

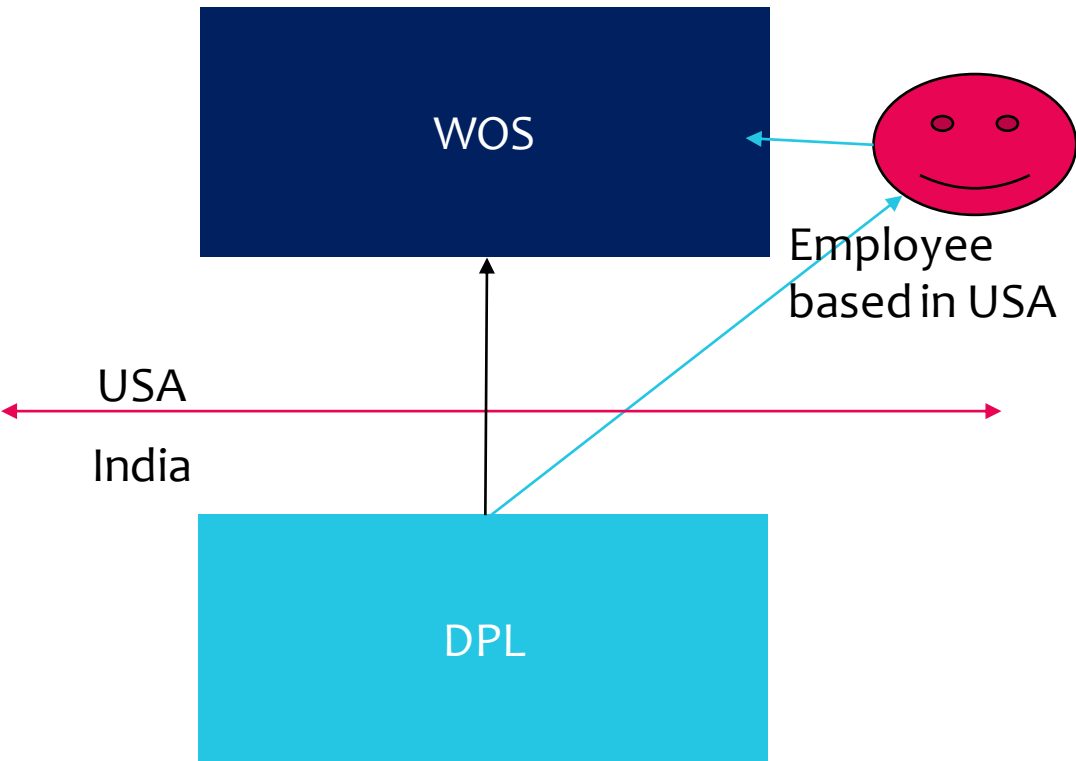


DAY 06 || Comprehensive Course on
Foreign Exchange Management, 1999

Faculty: CA. Sudha G. Bhushan

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CASE Study



- The applicant company (DPL) had set up a wholly owned subsidiary (WOS) viz. Dynamic USA Inc., USA
- The first outward remittance made on August 2, 2005, under the overseas direct investment (ODI) regulations under FEMA, 1999.
- The WOS was incorporated in September 2005 and a unique identification number (UIN) – AHWAZ20050329 was allotted.
- Subsequently, DPL had made further outward remittances to the WOS, including two remittances of USD 4,000.00 and USD 500.00 (on February 16, 2006 and May 08, 2006 respectively) which were made by way of purchase of foreign currency (Traveler's Cheques) from a full-fledged money changer (FFMC),
- to be handed over to an employee recruited and based in the US.
- These two amounts - used towards certain incorporation expenses, were treated as loan to the WOS. The prescribed forms for reporting the two above-mentioned remittances were not submitted within the stipulated time limit.

- The applicant company (DPL) had set up a wholly owned subsidiary (WOS) viz. Dynemic USA Inc., USA with first outward remittance made on August 2, 2005, under the overseas direct investment (ODI) regulations under FEMA, 1999.
- The WOS was incorporated in September 2005 and a unique identification number (UIN) – AHWAZ20050329 was allotted.
- Subsequently, DPL had made further outward remittances to the WOS, including two remittances of USD 4,000.00 and USD 500.00 (on February 16, 2006 and May 08, 2006 respectively) which were made by way of purchase of foreign currency (Traveler's Cheques) from a full-fledged money changer (FFMC),
- to be handed over to an employee recruited and based in the US.
- These two amounts - used towards certain incorporation expenses, were treated as loan to the WOS. The prescribed forms for reporting the two above-mentioned remittances were not submitted within the stipulated time limit.
- Whereas in terms of Regulation 6(3) of FEMA 120/2004, ODI may be funded out of one or more of the permitted sources - which include drawal of foreign exchange from an authorised dealer in India; use of traveler's cheques is not a permitted method for the purpose of ODI.

Example

- Anarji, an Indian company Invested INR 2500 cr in PQR,B.V, Netherlands.

As on 31st March 2020 its balance sheet had following figures

- Paid up capital – INR 400 cr
- Reserve and surplus – 100 cr

Example

- Networth of the company = 500Cr
- Financial commitment under Automatic route can be = 2000 cr

Obligations of Indian Party



Obligation of Indian party

An IP/ RI which has made direct investment abroad is under obligation to

**Receive share certificates
or any other document**

- as an evidence of investment in the foreign entity
- within six months, or such further period as Reserve Bank may permit,
- from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian Party or the date on which the amount due was allowed to be capitalised;

Repatriate to India

- all dues receivable from the foreign entity, like dividend, royalty, technical fees etc.,
- within 60 days of its falling due, or such further period as the Reserve Bank may permit: and

Form APR

- every year on or before December 31
- in respect of each JV or WOS outside India, and other reports or documents as may be prescribed by the Reserve Bank from time to time.

**An annual return on
Foreign Liabilities and
Assets (FLA)**

- directly by all the Indian companies which have made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year

A glowing lightbulb is the central focus of the image. The bulb is illuminated from within, casting a warm, golden light. The background is a soft, out-of-focus blue. A white rectangular box is superimposed over the middle of the bulb, containing the text "Form Annual Performance Report" in a bold, red, serif font.

Form Annual Performance Report

Form APR

Audit

Audit

- The APR, has to be based on the audited annual accounts of the JV/WOS for the preceding year,
- Unless specifically exempted by the Reserve Bank.

Where audit is not required

- Annual Performance Report (APR) may be submitted by the Indian Party based on the un-audited annual accounts of the JV / WOS subjected to conditions.

The exemption from filing the APR based on unaudited balance sheet not available

- in respect of JV/WOS in a country / jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country / jurisdiction as prescribed by Reserve Bank of India.

Obligation of Indian party

Form APR

Where audit is not required. Annual Performance Report (APR) may be submitted by the Indian Party based on the un-audited annual accounts of the JV / WOS provided:

a. The Statutory Auditors of the Indian Party certify

- ✓ that law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS and
- ✓ the figures in the APR are as per the un-audited accounts of the overseas JV / WOS; and

the un-audited annual accounts of the JV / WOS have been adopted and ratified by the Board of the Indian Party.

Certificate from Indian Party/ Resident Individual (Strike out whichever is not applicable)

We/ I the Indian Party/ Resident Individual (wherever applicable) further confirm that:

- i. Investment in step down subsidiary (SDS) has been reported to RBI from time to time in terms of Regulation 13 of Notification No. FEMA.120/RB-2004 dated July 7, 2004 as amended;
- ii. If the activity of the SDS is related to financial services - it is certified that Regulation 7(2) of Notification No FEMA 120/RB-2004 dated July 7, 2004 as amended has been complied with;
- iii. Changes in the capital structure of the JV/ WOS since last APR has been reported under Section C of Form ODI Part I.
- iv. We have received share certificate/s (or any other proof of investment) and submitted the same to the designated AD bank for verification within 6 months of making the remittance/s for all (equity/CCPS) investment made as per Regulation 15 (i) of FEMA Notification *ibid*.
- v. The previous APRs for all JV/ WOS have been filed to the respective designated AD bank.
- vi. Repatriated to India, all dues receivable from the overseas JV / WOS, like dividend, royalty, technical know-how fees etc., within 60 days of its falling due or as prescribed by Reserve Bank from time to time.

| | | | | |
|---|--|-------|--|-------------------|
| Signature of the authorized official of the IP approved by the Board / RI | | | | <u>Stamp/Seal</u> |
| Name & Designation of the Authorized Official of the IP | | | | |
| Place: | | Date: | | |

Certificate of the statutory auditor (only in case of Indian Party) / self-certification in case Resident individuals (strike out whichever is not applicable)

We hereby certify that:

- i. APR for the year ended _____ is prepared on the basis of audited/ unaudited balance sheet of the JV/WOS for the year ended _____.
- ii. APR for the year ended _____ is prepared on the basis of unaudited balance sheet of the JV/WOS since audit is not mandatory in host country and in compliance with Regulation 15 (iii) read with 15 (v) of FEMA Notification ibid and Para 6 of [A.P. \(DIR Series\) Circular No. 29 dated September 12, 2012](#).
- iii. The IP repatriated to India, all dues receivable from the foreign entity, like dividend, royalty, technical know-how fees etc., within 60 days of its falling due or as prescribed by the Reserve Bank from time to time. Repatriation from the JV/WOS has been verified from the Foreign Inward Remittance Certificate issued by the AD bank/s.

| | | | |
|---|--|-------------------|--|
| Signature of the Statutory Auditors of the Indian Party | | <u>Stamp/Seal</u> | |
| (Name of the firm and Registration number) | | | |
| Place: | | Date: | |

Certificate by the Authorized Dealer bank

- i. In terms of Para 3 of [AP \(Dir. Series\) Circular No. 14 dated September 5, 2008](#) the branch has received the share certificate/s or any other document as evidence of investment and are satisfied about the bonafide of the documents so received.
- ii. The duly filled in Form ODI Part II (Annual Performance Report) was submitted by the IP/ RI on _____ day of _____ (month) _____ (year).
- iii. All the previous year APRs submitted by the IP / RI have been reported in the online OID application.

Signature of the Authorized Official of the AD bank

Stamp/Seal

Name and designation of the AD bank official

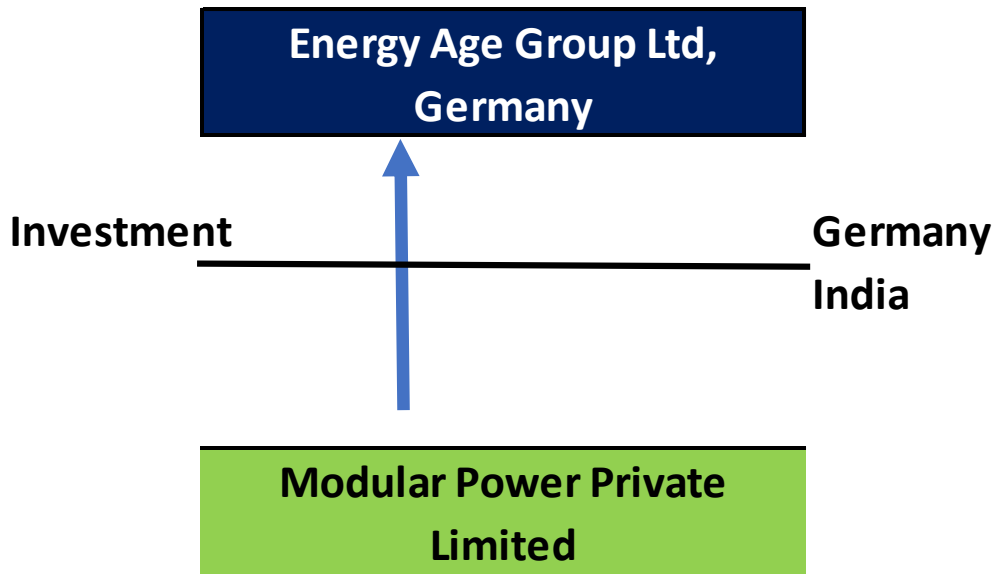
Place:

Date:

Post investment changes/additional investment in existing JV/WOS

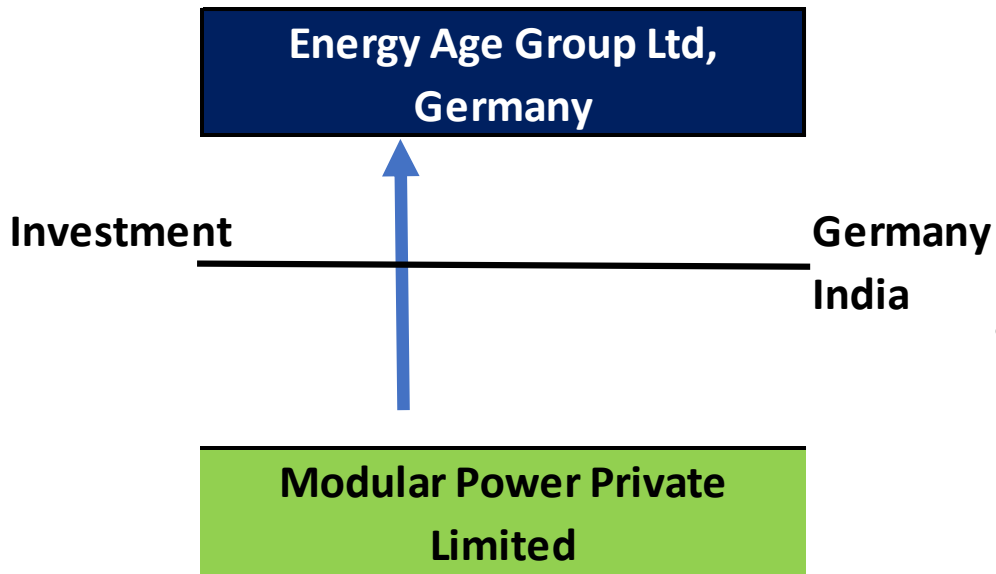
- A JV/WOS set up by the Indian party as per the Regulations may diversify its activities/set up step down subsidiary/alter the shareholding pattern in the overseas entity
- The Indian party should report to the RBI through the AD Category - I bank, the details of such decisions within 30 days of the approval of those decisions by the competent authority of the JV/WOS concerned in terms of local laws of the host country

C.A. No. 4707/2018 - Modular Power Private Limited



- The applicant had made investment in the overseas JV viz. Energy Age Group Ltd, Germany by acquiring 0.5% stake in 2008 due to global recession, there was delay in forming the Joint Venture and subsequently delay in getting confirmation of share allotment. The overseas entity issued a letter dated 22.1.2010 certifying allotment of 0.5% of shares to Modular Power which was submitted to authorised dealer in March 2010 with a delay beyond 6 months

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- in contravention of Regulation 15 (i) of Notification No FEMA 120-RB 2004 which obliges an Indian Party, which has acquired foreign security in terms of the Regulations to receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months.
- The overseas entity issued a letter dated 22.1.2010 certifying allotment of 0.5% of shares to Modular Power with a delay beyond 6 months.
- The APRs for 2009 and 2010 were still pending.
- Contravention of Regulation 15 (i), Regulation 16(1)(v) of Notification No FEMA 120-RB 2004.

