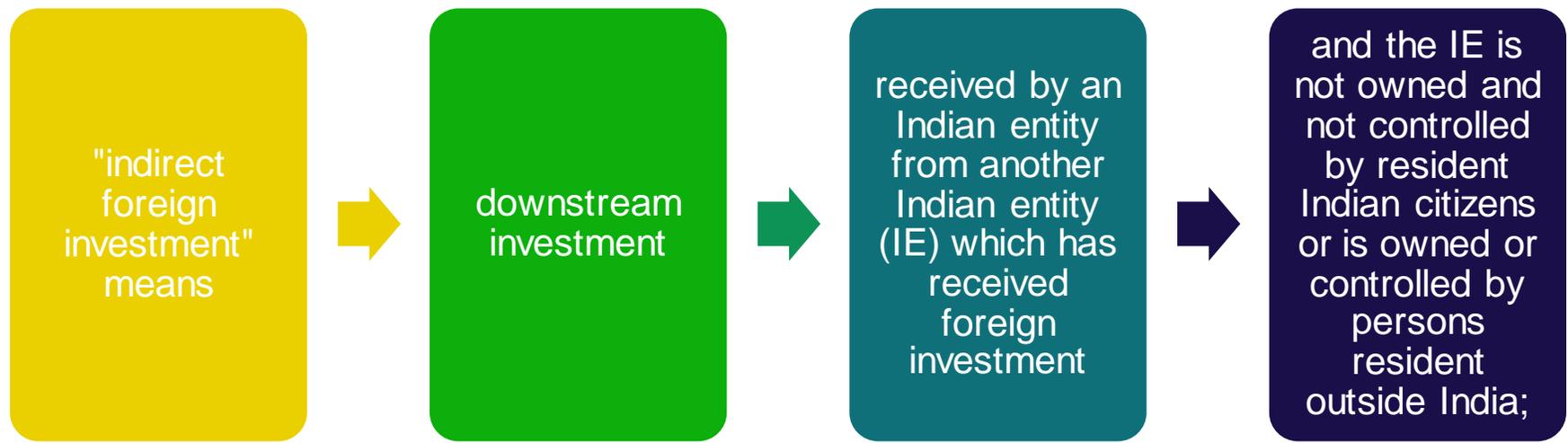
What needs to be seen if this investment from Indian co. X to another Indian co. Y is an Indian Foreign Investment

Case Studies

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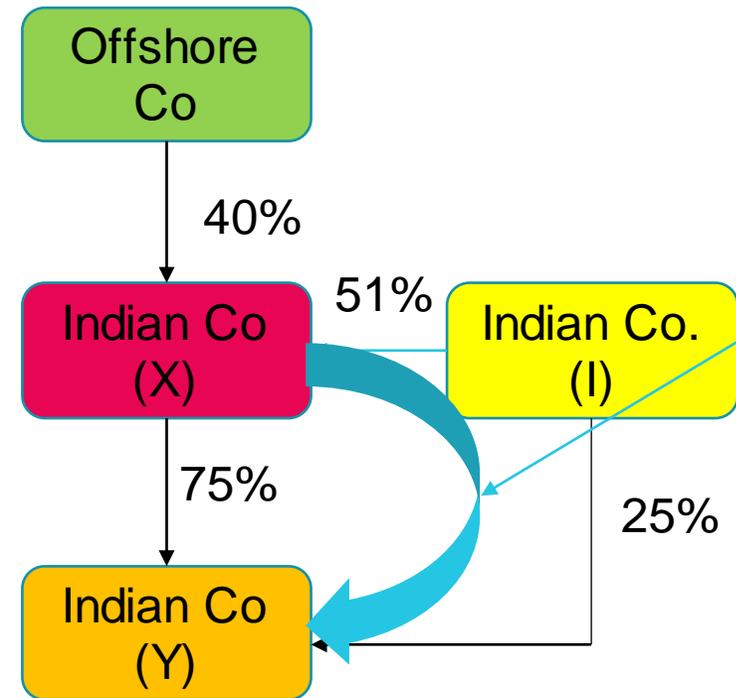


What needs to be seen if this investment from Indian co. X to another Indian co. Y is an Indian Foreign Investment



Case Studies

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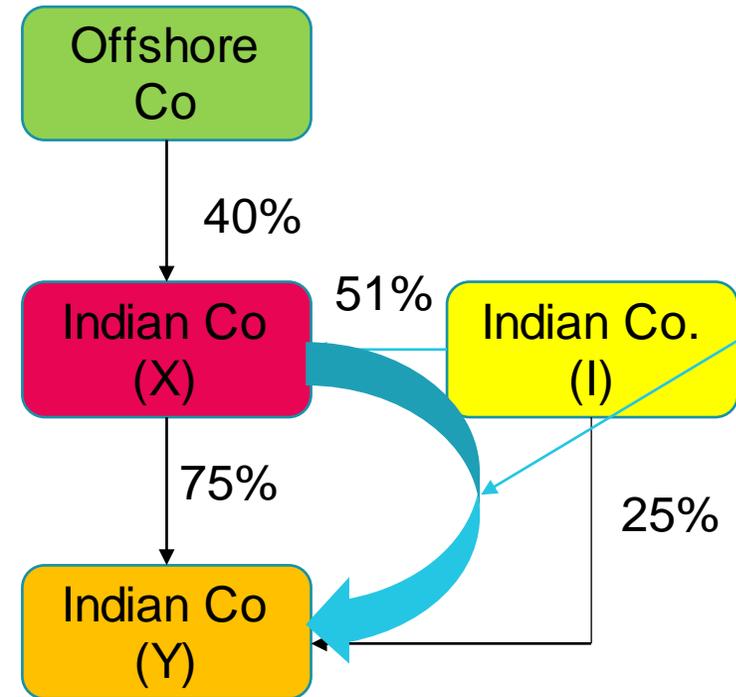


What needs to be seen if this investment from Indian co. X to another Indian co. Y is an Indian Foreign Investment

and the IE is **not owned and not controlled by resident Indian citizens** or is owned or controlled by persons resident outside India;

Case Studies

A



What needs to be seen if this investment from Indian co. X to another Indian co. Y is an Indian Foreign Investment

and the IE is **not owned and not controlled by resident Indian citizens** or is owned or controlled by persons resident outside India;

Ownership

'Ownership of an Indian company' shall mean

- beneficial holding of more than 50 percent
- of the equity instruments of such company.

Company owned by resident Indian citizens shall mean an Indian company

- where ownership is vested in resident Indian citizens and/ or Indian companies, which are ultimately owned and controlled by resident Indian citizens.

'Company owned by persons resident outside India'

- shall mean an Indian company that is owned by persons resident outside India.