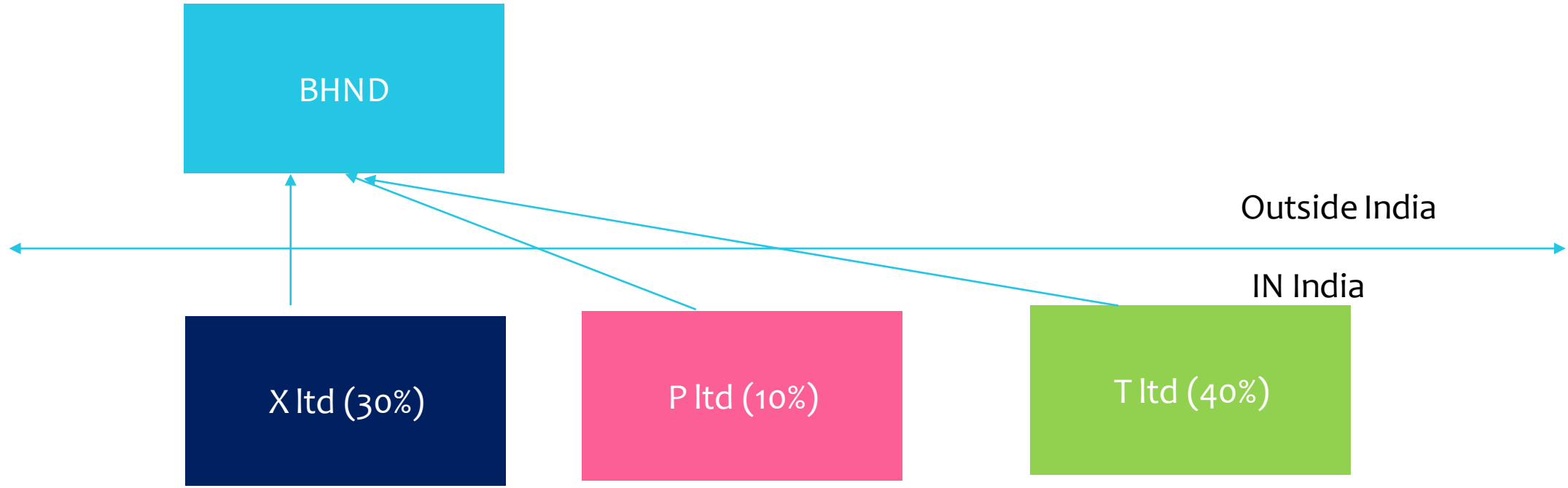
Obligation of AD bank

- AD Category - I bank is required to monitor the receipt of such documents and satisfy itself about the bonafides of the documents.
- It is further advised that -
 - a. the online OID application has been suitably modified to enable the nodal office of the AD bank to view the outstanding position of all the APRs pertaining to an applicant including for those JV / WOS for which it is not the designated AD bank. Accordingly, the AD bank, before undertaking / facilitating any ODI related transaction on behalf of the eligible applicant, should necessarily check with its nodal office to confirm that all APRs in respect of all the JV / WOS of the applicant have been submitted;
 - b. **certification of APRs by the Statutory Auditor or Chartered Accountant need not be insisted upon in the case of Resident Individuals and self-certification may be accepted;**

**Multiple IP in same
JV/WOS**

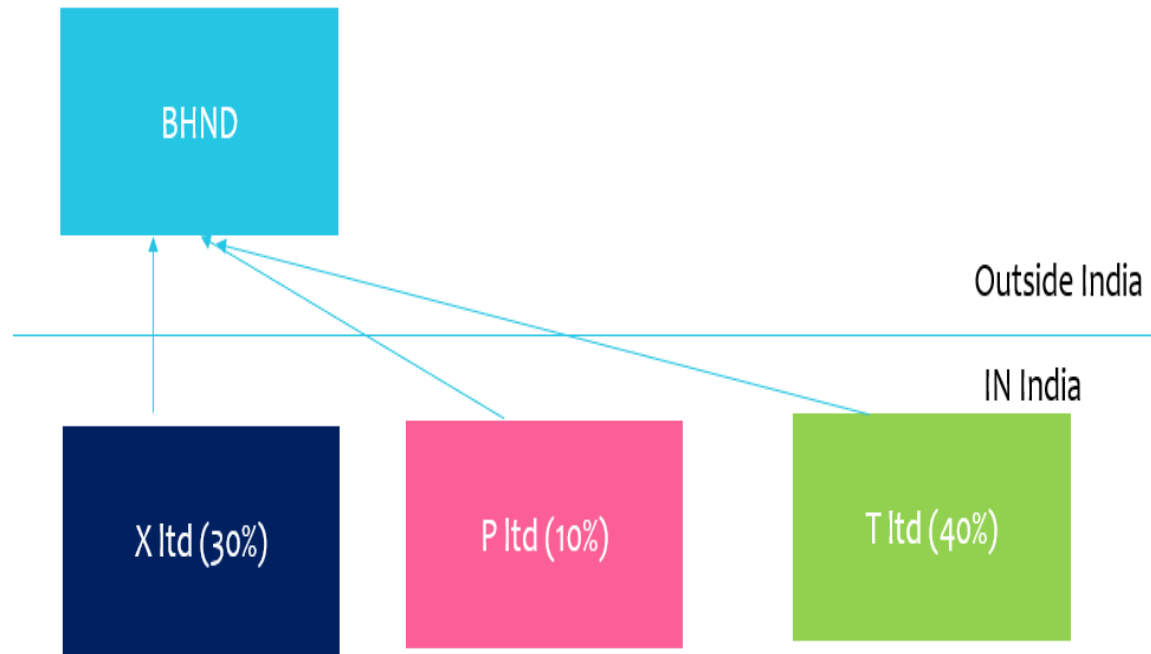


Case Study



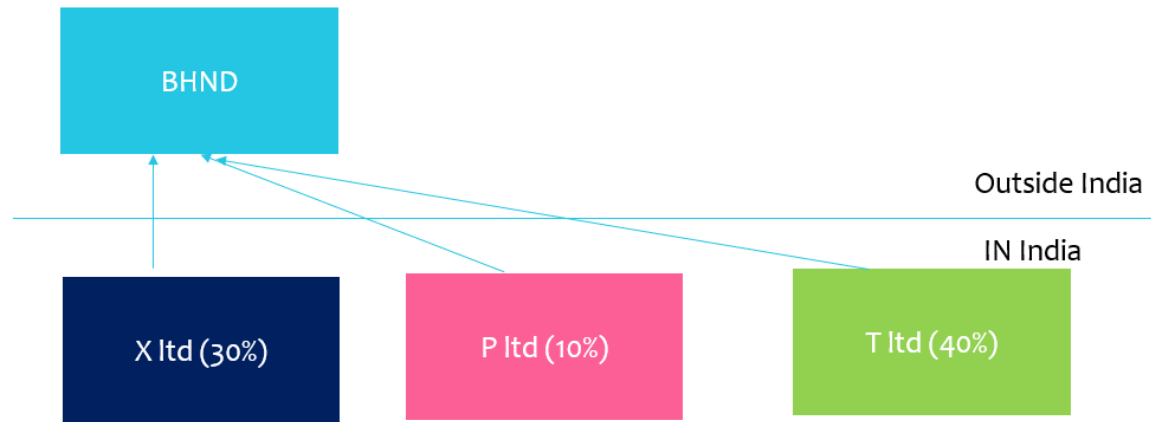
Case Study

Form ODI



- ❑ In cases where the investment (or financial commitment) is being made jointly by more than one IP,
- ❑ Form ODI is required to be submitted individually by all the investing entities and submitted to the designated branch of the AD bank.
- ❑ The AD bank should file online a consolidated Form ODI indicating details of each party.

Case Study

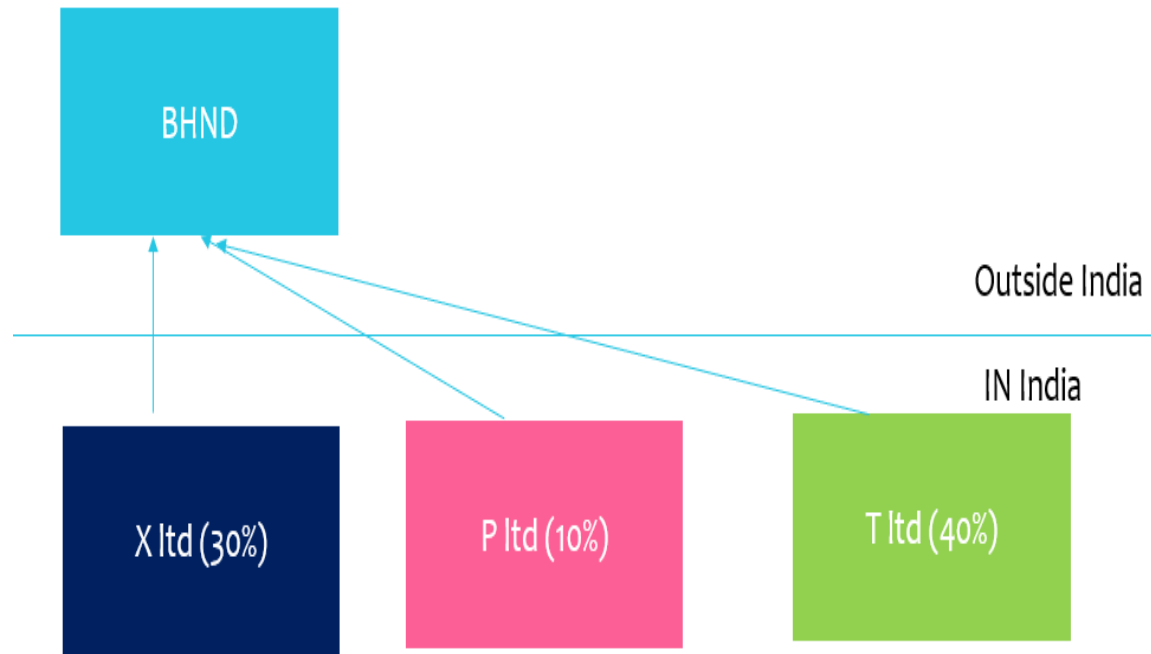


one JV/WOS || one 'designated Authorised Dealer'

- In case the JV/WOS is being set up abroad by two or more Indian promoters, then all Indian promoters collectively called the Indian party and the Resident Individual, would be required to route all transactions in respect of that JV/WOS only through one 'designated Authorised Dealer'. In case the Indian Party/ Resident Individual wants to switch over to another AD, an application by way of a letter may be made to the Reserve Bank after obtaining an NOC from the existing Authorized Dealer.
- The Indian promoters are free to designate different branches of the same Authorised Dealer or branches of other Authorised Dealers for their separate JVs/WOSs. The only requirement is that regardless of the number of promoters, one JV/WOS will have only one 'designated Authorised Dealer' to route all its transactions.

Case Study

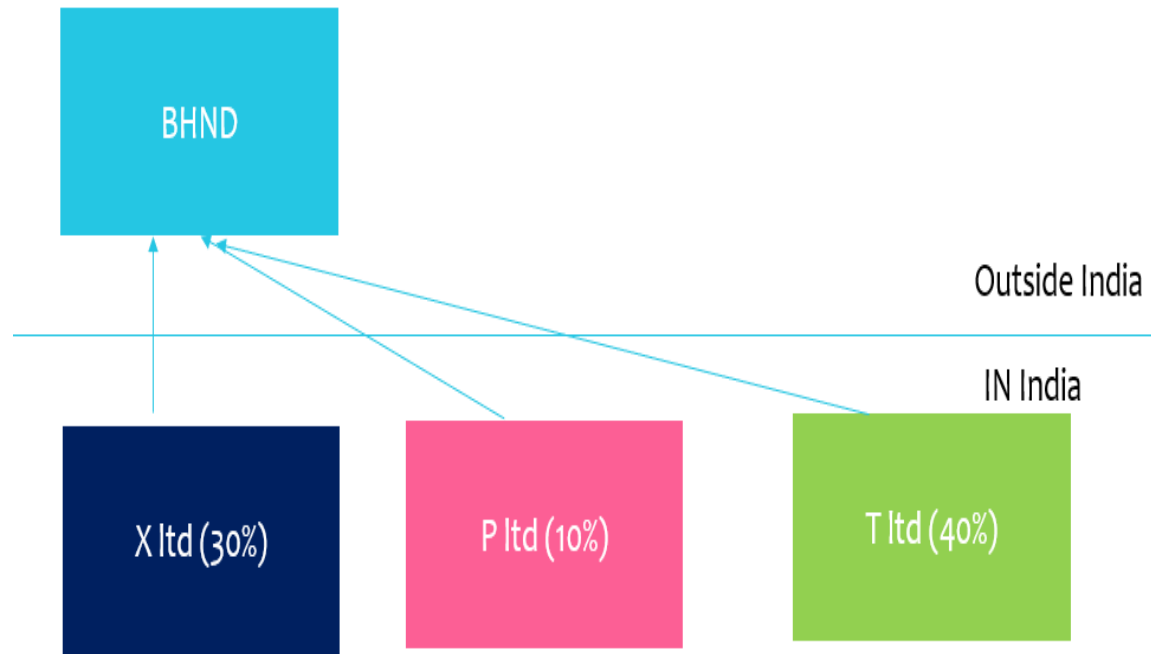
Form APR



- in case multiple IPs / RIs have invested in the same overseas JV / WOS, the obligation to submit APR shall lie with the IP / RI having **maximum stake in the JV / WOS**. Alternatively, the IPs / RIs holding stake in the overseas JV / WOS may mutually agree to assign the responsibility for APR submission to a designated entity which may acknowledge its obligation to submit the APR in terms of Regulation 15 (iii) of Notification, ibid, by furnishing an appropriate undertaking to the AD bank;

Case Study

Unique Identification Number



- In cases where the investment (or financial commitment) is being made jointly by more than one Indian Party, Reserve Bank would allot only one Unique Identification Number to the overseas JV/ WOS.

ODI in financial service sector



Can be made only by Indian Party engaged in financial services activities

Earned net profit during the preceding 3 financial years from financial service activities

Registered with regulatory authority in India

Obtained approval from concerned regulatory authorities
▫ both in India and abroad

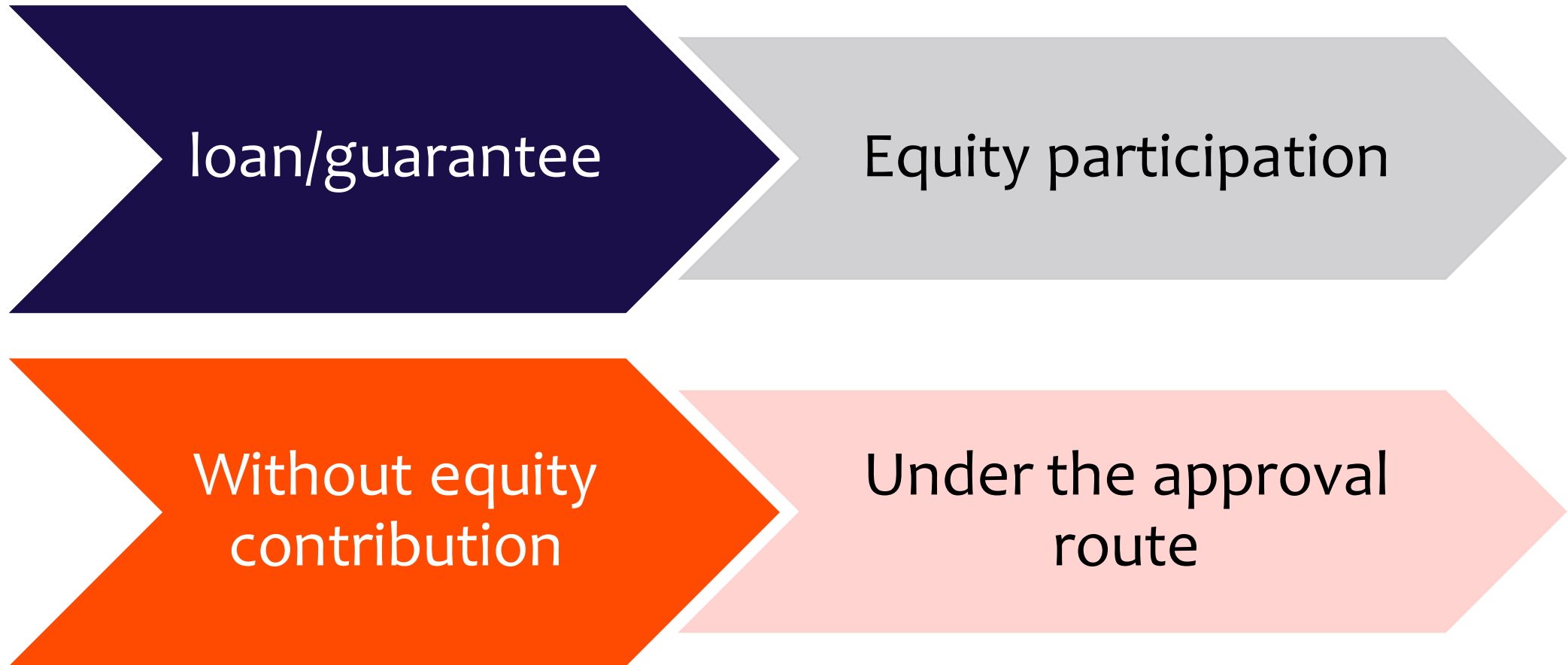
Fulfilled the prudential norms relating to capital adequacy as prescribed by concerned regulatory authority in India

Conditions applicable even for additional investment by an existing JV/WOS or its step down subsidiary

Loans and Guarantees by IP

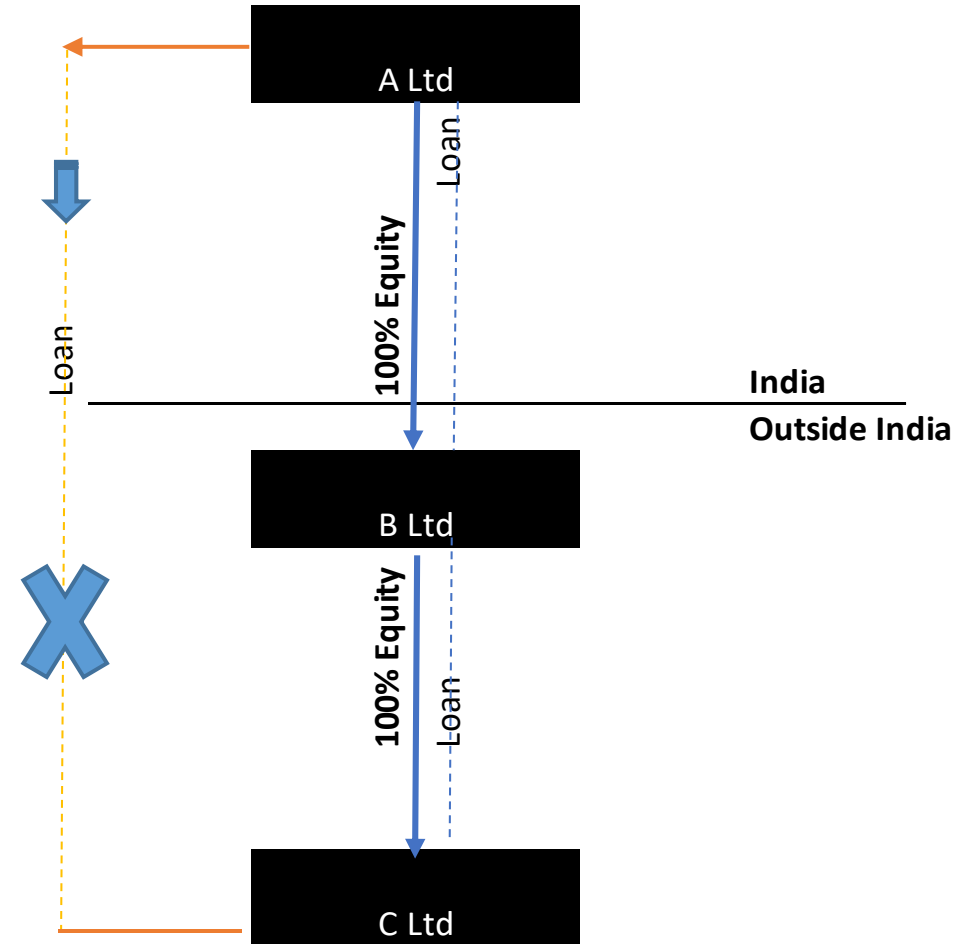


Loan



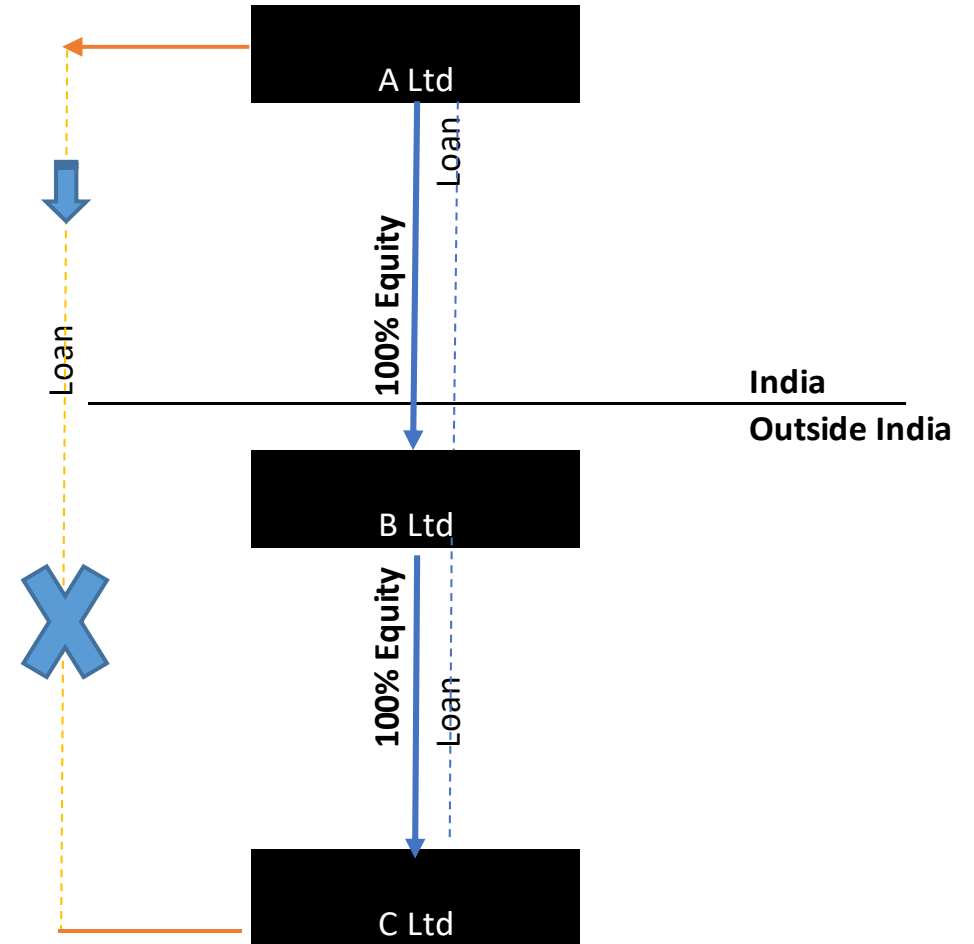
Example

- *Example:* A Ltd an Indian company has 100% equity capital of B Ltd, a company in Singapore. B Ltd has in turn 100% Equity contribution in C Ltd, another company in Singapore. In this case,
- Can A Ltd extend loan to B Ltd?
- Can A Ltd extend loan to C Ltd?



Example

- *Example:* A Ltd an Indian company has 100% equity capital of B Ltd, a company in Singapore. B Ltd has in turn 100% Equity contribution in C Ltd, another company in Singapore. In this case,
- A Ltd can extend loan to B Ltd.
- For extending loan to C Ltd. It needs approval from RBI.



Example

- Anarji, is an Indian company.

As on 31st March 2020 its balance sheet had following figures

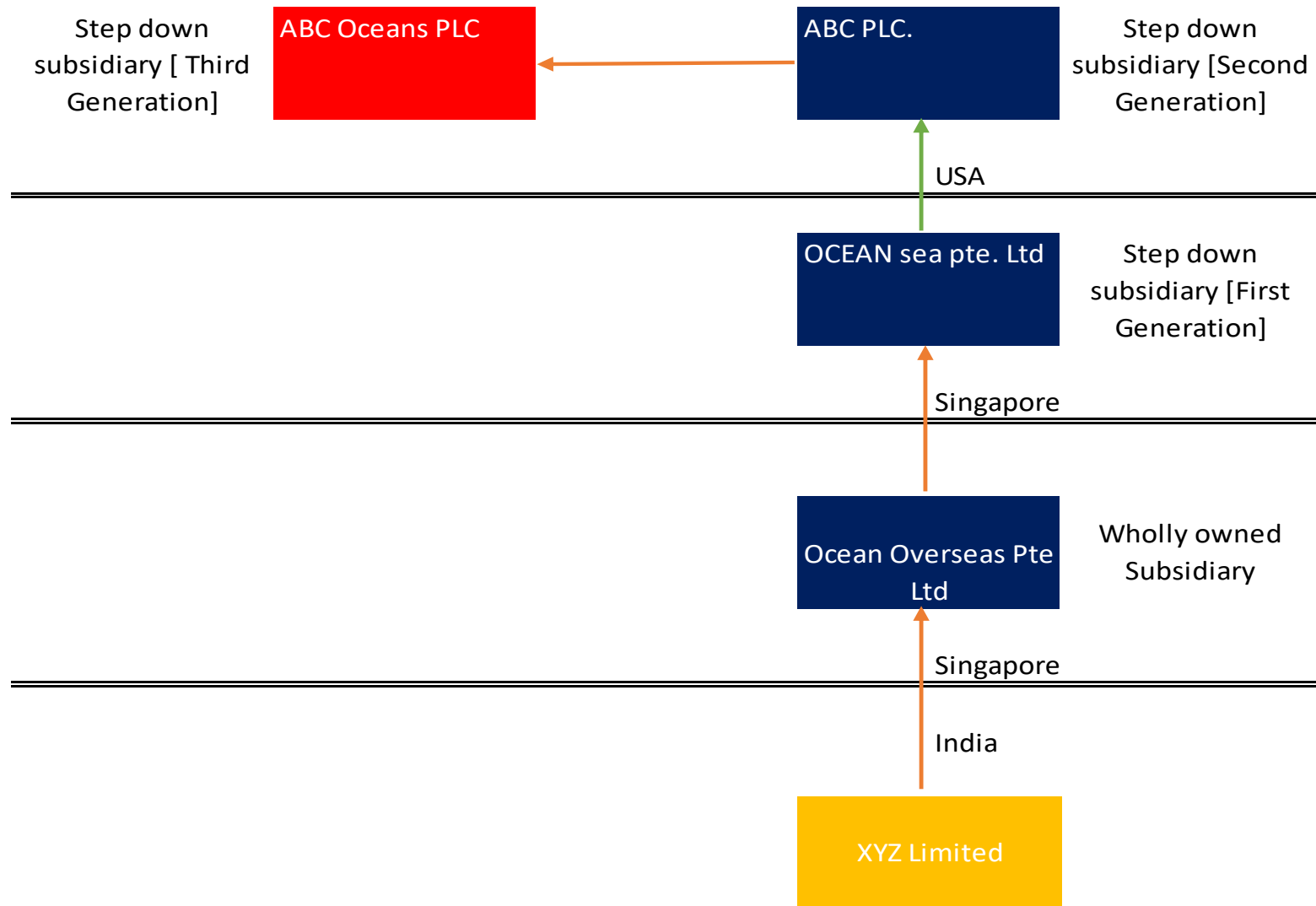
- Paid up capital – INR 400 cr
- Reserve and surplus – 100 cr

- It Invested INR 1000 cr in PQR,B.V, Netherlands in the following manner
 - Gave loan of 500 cr
 - Gave corporate Guarantee for 500 cr

Step Down Subsidiary



Subsidiary || Step down subsidiary

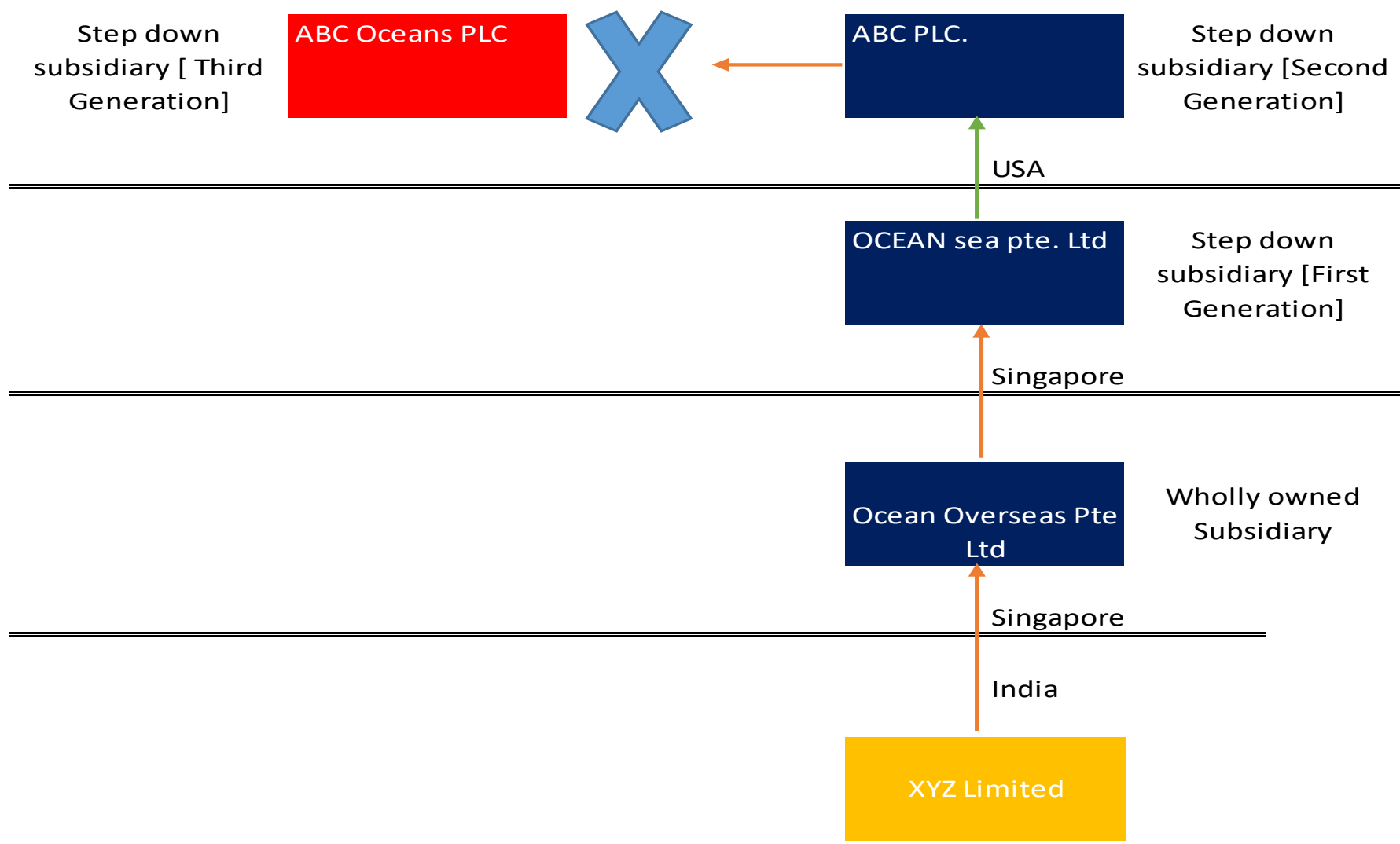


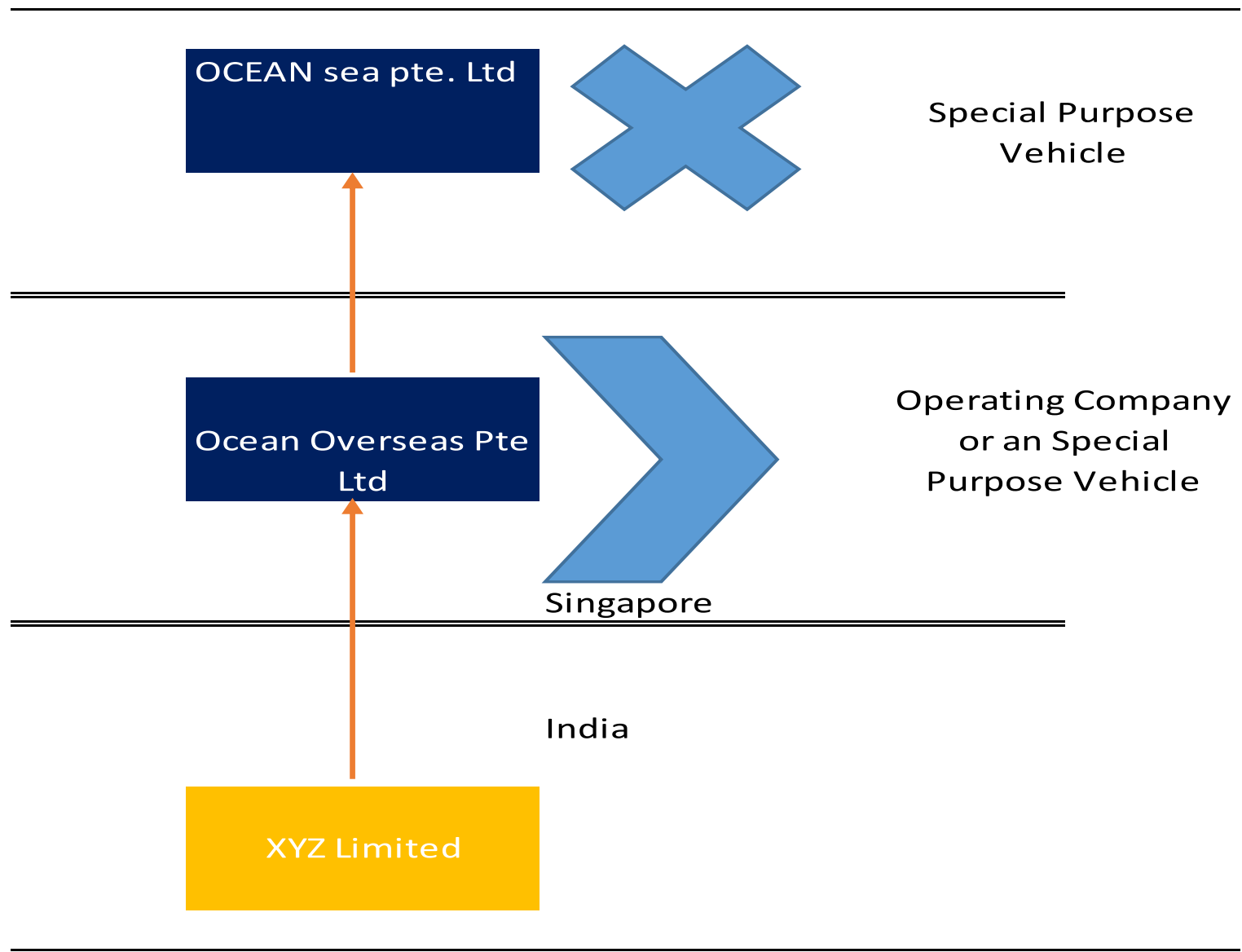
Level of step down Subsidiary (SDS) should be calculated treating the JV/ WOS as the parent. So an SDS under the direct JV/ WOS should be treated as first level SDS. Accordingly an SDS under the first level SDS would be treated as second level SDS.