Control

'Control' shall mean

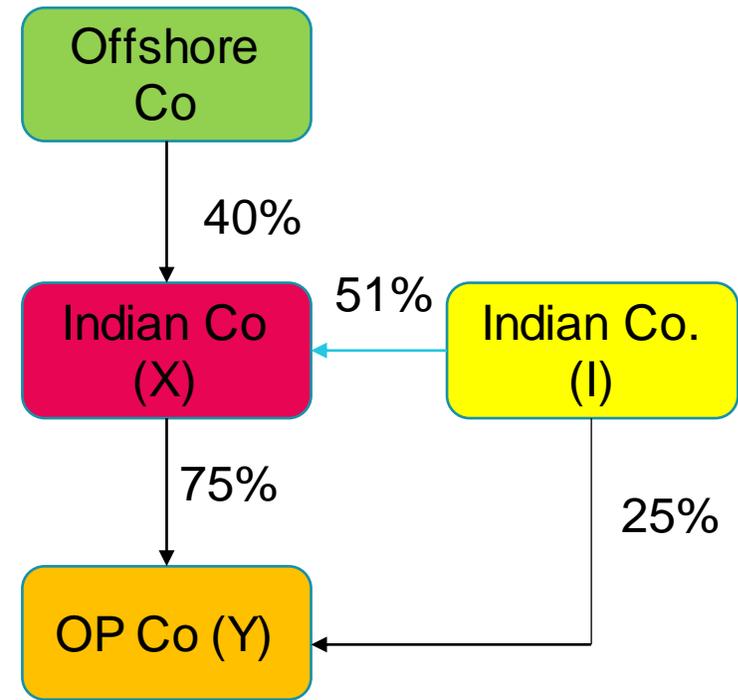
- the right to appoint majority of the directors or
- to control the management or policy decisions
- including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

'Company controlled by persons resident outside India'

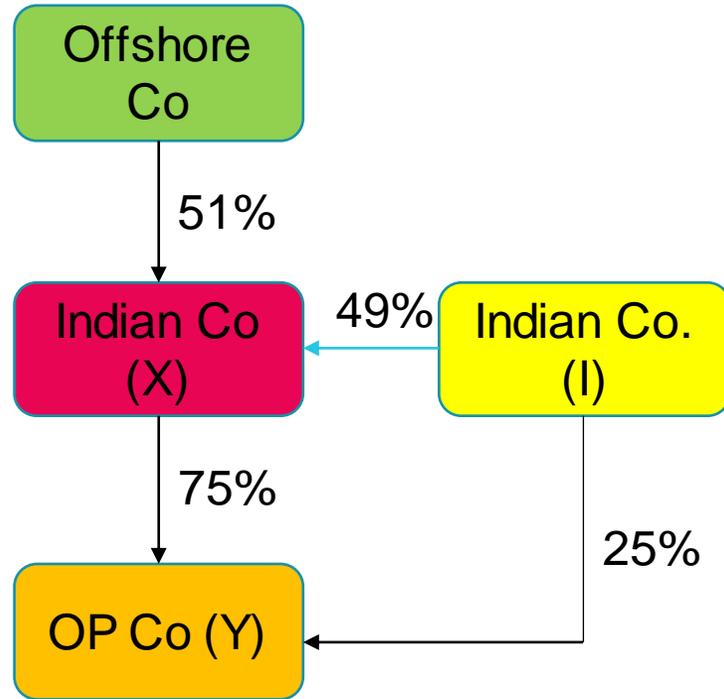
- shall mean an Indian company that is controlled by persons resident outside India.

Case Studies

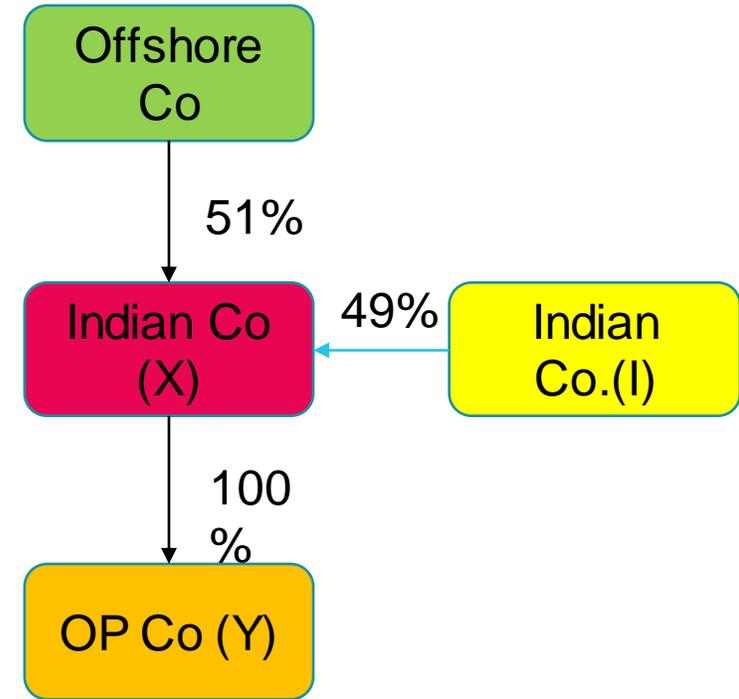
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B