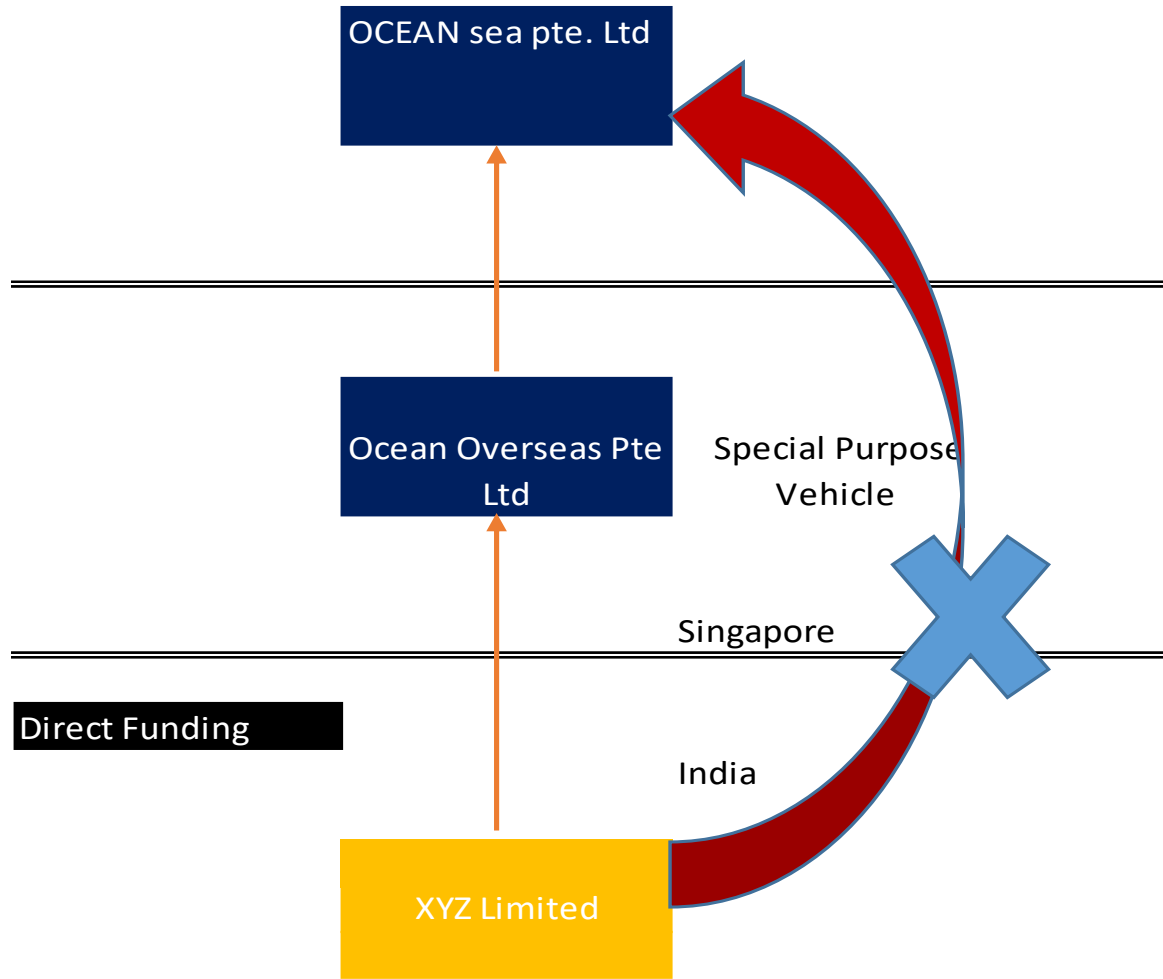
SDS || Companies Act, 2013

(1) On and from the date of commencement of these rules, no company, other than a company belonging to a class specified in sub-rule (2), shall have more than two layers of subsidiaries:

- Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country:*
- Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.*

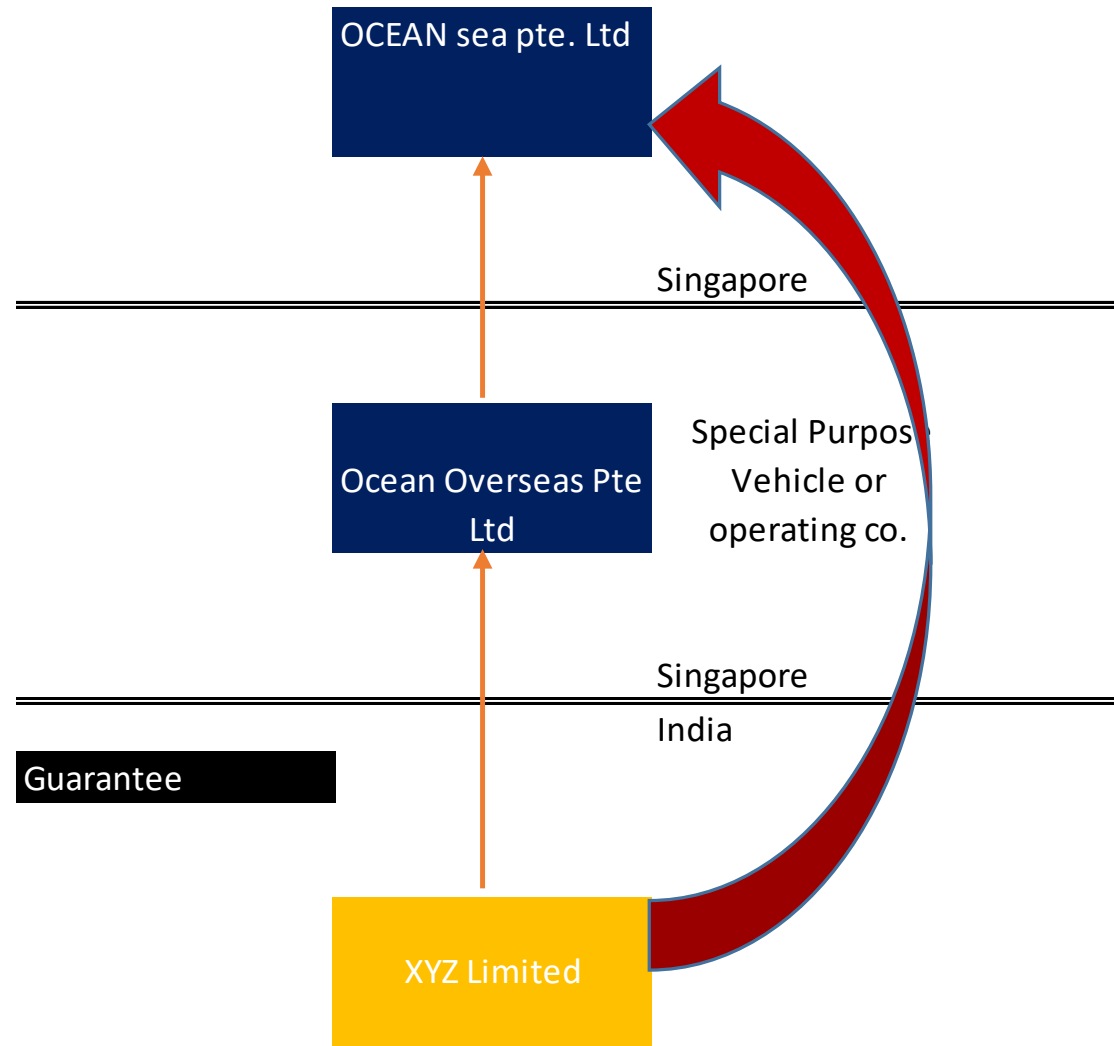






Can an Indian Party directly fund such step-down subsidiaries?

Where the JV/WOS has been established through a SPV, all funding to the operating step down subsidiary should be routed through the SPV only. However, in the case of guarantees to be given on behalf of the first level step down operating subsidiary, these can be given directly by the Indian Party provided such exposures are within the permissible financial commitment of the Indian Party.



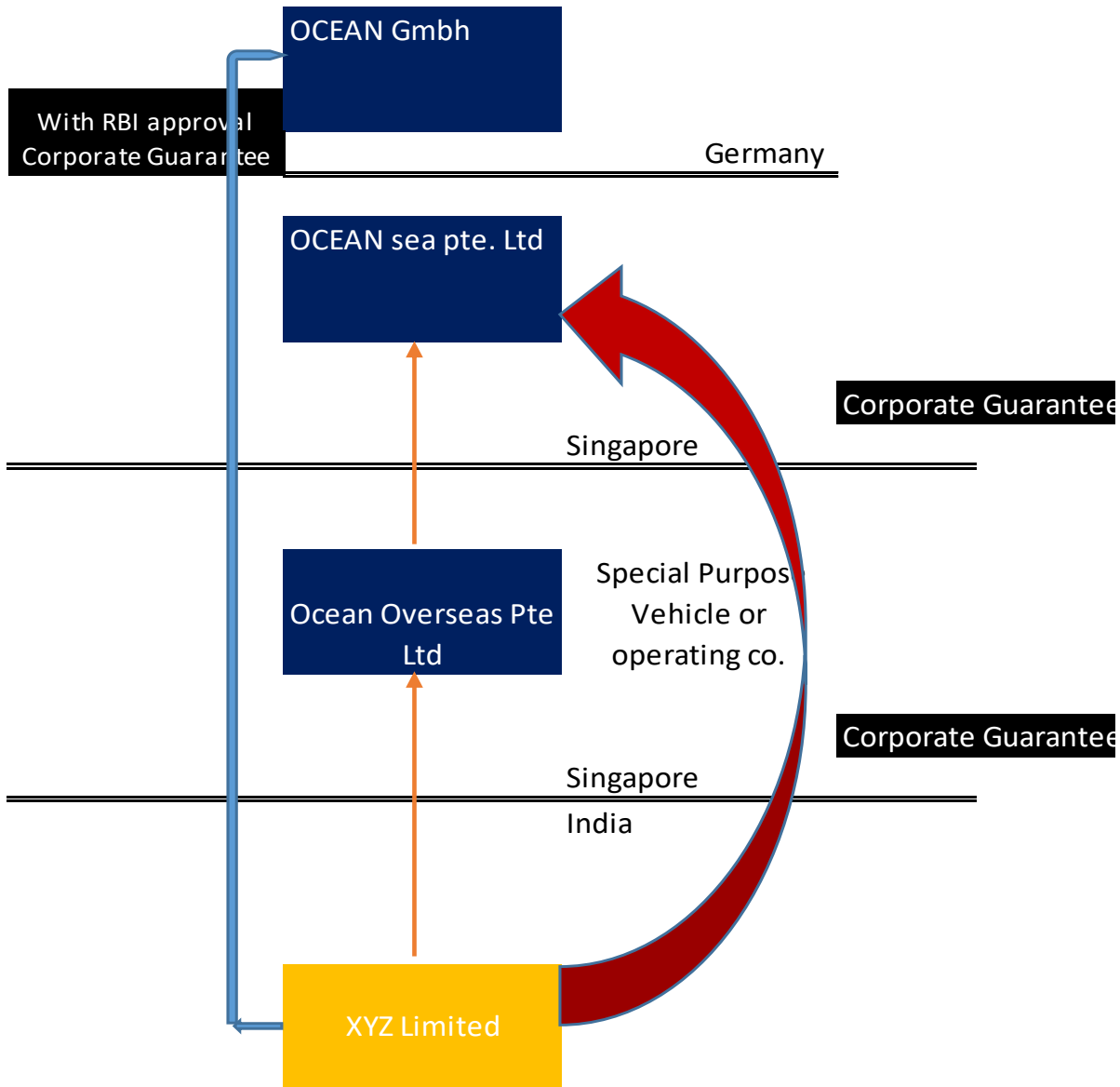
Guarantee

First level step down operating subsidiary

- guarantee may be issued by the Indian party
- on behalf of such step down operating subsidiary provided
- such guarantee is reckoned for the purpose of computing the total financial commitment of the Indian party.

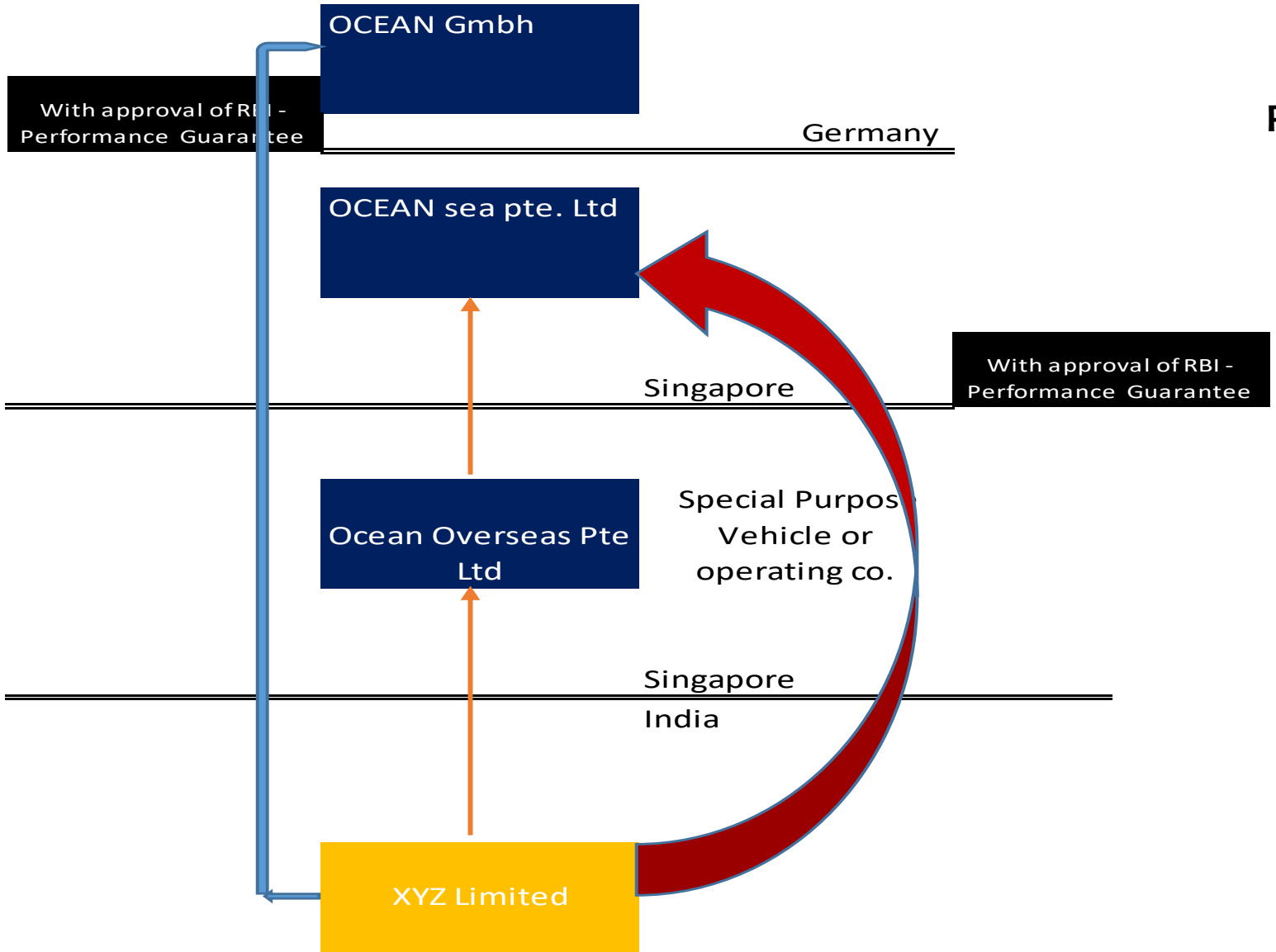
A second or subsequent level step down operating subsidiary

- guarantee may be issued by the Indian party on behalf of such step down operating subsidiary
- with prior approval of the Reserve Bank
- provided such Indian party holds indirect stake of not less 51% in the step down operating subsidiary
- guarantee is reckoned for the purpose of computing the financial commitment of the Indian party.



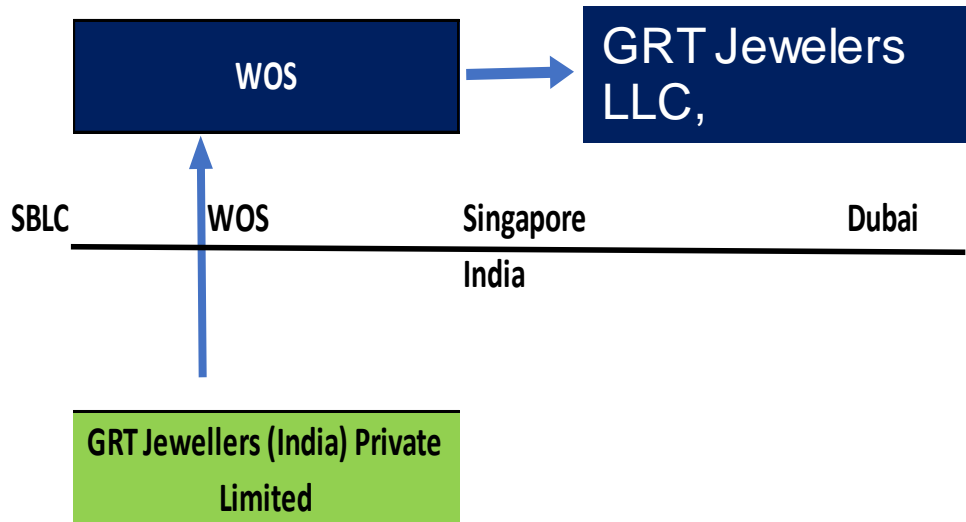
Under the Approval Route the Indian party is permitted, to issue corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries

Provided the Indian Party indirectly holds 51 per cent or more stake in the overseas second level step down operating subsidiary for which such guarantee is intended to be issued.



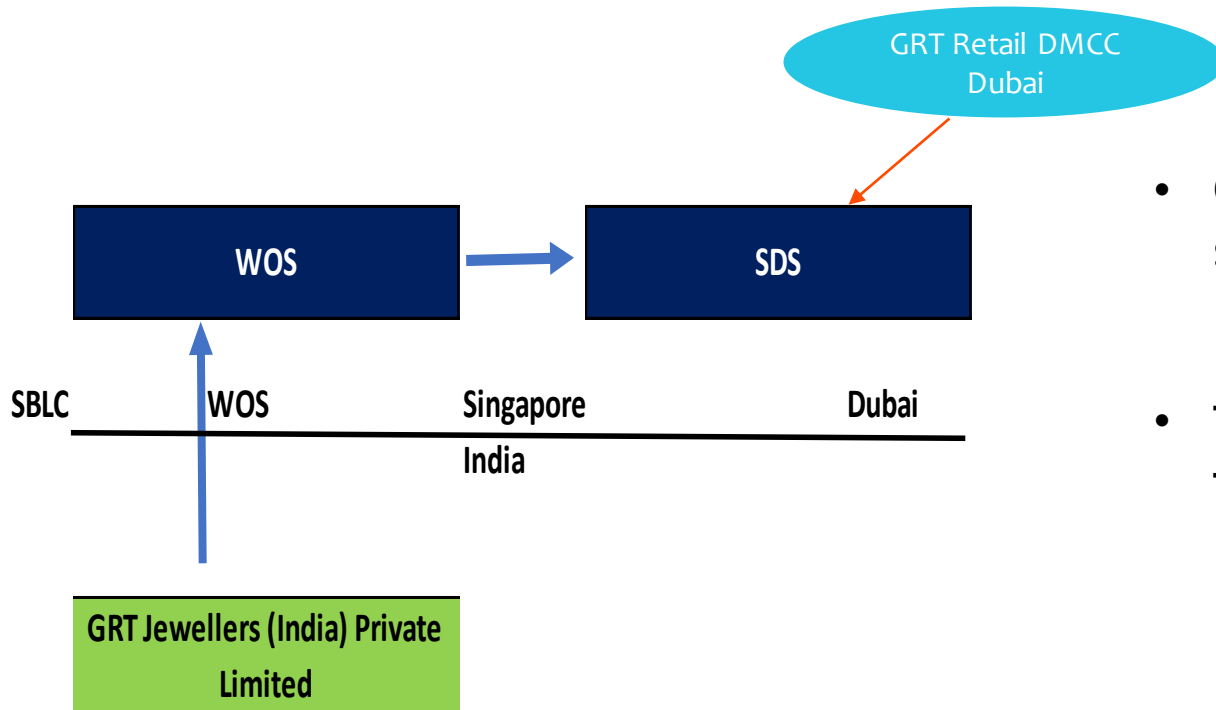
Performance Guarantee

C.A. 4136/2016 - GRT Jewellers (India) Private Limited



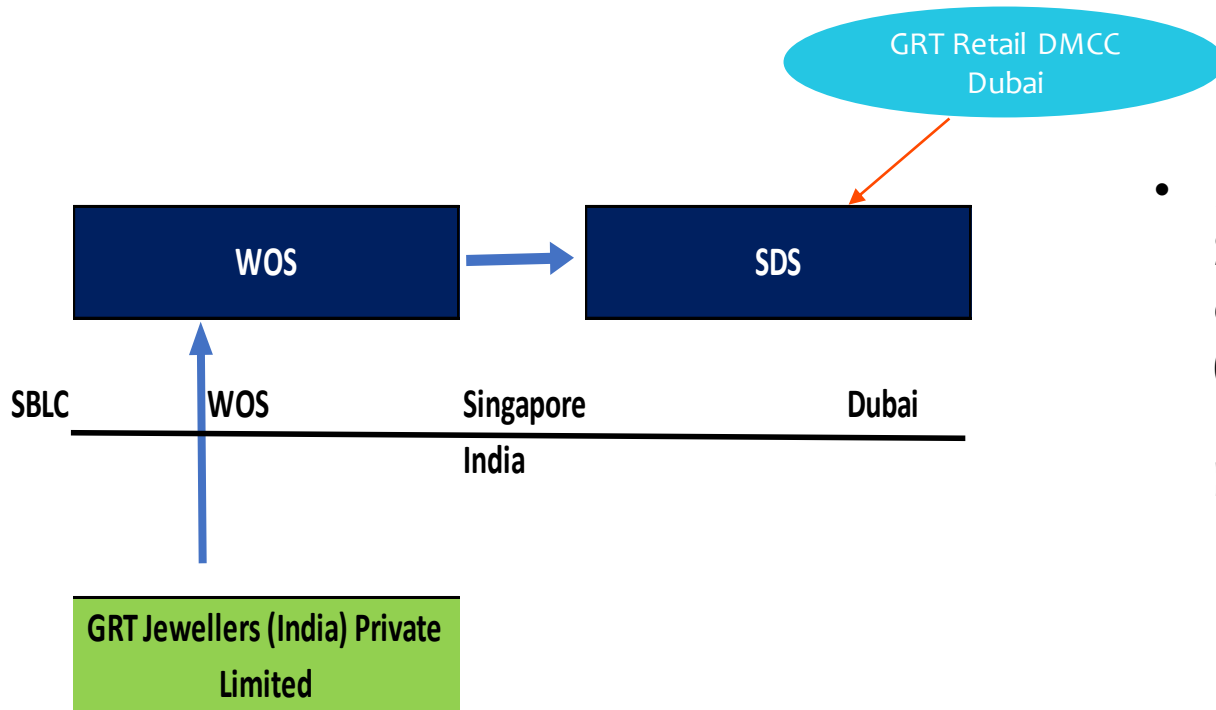
- The Grt Jewellers India (applicant) set up a WOS in Singapore
- The applicant then set up a first level SDS in Dubai through its WOS on on March 08, 2015
- WOS held 49% in SDS ie,e. Grt Jewelers LLC.

C.A. 4136/2016 - GRT Jewellers (India) Private Limited



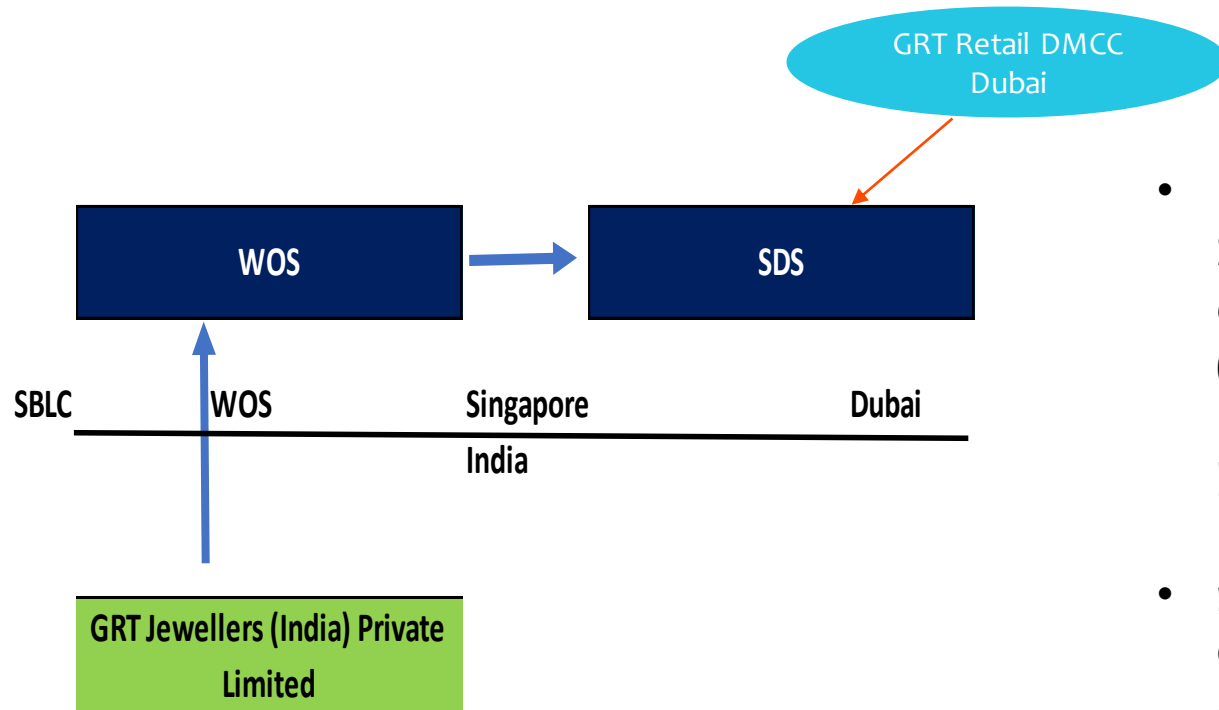
- On March 02, 2016 WOS in Singapore withdrew its shareholding in the SDS and the WOS was taken over by GRT Retail DMCC, Dubai.
- This resulted first level SDS became a second level SDS of the applicant.

C.A. 4136/2016 - GRT Jewellers (India) Private Limited



- Meanwhile, on June 03, 2015, in order to enable the above SDS, GRT Jewellers LLC, Dubai, to raise working capital loan overseas, the applicant offered SBLC of USD 5 million (Rs.31,98,55,000/-) through HDFC Bank Limited in India to HDFC Bank Limited in Bahrain on behalf of the then first level SDS.

C.A. 4136/2016 - GRT Jewellers (India) Private Limited



- Meanwhile, on June 03, 2015, in order to enable the above SDS, GRT Jewellers LLC, Dubai, to raise working capital loan overseas, the applicant offered SBLC of USD 5 million (Rs.31,98,55,000/-) through HDFC Bank Limited in India to HDFC Bank Limited in Bahrain on behalf of the then first level SDS.
- regulation does not provide for issue of SBLC / Bank Guarantee by an authorized dealer bank in India on behalf of first level SDS overseas

Renewal/ Rollover of an existing/ original guarantee that is part of total FC, shall not be regarded as fresh financial commitment; if

the existing / original guarantee was issued in terms of the then extant / prevailing FEMA guidelines

there is no change in the end use of the guarantee, i.e. the facilities availed by the JV / WOS / Step Down Subsidiary

there is no change in any of the terms & conditions, including the amount of the guarantee except the validity period

the reporting of the rolled over guarantee would be done in Form ODI - Part I; and

if the IP is under investigation by any investigation / enforcement agency or regulatory body, the concerned agency / body shall be kept informed about the same

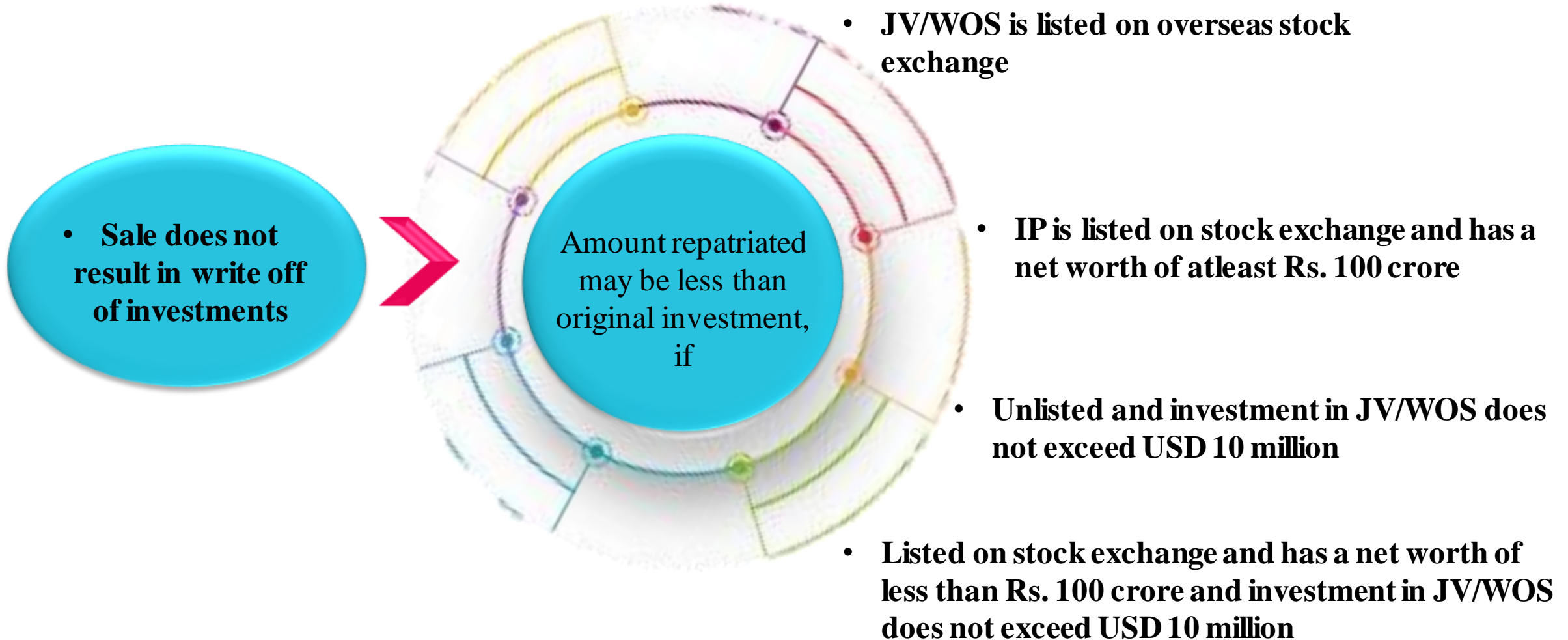
If conditions not met, RBI approval required.

Disinvestment



| Information w.r.t mode of disinvestment | |
|---|---|
| Method of disinvestment | Details to be furnished as Annex to the Form ODI Part III |
| Sale or transfer of shares to another IP/ Individual, Merger / Liquidation of IP | Furnish the details of the entity buying the stake and also whether the entity purchasing the stake is an existing foreign partner/ Indian Partner in the JV / WOS or a foreign party / IP buying stake in the concerned JV / WOS for the first time. |
| Closure/ Voluntary Liquidation of the JV/ WOS | Details of the JV/ WOS |
| Buy back by the JV/ WOS | Details of the JV/ WOS |
| Merger of two or more JV/ WOS of the same IP or different IP | Furnish details of merging JV/ WOS and the surviving JV/ WOS such as Name, UIN of the JV/ WOS and the name of the IP concerned of both the JV/ WOS. |
| Merger of the JV/ WOS with the Step down subsidiaries of the same IP or another IP | Furnish UIN of the merging JV/ WOS, the name of the IP holding indirect stake in SDS, name of the SDS, Level of SDS, name and country of immediate parent of SDS |
| Merger of JV/ WOS with an Independent Foreign Company not having any relation with the IP/ RI | Furnish the detail of the foreign company such as name and address |

Sale of Shares of JV/ WOS



Restructuring of B/s of JV/WOS by Listed IP



Restructuring of B/s of JV/WOS by Listed IP

Who can do?

- Listed IP having WOS or JV (at least 51% stake)

What can be written off?

- Capital (equity/preference)
- Other receivables

To what extent?

- 25% of equity investment in JV/WOS

Under what Route

- **Automatic Route**

To be reported to RBI

- Within 30 days of WO/ restructuring.

Documents

- **Submission to AD Bank**
 - Certified copy of B/S showing the loss in overseas JV/WOS
 - Projection for next 5 years indicating benefit.

Restructuring of B/s of JV/WOS by Unlisted IP

Who can do?

- Unlisted IP having WOS or JV (at least 51% stake)

What can be written off?

- Capital (equity/preference)
- Other receivables

To what extent?