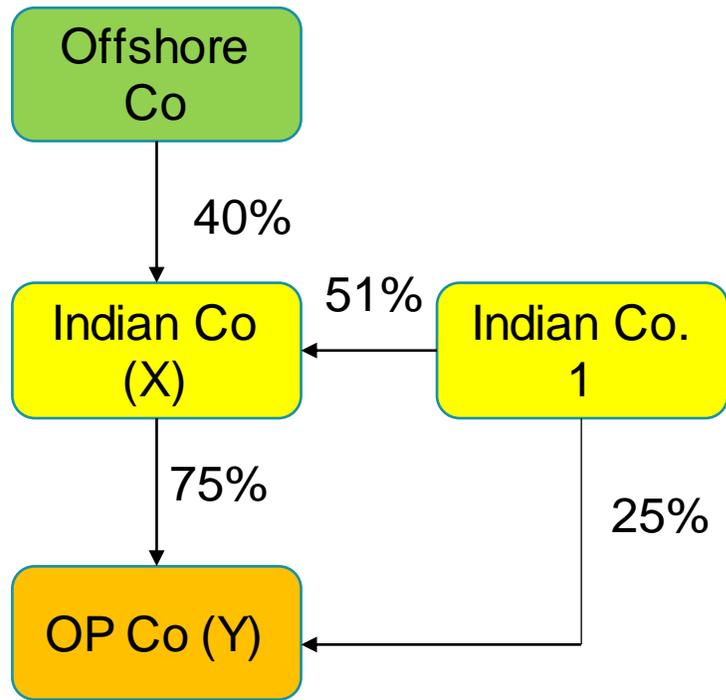


C



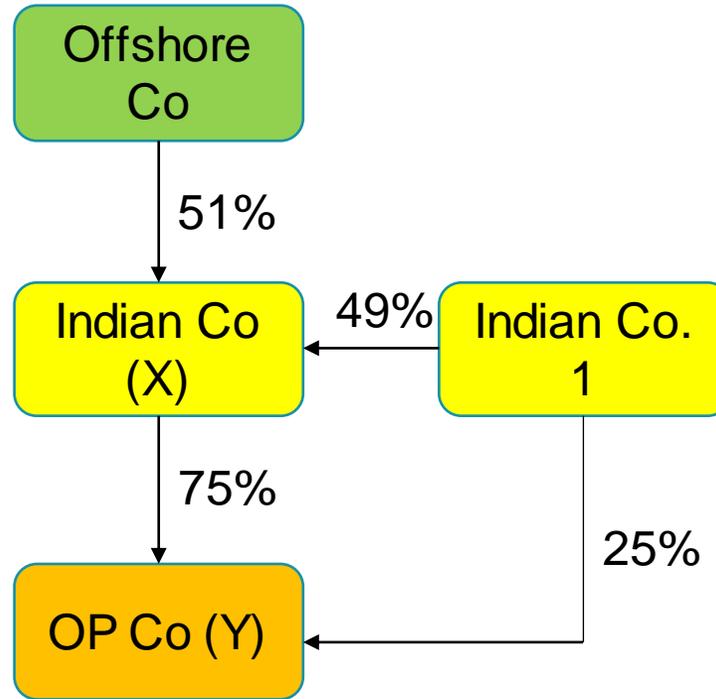
COMPUTATION OF DOWNSTREAM INVESTMENT

A



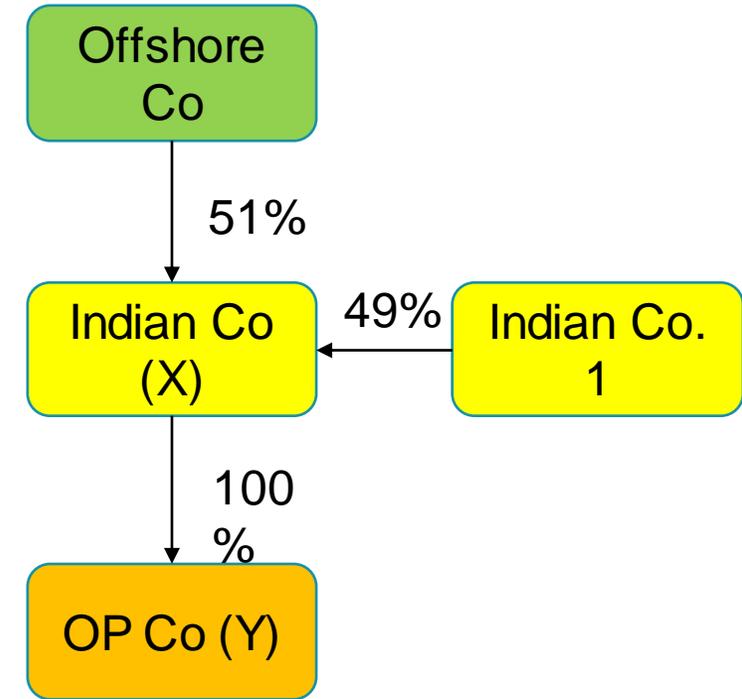
Foreign investment in Y = zero

B



Foreign investment in Y = 75%

C



Foreign investment in Y = 51%

Conditions of Downstream Investments (DI)

Approval

- of Board and also shareholder's agreement, if any.

Funds for making DI

- From abroad;
- Through internal accruals
- Profits transferred to reserves account after payment of taxes.
- Not use funds borrowed in domestic markets

Transfer of equity instruments held by Indian company as DI may be transferred to

- PROI, subject to reporting specified by RBI;
- PRII, subject to pricing guidelines adherence;
- Another FOCC Indian entity.

Manner of computing indirect foreign investment

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

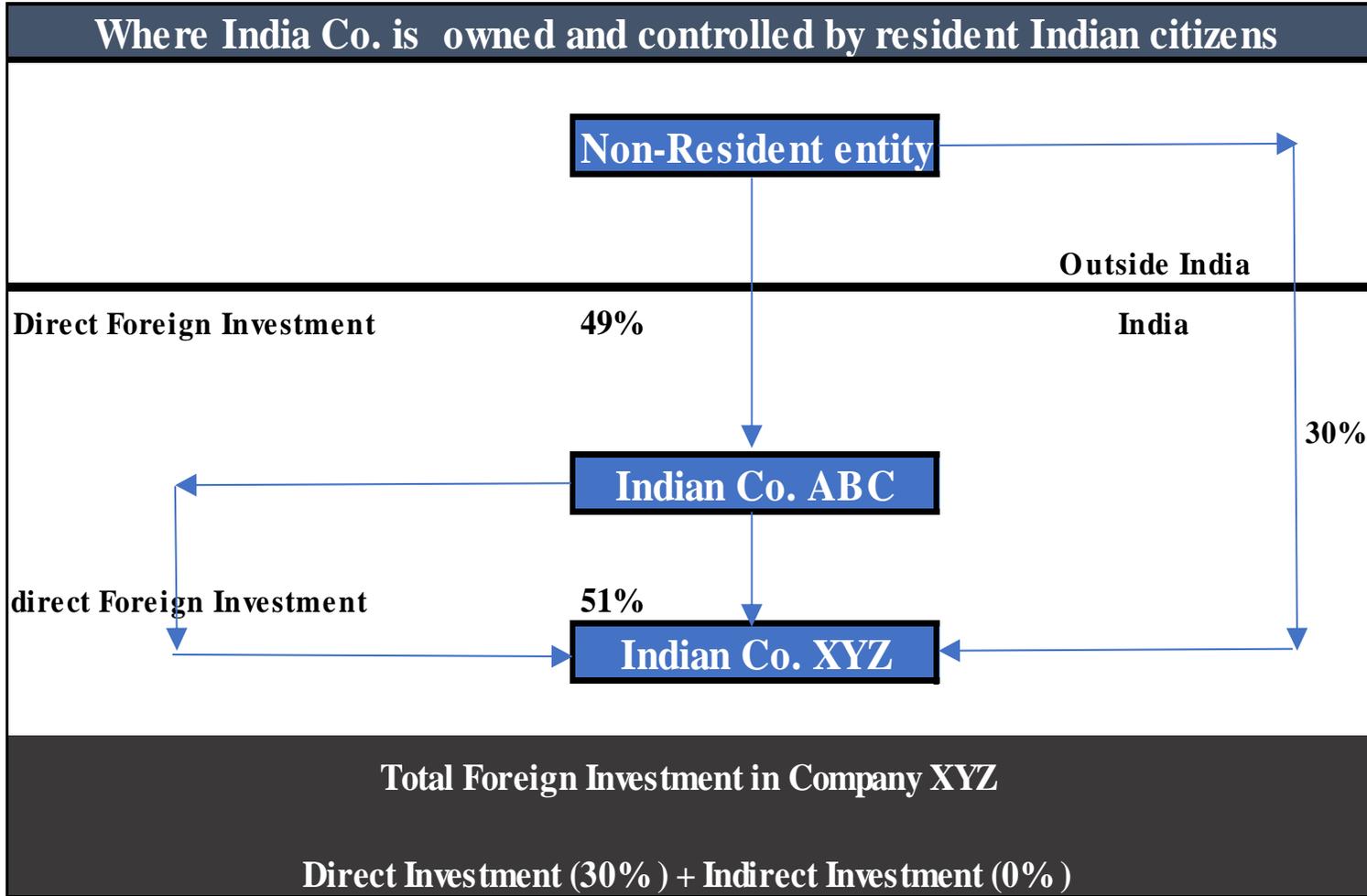
(A) where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y.

(B) where Company Y has foreign investment of say 75% and:

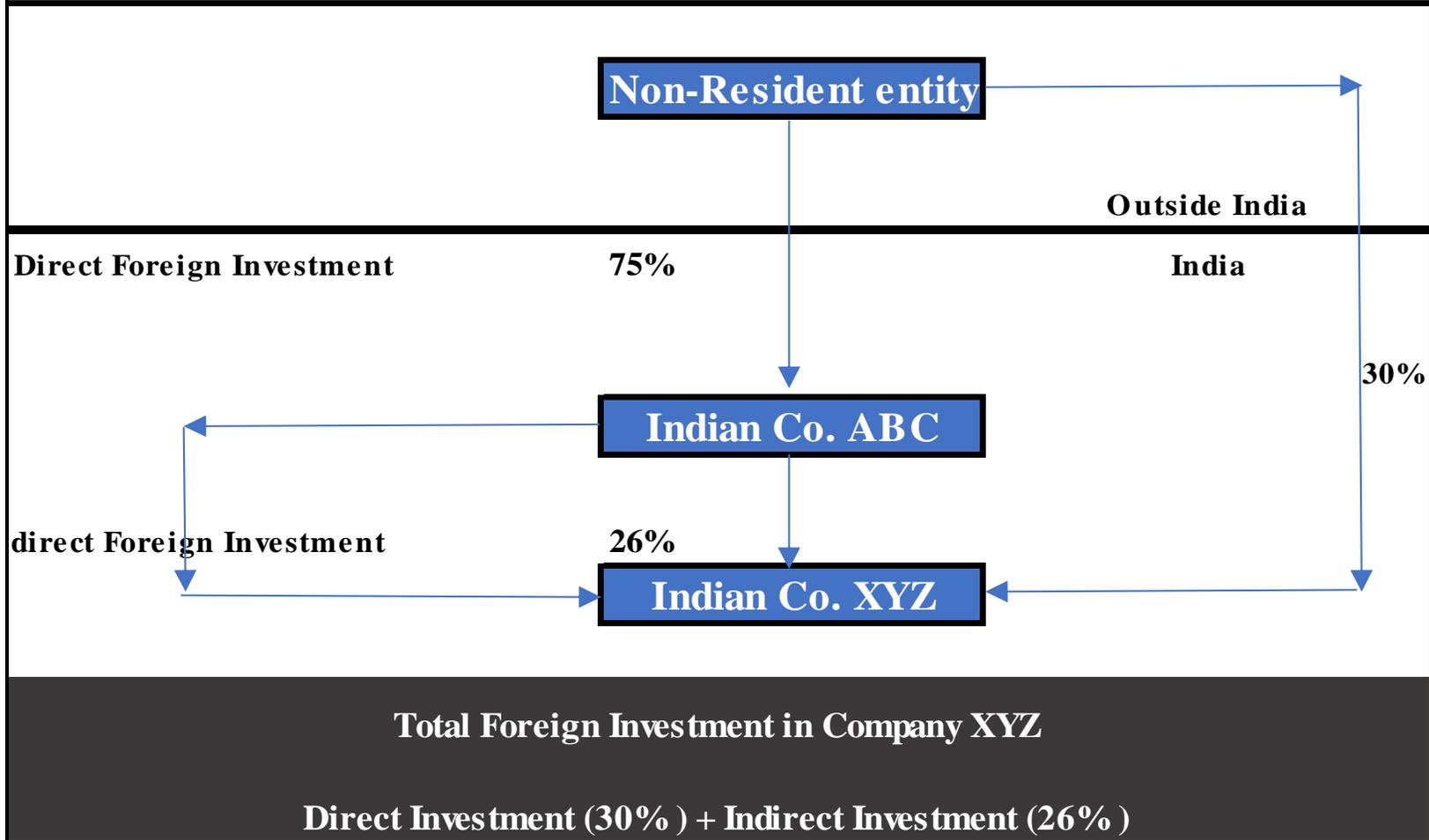
(I) invests 26% in Company X, the entire 26% investment by Company Y would be treated as indirect foreign investment in Company X;

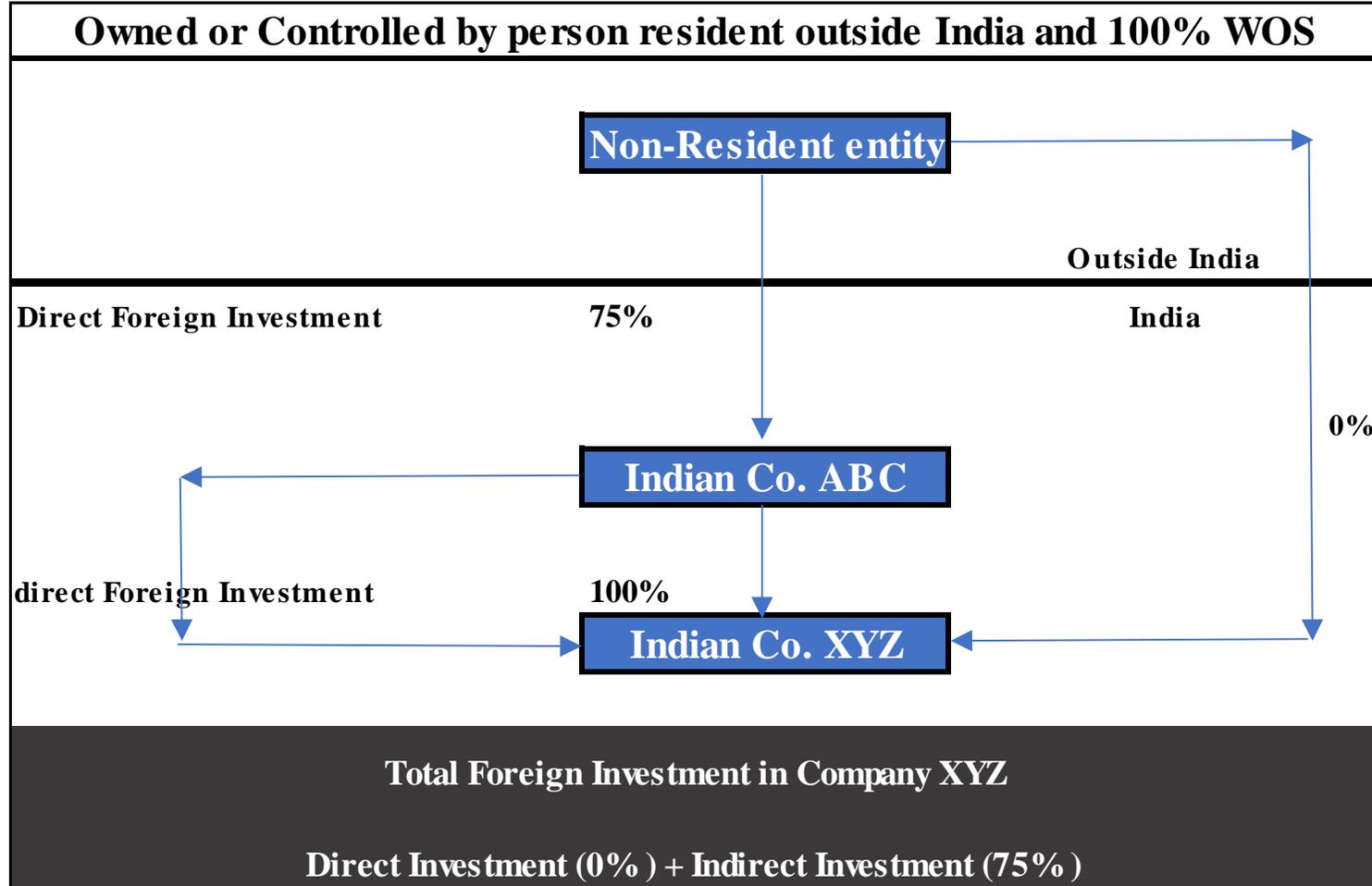
(II) invests 80% in Company X, the indirect foreign investment in Company X would be taken as 80%;

(III) where Company X is a wholly owned subsidiary of Company Y (i.e. Company Y owns 100% shares of Company X), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company X would be computed in the ratio of 75:25 in the total investment of Company Y in Company X.



Where Indian entity is not owned and controlled by resident Indian citizens





Reporting in case of DI

To notify Secretariat for Industrial Assistance, DIPP

- Within 30 days of investment;
- even if equity instruments have not been allotted
- along with the modality of investment in new/existing ventures

Submit form DI

- on SMF portal
- Within 30 days of investment.

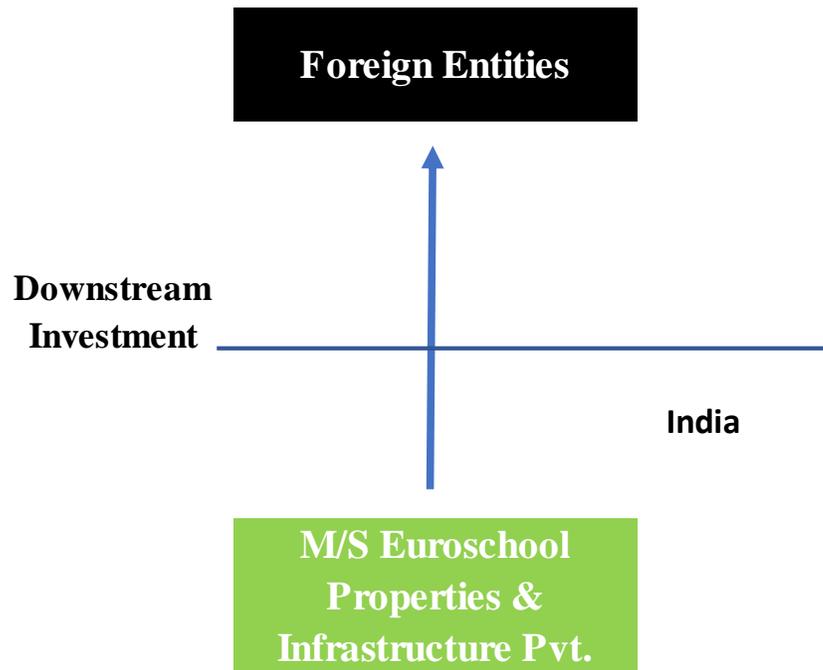
Onus of compliance

- First level Indian company making DI

Annual compliance

- Certificate from statutory auditors;
- In case of qualified report, information to be reported to regional office of RBI
- Acknowledgement to be obtained from RBI.
- Same to be stated in the Director's Report.

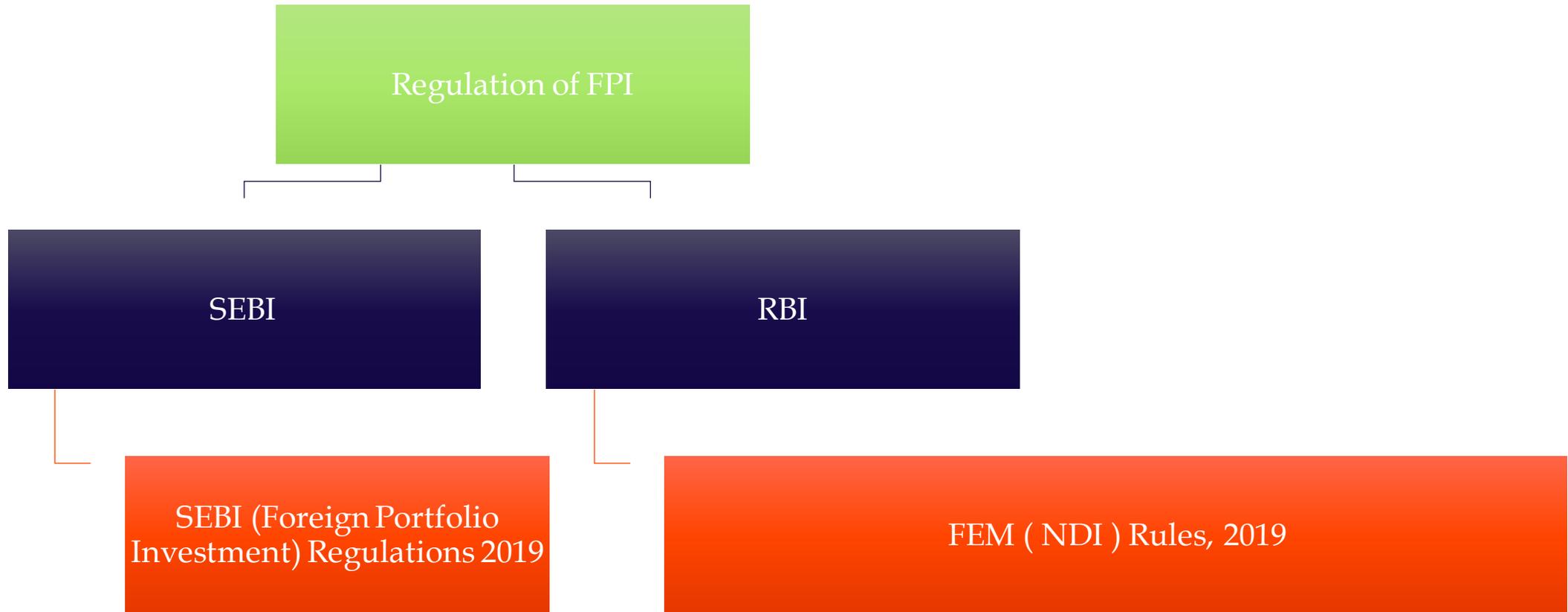
CA No. MUM 986/2019 - M/s Euroschool Properties & Infrastructure Pvt Ltd.



- Applicant, M/S Euroschool Properties & Infrastructure Pvt. Ltd is an Indian company engaged in the business of Providing assets on lease rental to educational institutions.
- Applicant made a downstream investment and filed form DI to the concerned authority.
- Applicant reported the form DI with a delay of 2 years.
- Contravened the provision of Regulation 14(6)(ii)(a) of FEMA 20 and Regulation 13.1.11 of FEMA 20R read with Consolidated FDI Policy effective from August 28, 2017 for failure to notify the RBI while making downstream investment within the period of 30 days.



Investment by FPIs – Schedule II



- Notwithstanding anything contained in paragraphs a) and c) above, portfolio investment, up to aggregate **foreign investment level** as permitted under Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 will not be subject to either Government approval or compliance of sectoral conditions, as the case may be, if such investment does not result in transfer of ownership and/or control of Indian entities from resident Indian citizens to non-resident entities. Other foreign investments will be subject to conditions of Government approval and compliance of sectoral conditions as laid down in the FDI policy.

Investment by FPIs – Schedule II

FPI can purchase/sell

- equity instruments of India Company
- ✓ listed
- ✓/to be listed on recognized stock exchange

Total holding of each FPI/investor group

- Less than 10% of total paid-up equity (fully diluted basis); or
- Less than 10% of paid up value of each series of debentures or preference shares or share warrants.

If limit is breached, the investment shall classify as FDI

- Reporting requirement to be complied.

Investment by FPIs – Schedule II

Total holding of all FPIs

➤ Shall not exceed 24% of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants.

w.e.f.: April 1, 2020 aggregate limit

- shall be the sectoral caps applicable as laid out in subparagraph (b) of paragraph 3 of Schedule I.

Aggregate limit may be decreased to a lower limit of 24% or 49% or 74% as deemed fit;

- With Board resolution and Shareholders' approval (SR) before 31st March, 2020; Once the aggregate limit increased to higher threshold then Indian Company cannot reduce it to lower threshold.

Investment by FPIs

Total holding of all FPIs

- The aggregate limit w.r.t Indian Company in a sector where FDI is prohibited shall be 24%.

Investment by FPIs || Breach of caps

Divest within 5 trading days

- The FPIs investing in breach of the prescribed limit shall have the option of divesting their holdings within 5 trading days from the date of settlement of the trades causing the breach.

If no divest

- In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under Foreign Direct Investment (FDI) and the FPI and its investor group shall not make further portfolio investment in the company concerned.