- 25% of equity investment in JV/WOS

Under which mode

- Under approval of RBI

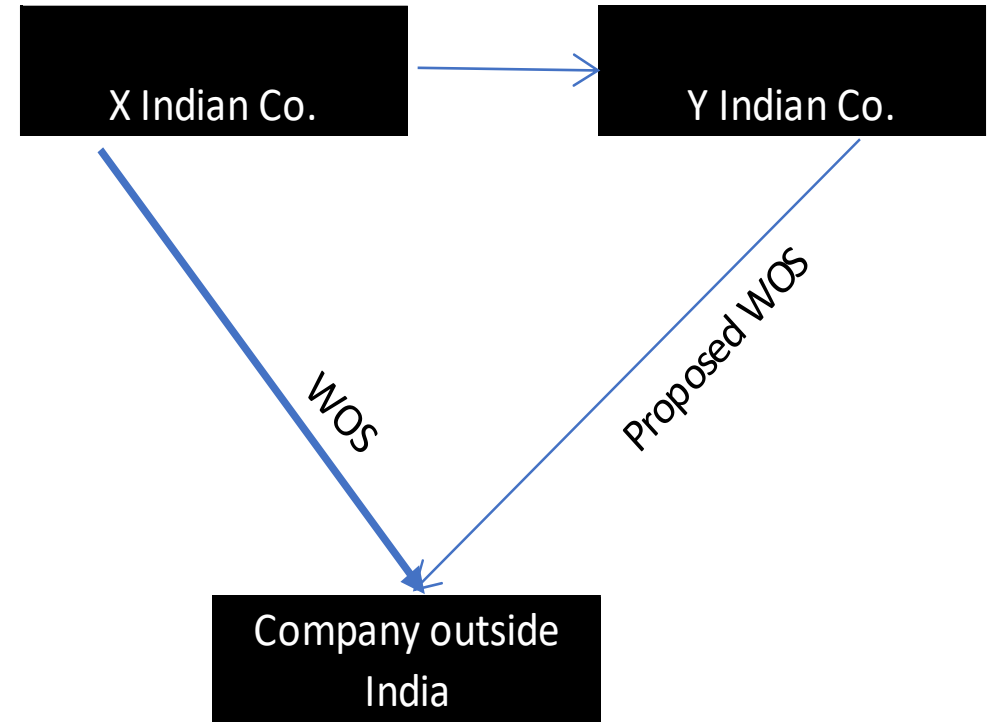
Exit by Indian party



- An Indian party can exit its investment in the overseas entity by any of the mode like Closure/Disinvestment/Voluntary Liquidation/Winding up of JV/WOS.

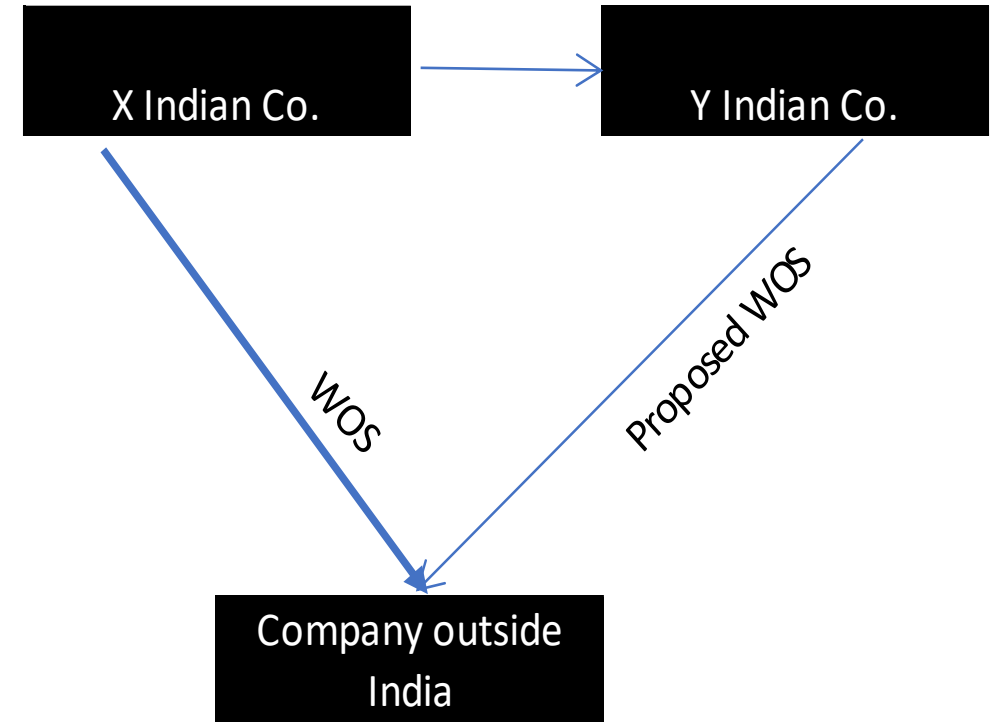
Example

- X Co. and Y Co. are Indian Companies. X Co. has an existing investment in PQR company, a company outside India. X Co. sold shares of PQR to Y co. Is it possible



Example

- X Co. and Y Co. are Indian Companies. X Co. has an existing investment in PQR company, a company outside India. X Co. sold shares of PQR to Y co. Is it possible
- Yes, it is possible to sale the shares of JV/WOS outside India held by Indian company to another Indian company subject to specified conditions.





With
write off



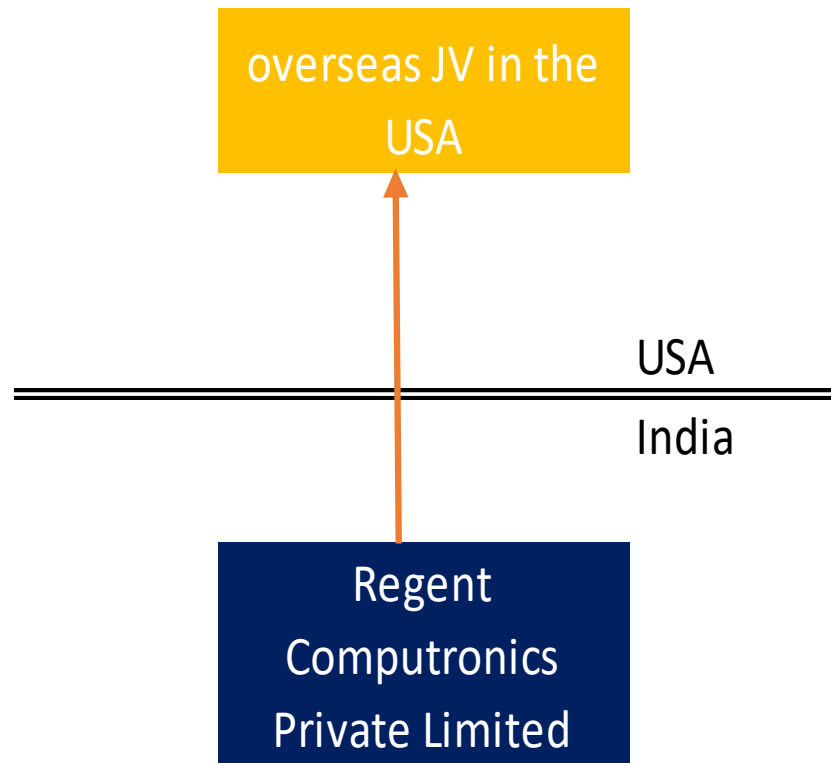
Without
write off

Without Write off

- ✓ the sale does not result in any write off of the investment made;
- ✓ the sale is effected through a stock exchange where the shares of the overseas JV/WOS are listed;
- ✓ if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, **the share price is not less than the value certified by a Chartered Accountant/Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV/WOS;**
- ✓ the Indian party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and/or export proceeds from the JV or WOS;
- ✓ the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the RBI;
- ✓ the Indian party is not under investigation by CBI /DoE/SEBI / IRDA or any other regulatory authority in India; and
- ✓ the Indian party is required to submit details of such disinvestment through its designated AD Category-I bank within 30 days from the date of disinvestment.
- ✓ Conditions relating to transfer needs to be satisfied otherwise the prior approval of the RBI is required to be taken.

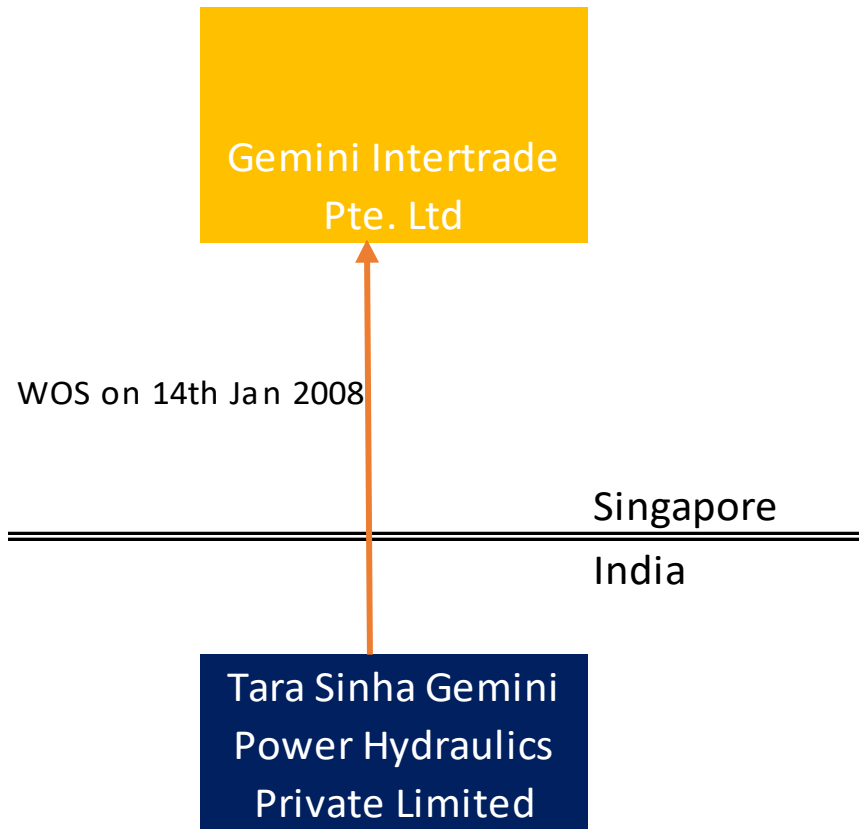
| | | | | |
|------|--|----------------------|-------------------------|--------|
| IX | Date wise details of remittances/ transaction (attach separate sheet if necessary) | | | |
| i. | Date of Remittance/ Transaction | Method of Investment | Category of Investment | Amount |
| | | | | |
| | | | | |
| | | | | |
| X | Fair Value of the total disinvestment as per the valuation report | | | |
| XI | Whether there is write off? If yes please provide the amount of write off | | | |
| i. | Equity | Loan | Others (please specify) | |
| | | | | |
| XII | Amount Repatriated on disinvestment (attach separate sheet if necessary) | | | |
| i. | Date of Repatriation | Equity | Loan | Others |
| | | | | |
| | | | | |
| | | | | |
| XIII | Amount repatriated since reporting of the last APR except the disinvestment proceeds | | | |
| I | Equity | Loan | Others (Please Specify) | |
| | | | | |

CA No 4922 / 2019



- Overseas direct investment (ODI) in January 2017 in an overseas JV in the USA
- The overseas JV was not successful due to adverse market situation
- The applicant disinvested their stake in August 2017

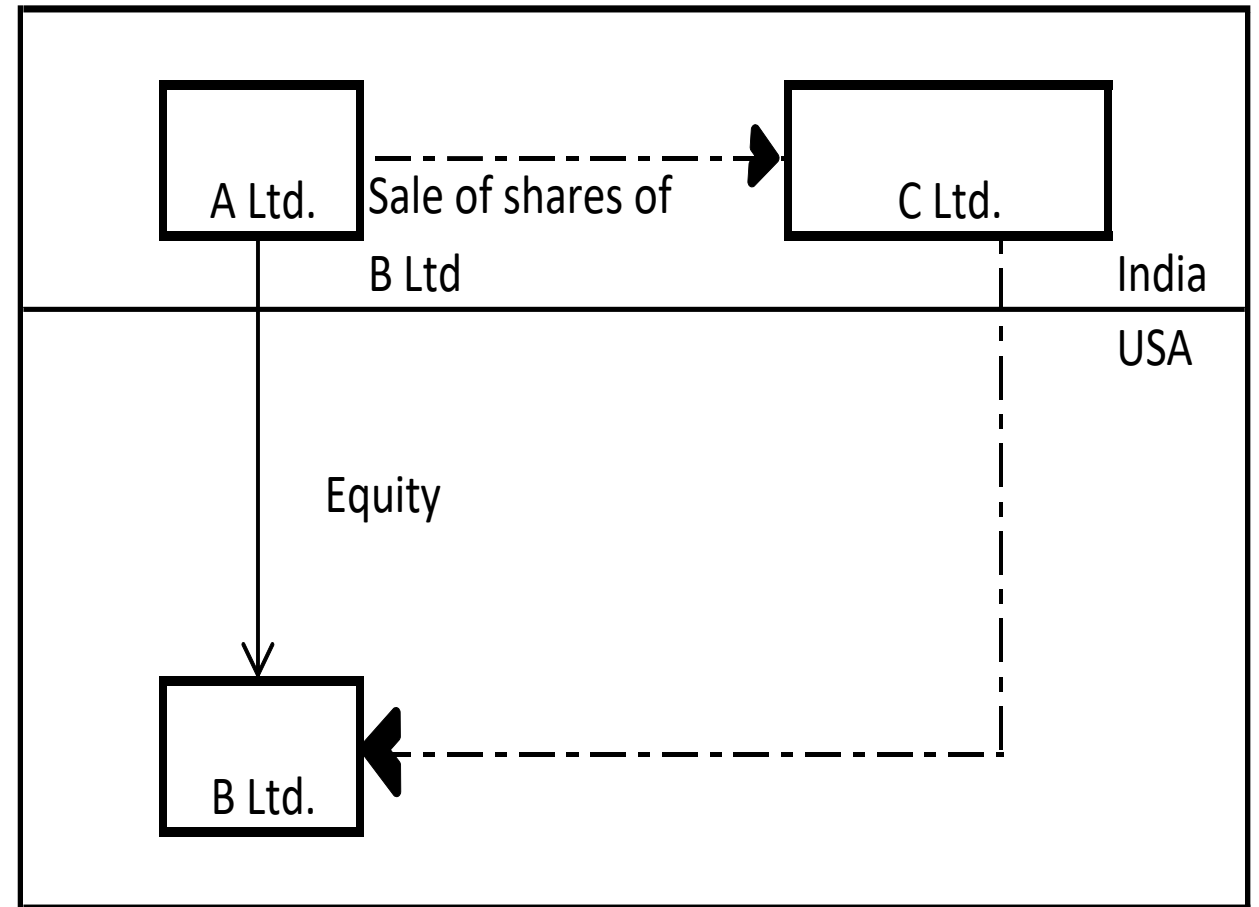
CA No 5013 / 2019



- Facts of the case
- The WOS was incorporated on 14th Jan 2008
- The applicant remitted USD 6500 and USD 4000 to the WOS on February 22, 2008 and March 11, 2008 respectively
- It disinvested and closed down the WOS on September 30, 2017
- disinvestment proceeds amounting to USD 8061 (INR 5,14,131) were repatriated only on January 16, 2018
- beyond the stipulated time period of 90 days, thereby contravening Regulation 16(2) of FEMA 120/2004-RB