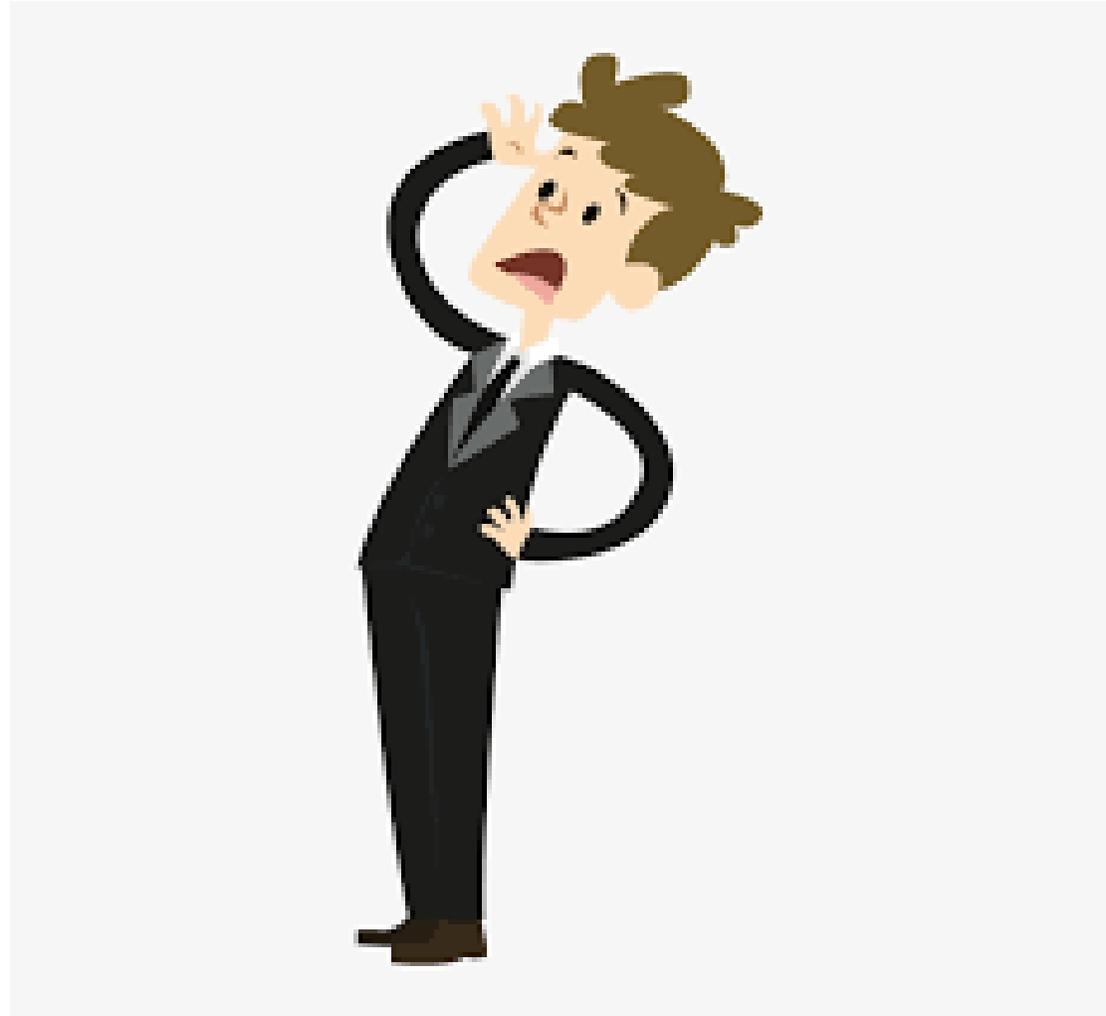


Investment by NRIs – Schedule III and Sch IV

- Mr. Ramdav, had a business in India and he shifted to Australia in 2015 and he is resident there.
- He is an NRI.
- He has 10,0000 USD he want to make investment in India



He is totally confused
where he can make
investments and how.. !!





He approaches you –
To guide



Various Schemes for Investment in India by NRIs

Chapter No.	Schedule No.	Under Foreign Exchange Management (Non-debt Instruments) Rules, 2019
III	I	Purchase / Sale of Equity instruments of an Indian company by a person resident outside India
V	III	Purchase/ Sale of Capital Instruments of a listed Indian company on a recognised stock exchange in India by NRI or OCI on repatriation basis
V	IV	Investment on non-repatriation basis by NRI or OCI
III	VI	Investment in a LLP
VIII	VIII	Investment by a person resident outside India in an Investment Vehicle
	IX	Issue of Indian Depository Receipts
VIII	-	Convertible Notes issued by Indian Start-up companies

FDI- Two Routes and Restricted List

Automatic Route

- Permitted for most sectors
- No prior approval needed
- Use of normal banking channels
- Post facto compliance Reporting through FIRMS Platform
- Subject to Pricing guidelines

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Approval Route

- For projects that don't qualify for automatic route E.g. Defence, Broadcasting, Single and Multi-brand retail etc.
- Online Application to concerned Ministry through DIPP website
- Subject to normal compliance / Pricing requirement

Restricted List

- Atomic energy/ Railway Operations
- Lottery / Gambling and betting (Including Foreign Technology collaboration in any form including licensing for franchise, trademark, brand name, management contract)
- Trading in TDRs
- Real Estate business
- Manufacturing of Tobacco/Tobacco substitutes



- Atomic energy/ Railway Operations
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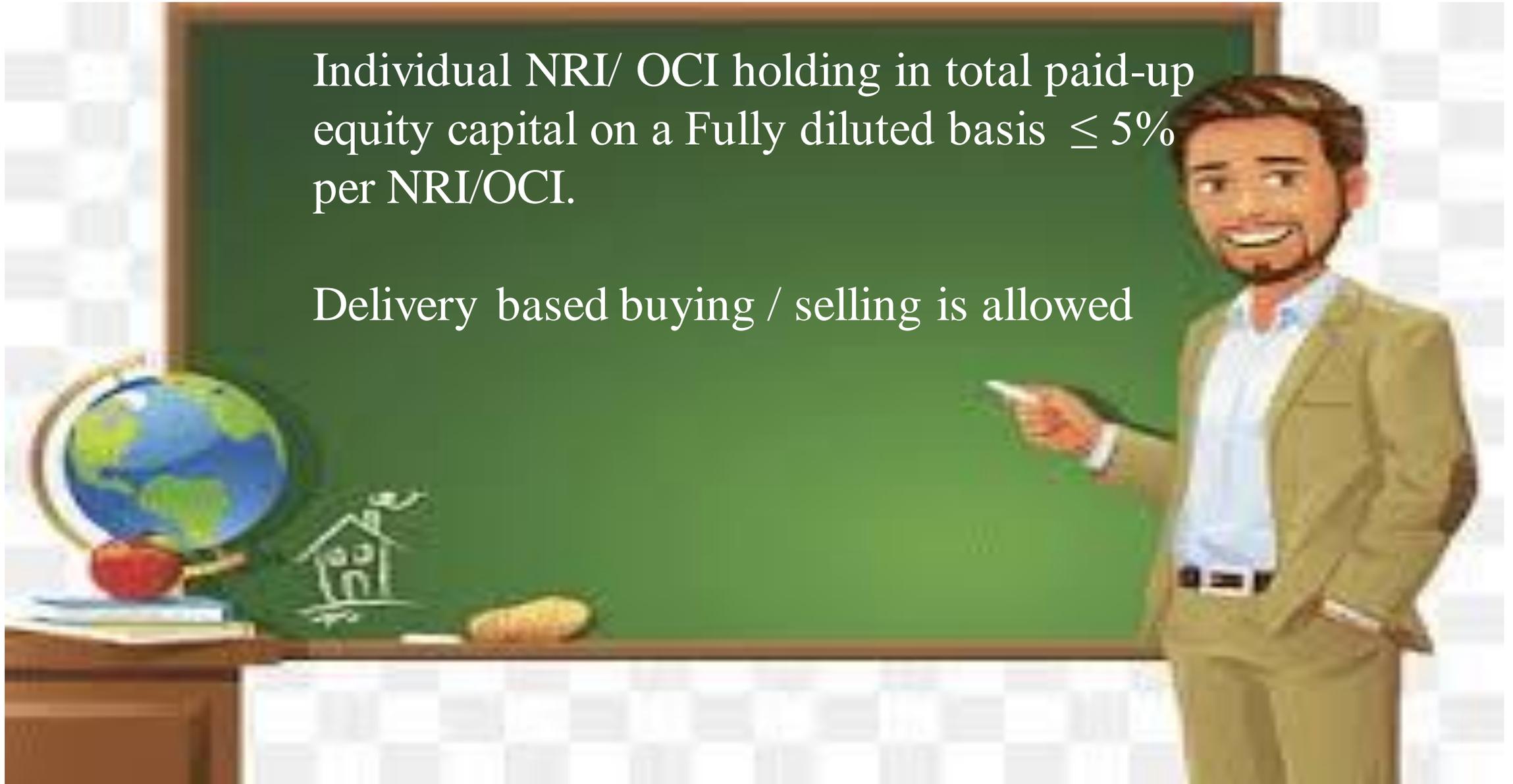
Portfolio Investment by NRIs/OCIs on Repatriation Basis