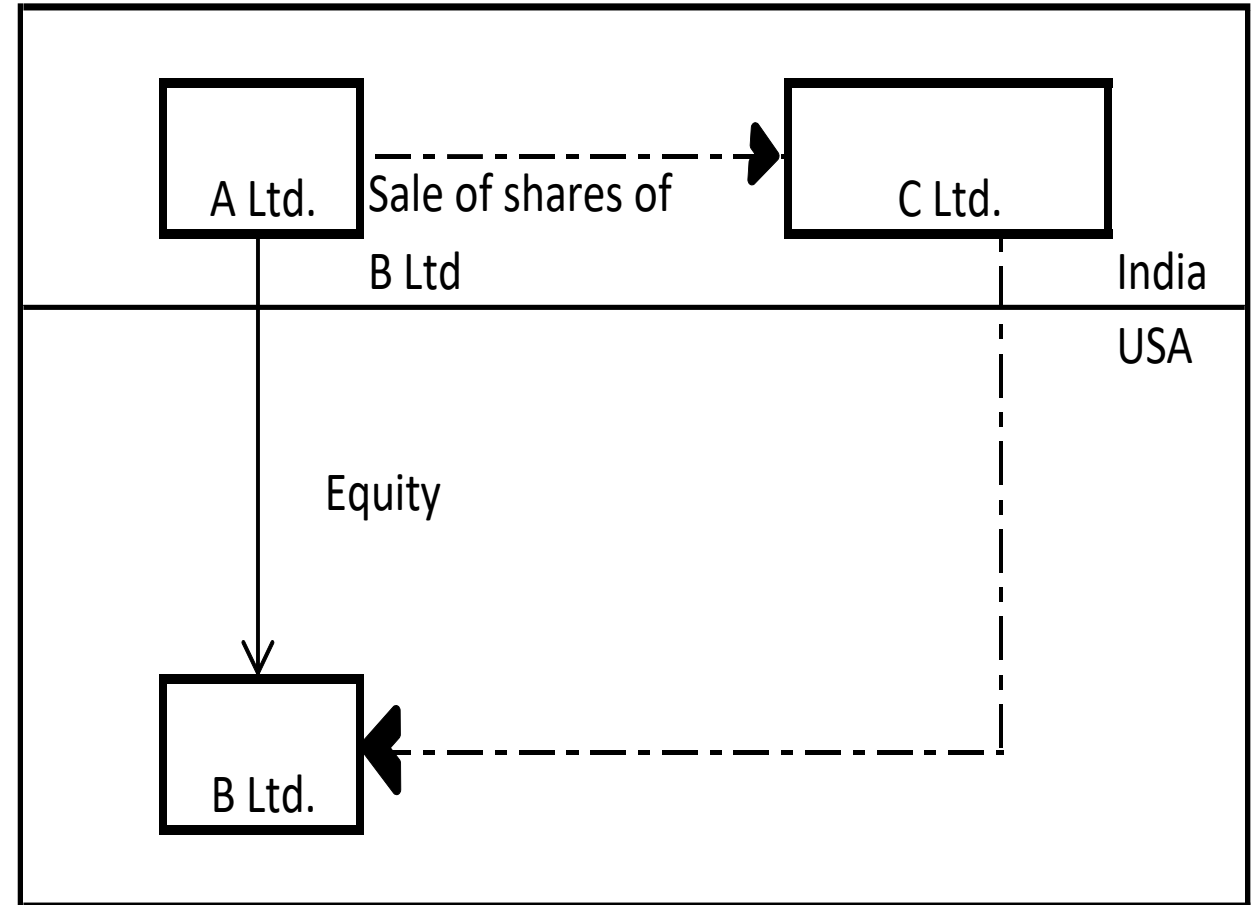
Example

- A Ltd., an Indian unlisted company has subscribed to equity capital of B Ltd, a company incorporated in USA, in Sept 2019. The investment value is less than USD 10 million. B Ltd. has commenced its operations in Oct 2019.
- A Ltd. proposes to sell shares of B Ltd to C Ltd. in June 2020

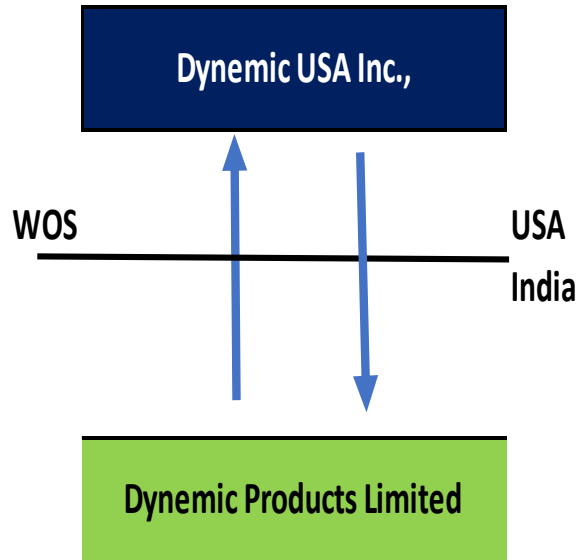


Example

- A Ltd., an Indian unlisted company has subscribed to equity capital of B Ltd, a company incorporated in USA, in Sept 2019. The investment value is less than USD 10 million. B Ltd. has commenced its operations in Oct 2019.
- A Ltd. proposes to sell shares of B Ltd to C Ltd. in June 2020
- The Prior approval of RBI is required in this case. As the overseas operation have to be there for at least one full year.



C.A. No. 4587/2017 - Dynemic Products Limited



- The applicant company had set up a WOS viz. Dynemic USA Inc.,
- The WOS was liquidated in November 2009 resulting in a disinvestment of ODI which involved write-off of a major component receivables (loan) of DPL from the WOS.
- Further, some proceeds from disinvestment were received in the form of cash and physical asset (laptop).
- Contravention of Regulation 16 of FEMA Notification No. FEMA. 120/2004-RB

- The applicant company (DPL) had set up a wholly owned subsidiary (WOS) viz. Dynemic USA Inc., USA with first outward remittance made on August 2, 2005, under the overseas direct investment (ODI) regulations under FEMA, 1999.
- The WOS was incorporated in September 2005 and a unique identification number (UIN) – AHWAZ20050329 was allotted.
- Subsequently, DPL had made further outward remittances to the WOS, including two remittances of USD 4,000.00 and USD 500.00 (on February 16, 2006 and May 08, 2006 respectively) which were made by way of purchase of foreign currency (Traveler's Cheques) from a full-fledged money changer (FFMC),
- to be handed over to an employee recruited and based in the US.
- These two amounts - used towards certain incorporation expenses, were treated as loan to the WOS. The prescribed forms for reporting the two above-mentioned remittances were not submitted within the stipulated time limit.

- Whereas Regulation 16 of FEMA 120/2004 lays down the conditions under which an eligible Indian Party may transfer, by way of sale any share or security held by it in a joint venture (JV) or WOS outside India - under automatic route; disinvestment proceeds were received in the form of cash and other physical asset, without routing the transaction through a designated authorised dealer. In view of the relatively small amounts involved and other bona fides, the transactions were permitted to be regularized through compounding of the contraventions.
- Whereas in terms of Regulation 16(1)(iii) of FEMA 120/2004, for an Indian Party having made ODI in a JV/WOS – whose shares are not listed on the stock exchange, shall be able to disinvest, under automatic route, after submission of a certificate indicating the fair value of the shares based on the latest audited financial statements of the JV/ WOS, as certified by a Chartered Accountant /Certified Public Accountant; the applicant submitted a fair valuation certificate on October 16, 2016 after a long delay since the disinvestment had already been carried in November 2009.



With
write off



Without
write off

With write off

where the amount repatriated after disinvestment is less than the original amount invested

- without prior approval of the RBI, :

where the JV/WOS

- is listed in the overseas stock exchange;

where the Indian party

- is listed on a stock exchange in India
- and has a net worth of not less than Rs 100 crore;

Indian party is an unlisted company

- The investment in the overseas venture does not exceed USD 10 million; and

Indian party is a listed company

- with net worth of less than Rs 100 crore
- but investment in an overseas JV/WOS does not exceed USD 10 million.

➤ in all other cases prior approval of RBI shall be required before writing off the amount of investment.

With write off

where the amount repatriated after disinvestment is less than the original amount invested

- without prior approval of the RBI, :

where the JV/WOS

- is listed in the overseas stock exchange;

where the Indian party

- is listed on a stock exchange in India
- and has a net worth of not less than Rs 100 crore;

Indian party is an unlisted company

- The investment in the overseas venture does not exceed USD 10 million; and

Indian party is a listed company

- with net worth of less than Rs 100 crore
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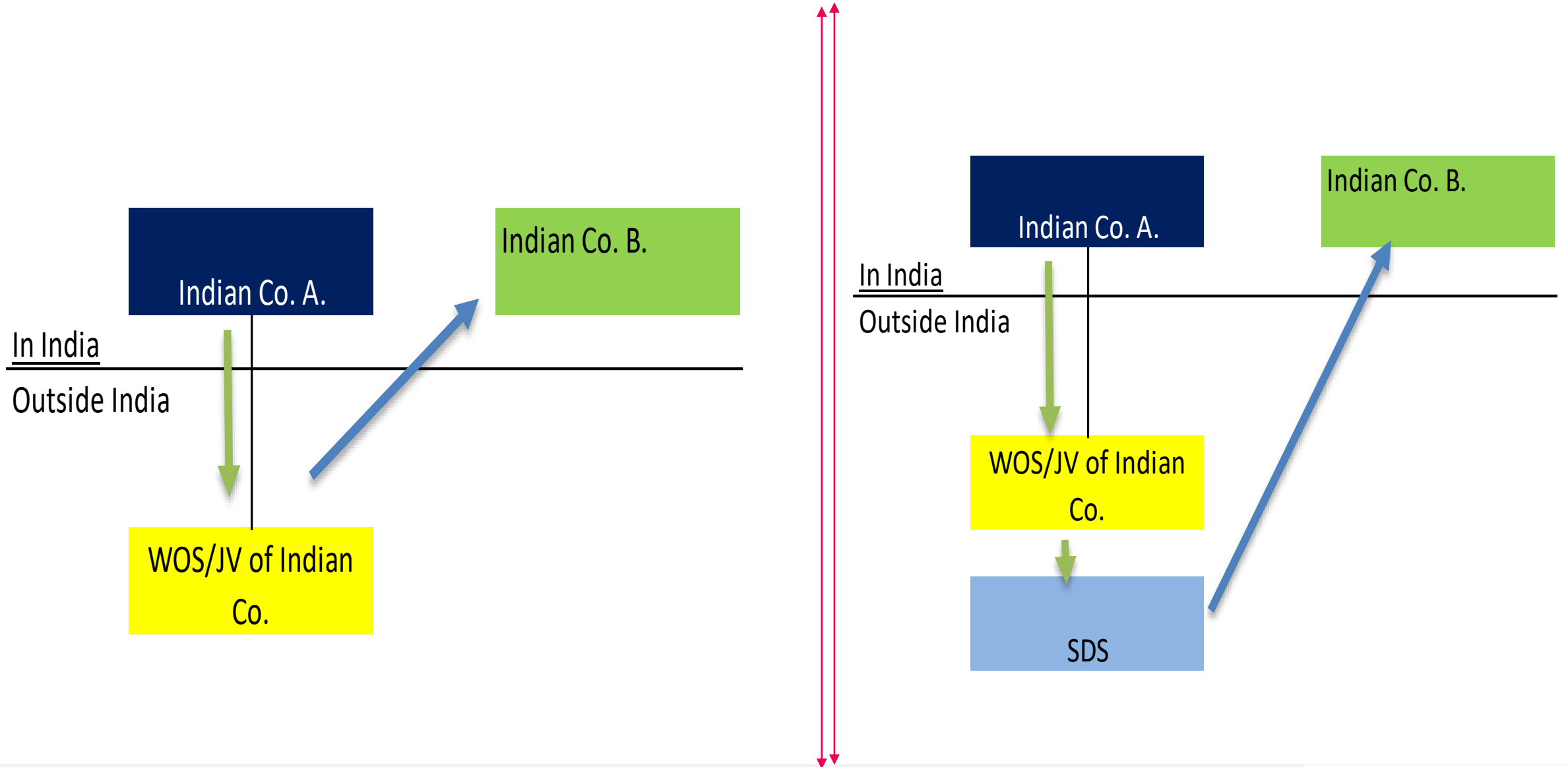
➤ **in all other cases prior approval of RBI shall be required before writing off the amount of investment.**

| | | | | |
|------|--|----------------------|-------------------------|-------------------|
| i. | Equity | Loan | Guarantees Issued | Guarantee Invoked |
| | | | | |
| IX | Date wise details of remittances/ transaction (attach separate sheet if necessary) | | | |
| i. | Date of Remittance/ Transaction | Method of Investment | Category of Investment | Amount |
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| XI | Whether there is write off? If yes please provide the amount of write off | | | |
| i. | Equity | Loan | Others (please specify) | |
| | | | | |
| XII | Amount Repatriated on disinvestment (attach separate sheet if necessary) | | | |
| i. | Date of Repatriation | Equity | Loan | Others |
| | | | | |
| | | | | |
| | | | | |
| XIII | Amount repatriated since reporting of the last APR except the disinvestment proceeds | | | |
| I | Equity | Loan | Others (Please Specify) | |
| | | | | |

Round Tripping



Example



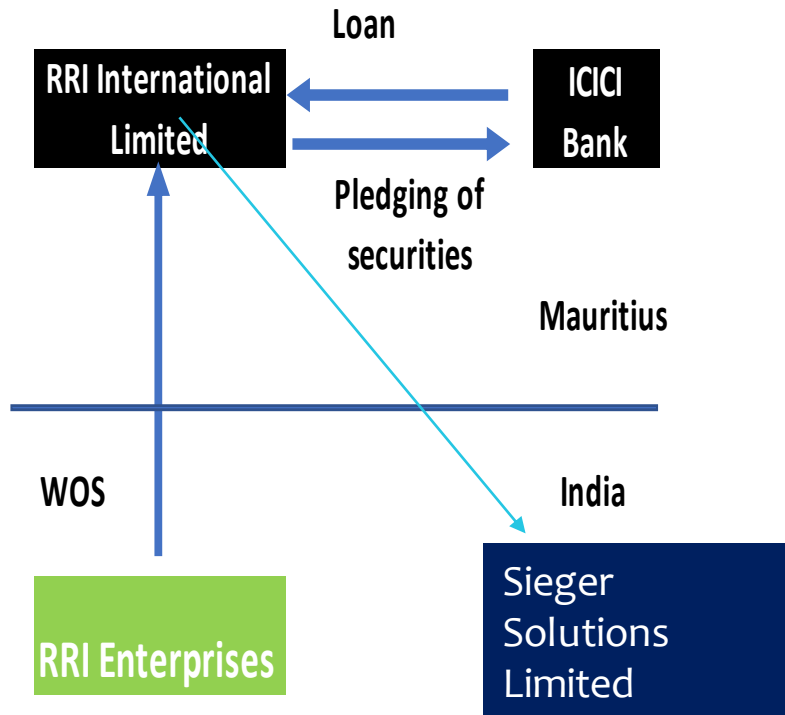
FAQ

- *Can an Indian Party (IP) set up a step down subsidiary /joint venture in India through its foreign entity (WOS/JV), directly or indirectly through step-down subsidiary of the foreign entity?*
- **Ans** - No, the provisions of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, dealing with transfer and issue of any foreign security to Residents do not permit an IP to set up Indian subsidiary(ies) through its foreign WOS or JV nor do the provisions permit an IP to acquire a WOS or invest in JV that already has direct/indirect investment in India under the automatic route.
- **However, in such cases, IPs can approach the Reserve Bank for prior approval through their Authorised Dealer Banks which will be considered on a case to case basis, depending on the merits of the case.**

Creation of Charge

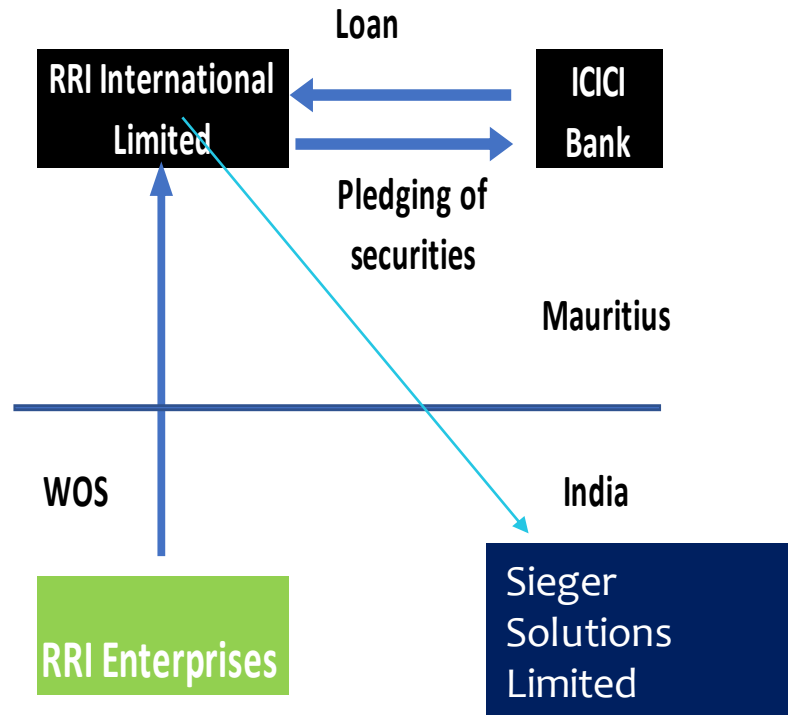


CA No 4095 / 2016 - RIR Enterprises.