FEMA (Non-Debt Instrument) Rules, 2019 - Chapter V- Schedule III

- **Types of Instruments**
 - Purchase or Sell Capital Instruments of a listed Indian company on repatriation basis, on a recognised stock exchange in India
- **Eligible Investors**
 - NRIs/ OCIs
 - **PIO not registered as an OCI Cardholder** – Not treated as NRI and not allowed to invest under Schedule- III
- **Individual/ Aggregate Ceiling**
 - Individual NRI/ OCI holding in total paid-up equity capital on a fully diluted basis $\leq 5\%$ per NRI/OCI.
 - Aggregate holding in paid-up equity capital on a fully diluted basis by all NRIs/OCIs $\leq 10\%$
 - Aggregate ceiling can be raised to 24% by passing a Special Resolution in General Body.
 - Only Delivery based buying / selling is allowed
- **Method of Investment NRIs/ OCIs**
 - Through NRE PIS account opened with a designated branch of an AD
 - Sale Proceeds of investments held under PIS to be credited to this Account only
- **Remittance of sale proceeds**
 - Sale proceeds (net of taxes) can be directly remitted outside India or credited to NRE (PIS) account of the person concerned.

Individual NRI/ OCI holding in total paid-up equity capital on a Fully diluted basis $\leq 5\%$ per NRI/OCI.

Delivery based buying / selling is allowed



Portfolio Investment by NRIs/OCIs on Repatriation Basis

FEMA (Non-Debt Instrument) Rules, 2019 - Chapter V- Schedule III

Purchase or sale of units of domestic mutual funds

- NRIs/OCIs can, without limit, invest /purchase or sell units of domestic mutual funds which invest more than 50 percent in equity.

Purchase or sale of shares in public sector enterprises

- NRIs/OCIs can, without limit purchase or sell shares in public sector enterprises being disinvested by the Central Government, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

Subscription to National Pension System.-

- NRIs/OCIs can subscribe to the National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such person is eligible to invest as per the provisions of the Pension Fund Regulatory and Development Authority Act.
- The annuity/ accumulated saving are repatriable

NRIs / OCIs allowed to offer such instruments as permitted by RBI as collateral to the recognized Stock Exchanges in India for their transactions in exchange traded derivative contracts

Investment in Company /LLP / Partnership by NRIs/ OCIs on Non-Repatriation Basis

FEMA (Non-Debt Instrument)Rules, 2019 - Chapter V- Schedule IV

▪ **Non-repatriable- Meaning:**

- Only Interest/ Dividend / Current Income can be remitted abroad
- Principal + Gains on divestment cannot be repatriated except under US D 1 Million Scheme

▪ **Eligible Investors**

- NRIs/ OCIs including a Company, Trust and a Partnership Firm incorporated outside India and owned and controlled by NRIs/OCIs
- PIO not registered as an OCI Cardholder – Not eligible to invest under Schedule 4
- Foreign Company/Trust/Firms Owned & Controlled by NRIs- meaning
 - Not defined under Schedule 4
 - Regulation 14 – Company - 50%+ of Share Capital / LLP - Beneficially owned by NRIs
 - Control – Right to appoint majority of Directors / Partners / DPs with NRIs/OCIs

▪ **Restricted Sectors:**

- Nidhi Company, Agricultural / plantation activity or real estate business / construction of farmhouses / dealing in TDR not allowed.
 - Earning of rent income on lease of the property, not amounting to transfer / Investments in units of REITs regulated by SEBI (REITs) Regulations 2014 excluded from the definition of “real estate business”

- 
- Nidhi Company
 - Agricultural
 - plantation activity
 - Real estate business
 - construction of farmhouses
 - dealing in TDR not allowed

Investment in Company /LLP / Partnership by NRIs/ OCIs on Non-Repatriation Basis

FEMA (Non-Debt Instrument)Rules, 2019 - Chapter V- Schedule IV

▪ **Types of Instruments**

- Equity instruments of Listed/ Unlisted Companies
- Units issued by investment vehicles, either on stock exchange or outside it
- Contribution to Capital of LLP as a Partner without any limit
- Convertible notes issued by startup companies
- Units of domestic mutual funds on non-repatriation basis which invest more than 50% in equity.

▪ **Investment in capital of firm / Proprietary concern**

- In concerns which are not engaged in agriculture/ plantation activity or print media or real estate business.

▪ **Other benefits**

- No pricing norms/ No filing requirements
- Can also invest in Retail trading/Stocks trading/Tobacco/Gambling

▪ **Mode of Investment - Inward remittance / NRE / FCNR(B) / NRO Accounts in India**

▪ **Sale proceeds - Net of taxes to be credited to NRO Account**

▪ **Amount invested and capital appreciation is not allowed to be repatriated abroad except under US \$ 1 Million Scheme**

Foreign Investment in LLP on Repatriation Basis- Schedule VI

▪ **Eligible Investors:**

- A person resident outside India, including NRIs/OCIs (except Citizens of / entities incorporated in Pakistan or Bangladesh, FPIs & FVCIs)
- FVCI/ RFPI not allowed to invest in LLPs.

▪ **Eligible Sectors/ Activities:**

- Sectors/ activities where 100% FDI is permissible under Automatic route and there are no FDI linked performance conditions.

▪ **Examples of sector/ activities where foreign investment in LLP is prohibited:**

- Sectors where FDI is permissible under Government approval route
- Sectors not opened for FDI – e.g. Tobacco / Railways
- Sectors with performance linked conditions – Trading, NBFC, etc.
- Agriculture/ Plantation/Print Media/ Private Security

▪ **Compliance with provisions of the LLP Act, 2008 is must.**

▪ **Investment by way of “profit share” will fall under the category of reinvestment of earnings**

Foreign Investment in LLP on Repatriation Basis- Schedule VI

- Conversion of an existing Company into LLP is permissible in sectors/ activities where 100% FDI is permissible under Automatic route and there are no FDI linked performance conditions.
- **Acquisition or transfer of LLP Profit Share:**
 - Transfer from resident to non-resident cannot be at a price less than the fair price
 - Transfer from non-resident to resident should no be at a price more than the fair price
 - Fair price shall be as per the internationally approved valuation methodology.
 - Valuation by CA/ Cost Accountant/ Registered Valuer
- **Downstream investment in Company or LLP.**
 - Rule 23(5) & (6) applicable to companies shall mutatis mutandis shall apply to LLPs.
 - The first level Indian company making downstream investment shall be responsible for ensuring compliance with the provisions of these rules for the downstream investment made by it at second level and so on and so forth
- **Mode of Payment / Reporting as specified by the RBI**

Investment by Non-Residents including NRIs through an Investment Vehicle (AIF)- Schedule VIII

- **Investment Vehicle (IV):**
 - Company, Trust, Partnership, etc. registered under Indian Laws
 - Required to be Registered with the Regulatory Authority in India, e.g. SEBI, IRDI, RBI, etc.
- **Eligible Investors:**
 - A person resident outside India, including NRIs/OCIs (except Citizens of / entities incorporated in Pakistan or Bangladesh)
 - Investment in Units of the IVs.
- **Acquisition/Sale/Transfer :**
 - In any manner or redeem the units as per regulations framed by SEBI or directions issued by the RBI.
 - Units can also be issued against swap of capital instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such Investment Vehicle.
- **AIF with Foreign Investment :**
 - Investment to be reckoned as indirect foreign investment if the Sponsor or the Manager or the Investment Manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India.
 - If sponsors or managers or investment managers are organized in a form other than Companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.
 - AIF Category III which has received any foreign investment shall make portfolio investment in only those securities or instruments in which a FPI is allowed to invest under the Act, rules or regulations



Investment by NRIs – Schedule IV

Investment on non-repatriation basis

Make investment in

- Equity instruments issued by a company without any limit either on stock exchange or outside it
- Units issued by Investment vehicle either on stock exchange or outside it
- Contribution to capital of an LLP
- Convertible notes by Start up

Investment cannot be made in equity instruments or units of

- Nidhi company or
- a company engaged in
 - agricultural/ plantation activities or
 - real estate business or
 - construction of farm houses or
 - dealing in Transfer of Development Rights.

Investment can be made by contribution to capital of a firm or a proprietary concern

- Not engaged in
 - plantation activity or
 - print media or
 - real estate business.

- 
- Deemed to be domestic investment
 - At par with investment by residents.

Investment on non-repatriation basis

Make investment in

- Equity instruments issued by a company without any limit either on stock exchange or outside it
- Units issued by Investment vehicle either on stock exchange or outside it
- Contribution to capital of an LLP
- Convertible notes by Start up

Investment cannot be made in equity instruments or units of

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 - dealing in Transfer of Development Rights.

Investment can be made by contribution to capital of a firm or a proprietary concern

- Not engaged in
 - plantation activity or
 - print media or
 - real estate business.

By NRI, OCI or company, a trust and a partnership firm incorporated outside India, owned and controlled by NRIs or OCIs.

Investment on non-repatriation basis

Units of mutual funds

- which invest more than 50% in equity

Investment can be made by contribution to capital of a firm or a proprietary concern

- Not engaged in
 - plantation activity or
 - print media or
 - real estate business.

By NRI, OCI



Investment in LLP Schedule VI

FDI in LLP – Schedule VI

Who can invest

- PROI
 - Other than citizen of Pakistan or Bangladesh
- Entity incorporated outside India
 - Other than an entity incorporated in Pakistan or Bangladesh
 - Not being FPI or FVCI

Invest in which LLP

- Operating in sectors where
 - 100% FDI permitted under automatic route;
 - No FDI linked performance conditions
- if both aforesaid conditions met, then
 - such LLP can be converted in to company and vice versa.

FDI in LLP - contd

Manner of investing

- Either by capital contribution; or
- acquisition/ transfer of profit shares

Pricing requirement

- Fair value as per any internationally accepted/ adopted as per market practice
 - by CA or practicing Cost Accountant or approved valuer from the panel maintained by the CG.

Pricing for transfer of contribution/ profit share

- PRII to PROI
 - Consideration not less than fair price of share
- PROI to PRII
 - Consideration not more than fair price.



Investment by FVCI Schedule VII

Investment by FVCI – Schedule VII

➤ FVCI may purchase

- Securities (not listed on a recognised stock exchange at the time of issue) issued by Indian company engaged in
 - Biotechnology
 - IT related to hardware and software development
 - Nanotechnology
 - Seed research and development
 - Research and development of new chemical entities in pharmaceutical sector
 - Dairy industry
 - Poultry industry
 - Production of bio-fuels
 - Hotel-cum-convention centres with seating capacity of more than 3000.
 - Infrastructure sector



Investment by FVCI

- FVCI may purchase
 - equity /equity linked instrument/debt instrument by a start up;
 - Units of VCF or Cat I AIF or
 - Units of scheme/ fund set up by a VCF or CAT I AIF.
- Investment in equity instruments to be
 - As per sectoral caps, entry routes and attendant conditions.



Investment in Investment Vehicles Schedule VIII

FDI in Investment Vehicles – Schedule VIII

- Investment Vehicles
 - AIFs; REITs; INViTs; MFs that invest more than 50% in equity
- Who can invest
 - PROI (including FPI and NRI)
 - Other than citizen of Pakistan or Bangladesh
 - Entity incorporated outside India
 - Other than an entity incorporated in Pakistan or Bangladesh
- May issue units against swap of equity instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such Investment Vehicle
- Sale/ Transfer
 - As per SEBI regulations/ RBI directions.

FDI in Investment Vehicles

- Downstream investment by IV shall be regarded as indirect foreign investment, if
 - Sponsor or the Manager or the Investment Manager
 - is not owned and not controlled by resident Indian citizens; or
 - is owned or controlled by persons resident outside India.
 - Extent of foreign investment in the corpus of the Investment Vehicle will not be a factor;
 - AIF Cat III, with foreign investment, shall make portfolio investment in only those securities or instruments in which a FPI is allowed to invest.

A blurred background image of a modern desk. In the foreground, a silver laptop is open. To its left, a white smartphone lies flat. Behind the laptop, a stack of several books is visible. To the right of the laptop, a pair of black headphones is resting on the desk. The overall scene is brightly lit, suggesting an office or study environment.

DRs by PROI – Schedule IX

Investment in DRs by PROI – Schedule IX

- Eligible instruments for issue of DRs
 - Any security or unit in which PROI can invest
- Who can issue or transfer
 - A person eligible to issue or transfer eligible instruments to a foreign depository
 - Under DR Scheme, 2014
 - at a price not less than the price applicable to a corresponding mode of issue or transfer of such instruments to domestic investors.
 - Domestic custodian may purchase on behalf of PROI

A blurred background image of a modern desk. In the foreground, a silver laptop is open. To its left, a white smartphone lies flat. Behind the laptop, a stack of several books is visible. In the background, another laptop is open, and a pair of black headphones is resting on it. The overall scene is brightly lit, suggesting a clean, professional workspace.

Issue of IDR's – Schedule X

Issue of IDRs – Schedule X

- Who can issue
 - Companies incorporated outside India
 - Through domestic depository
To PRII and PROI
- Conditions for issue
 - Issue is in compliance with Rule 13 of Companies (Registration of Foreign Companies) Rules, 2014 and SEBI (ICDR) Regulations, 2009.
- IDR by financial/ banking companies having presence in India
 - Through branch or subsidiary
 - Will require prior approval of sectoral regulator

Issue of IDRs

- Conditions for issue
 - Shall be denominated in Indian Rupees only
 - Proceeds of issue shall be immediately repatriated outside India by companies issuing IDR
- Who can invest
 - FPI or NRI or OCI
- IDR shall not be redeemable into underlying equity shares before expiry of 1 year from date of issue
- Redemption/ conversion shall be in compliance of
 - FEM(Transfer or Issue of any Foreign Security) Regulations, 2004



**Your Queries Please
Thankyou !!**

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