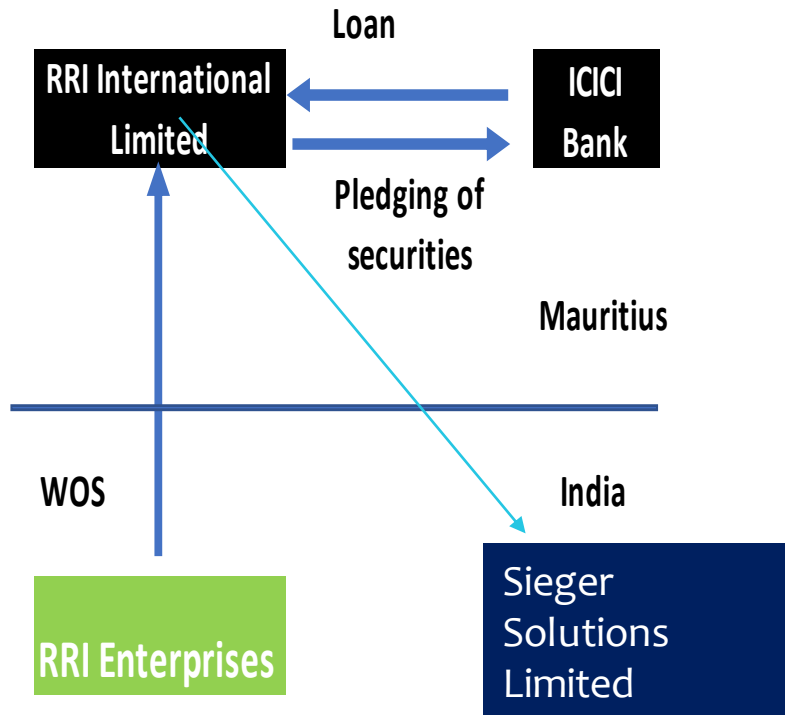
- Applicant, RIR Enterprises is an Indian firm engaged in the business of making writing notebooks, including buying paper, cutting and binding.
- Applicant gave a personal guarantee to ICICI Bank, Bahrain, to enable its WOS, RRI International Limited to raise a loan from ICICI Bank.
- The WOS invested the loan amount in the preference shares of a company

CA No 4095 / 2016 - RIR Enterprises.



- Applicant, RIR Enterprises is an Indian firm engaged in the business of making writing notebooks, including buying paper, cutting and binding.
- Applicant gave a personal guarantee to ICICI Bank, Bahrain, to enable its WOS, RRI International Limited to raise a loan from ICICI Bank.
- The WOS invested the loan amount in the preference shares of an Indian company – Sieger Solutions Limited
- Contravened the provisions of Regulation 3 of FEMA. 20/2000-RB dated May 03, 2000

Certificate from Auditors



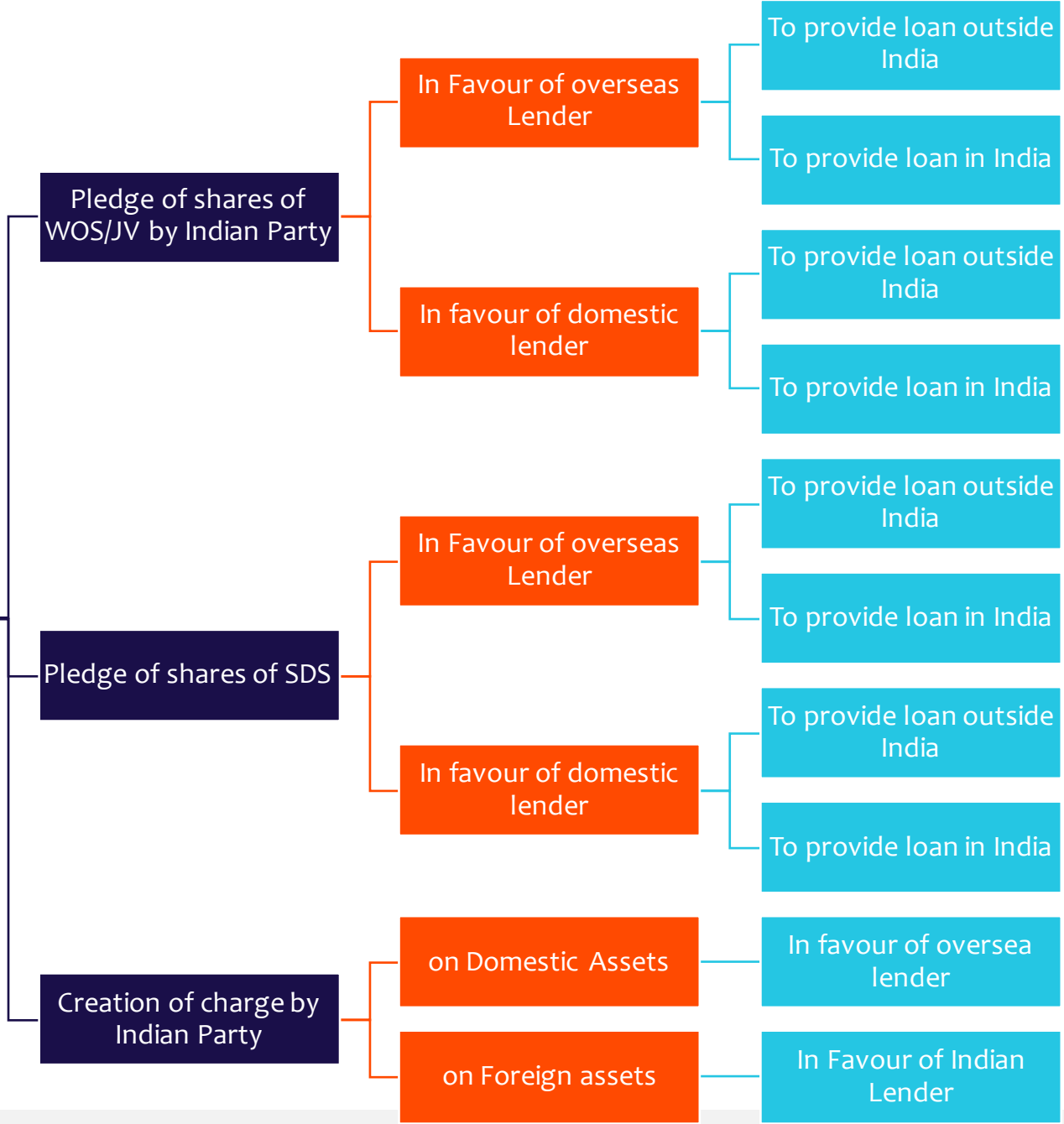
- The loan / funds raised overseas by the JV / WOS / SDS shall be utilized only for its **core business activities overseas** and not for investing back in India in any manner whatsoever;
- A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / funds raised overseas by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;

"Core Activity" means an activity carried on by an Indian entity, turnover where from constitutes not less than 50% of its total turnover in the previous accounting year;

Creation of Charge



Pledge of shares by Indian company



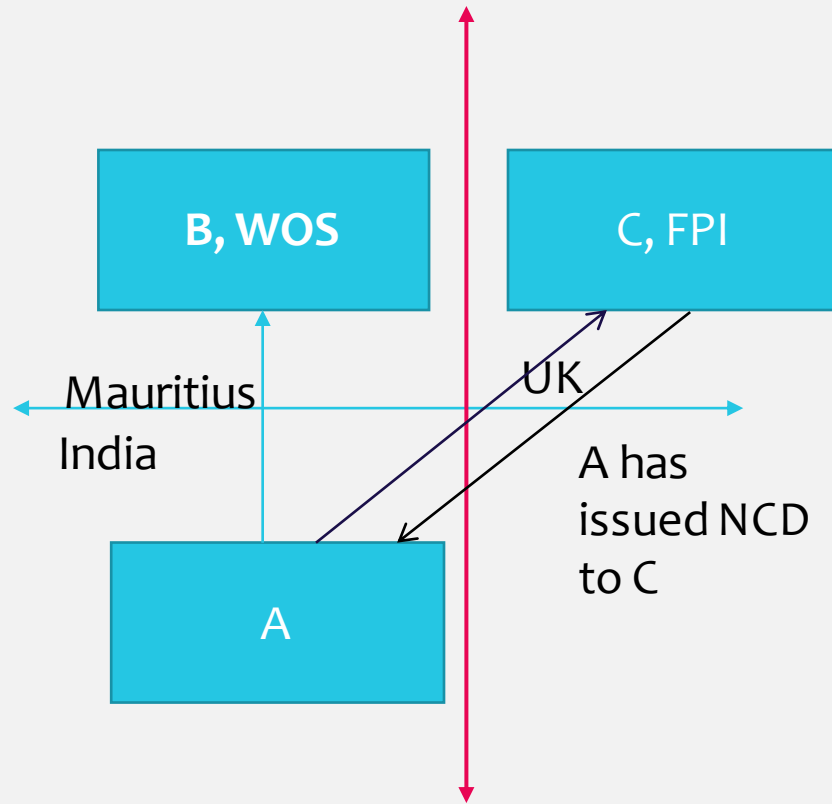
Our customer “A” is an Indian company listed in NSE and BSE.

A has 100% WOS “B” in Mauritius.

A has planned to raise capital through unlisted and unsecured NCDs for USD 5 million.

There is SEBI registered UK based FPI “C”.

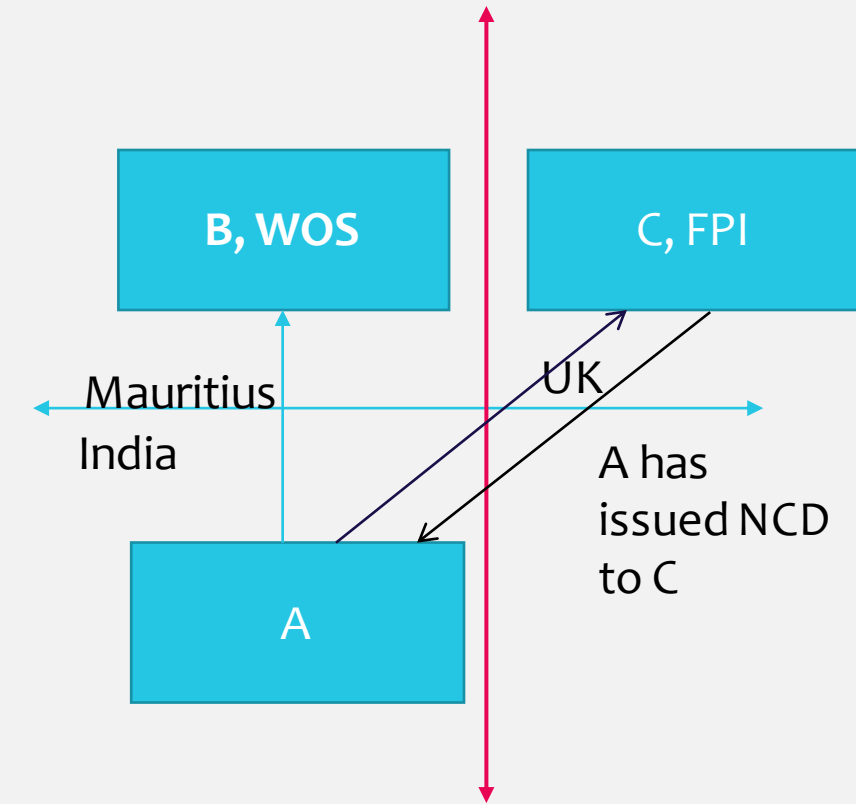
“C” has subscribed to these NCDs for USD 5 million.

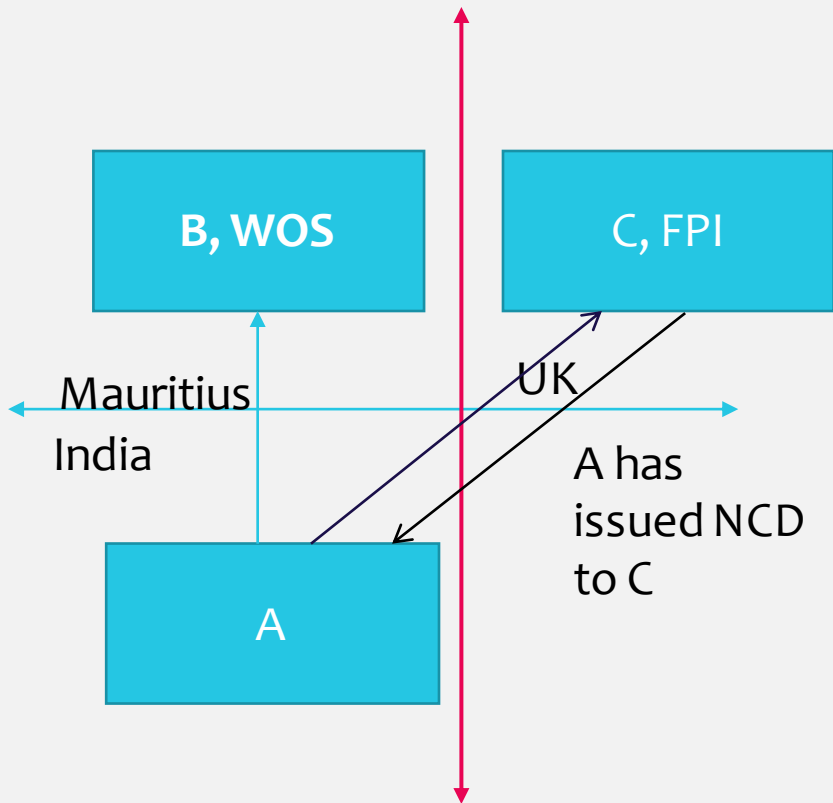


NCDs for USD 1 million has already been paid by and issued to C.

For remaining USD 4 million, C is asking for double financial assurance from A in manner as below,

1. C is asking for corporate guarantee in favour of Debenture Trustee **from B** for USD 4 million.
2. Additionally, C is asking for pledge of shares of B held by A in favour of debenture trustee. All shares to be issued by B to A in future also to be pledged in the same manner,





In case of enforcement of guarantee, B will pay to Debenture Trustee and it in turn will pay to C. Although B is 100% WOS of A only, B has independent strong cash flows and able to pay if guarantee invoked.

A has approached our bank to present this case to RBI seeking approval for creation of charge and issuance of CG. As an AD, can we present this case to RBI and under what regulation?

Events

B, WOS has to give guarantee on behalf of A in favour of foreign lender

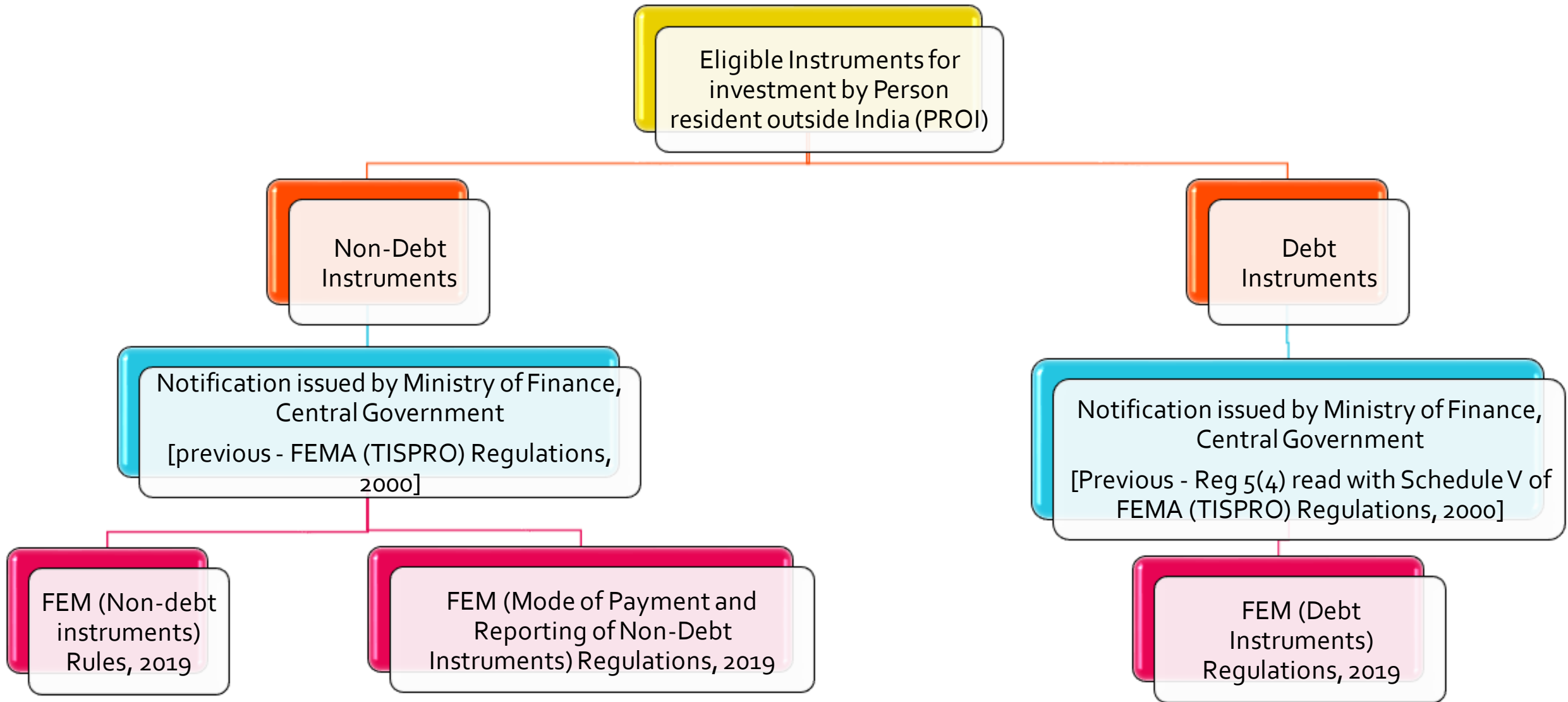
Foreign lender to be recognized lender

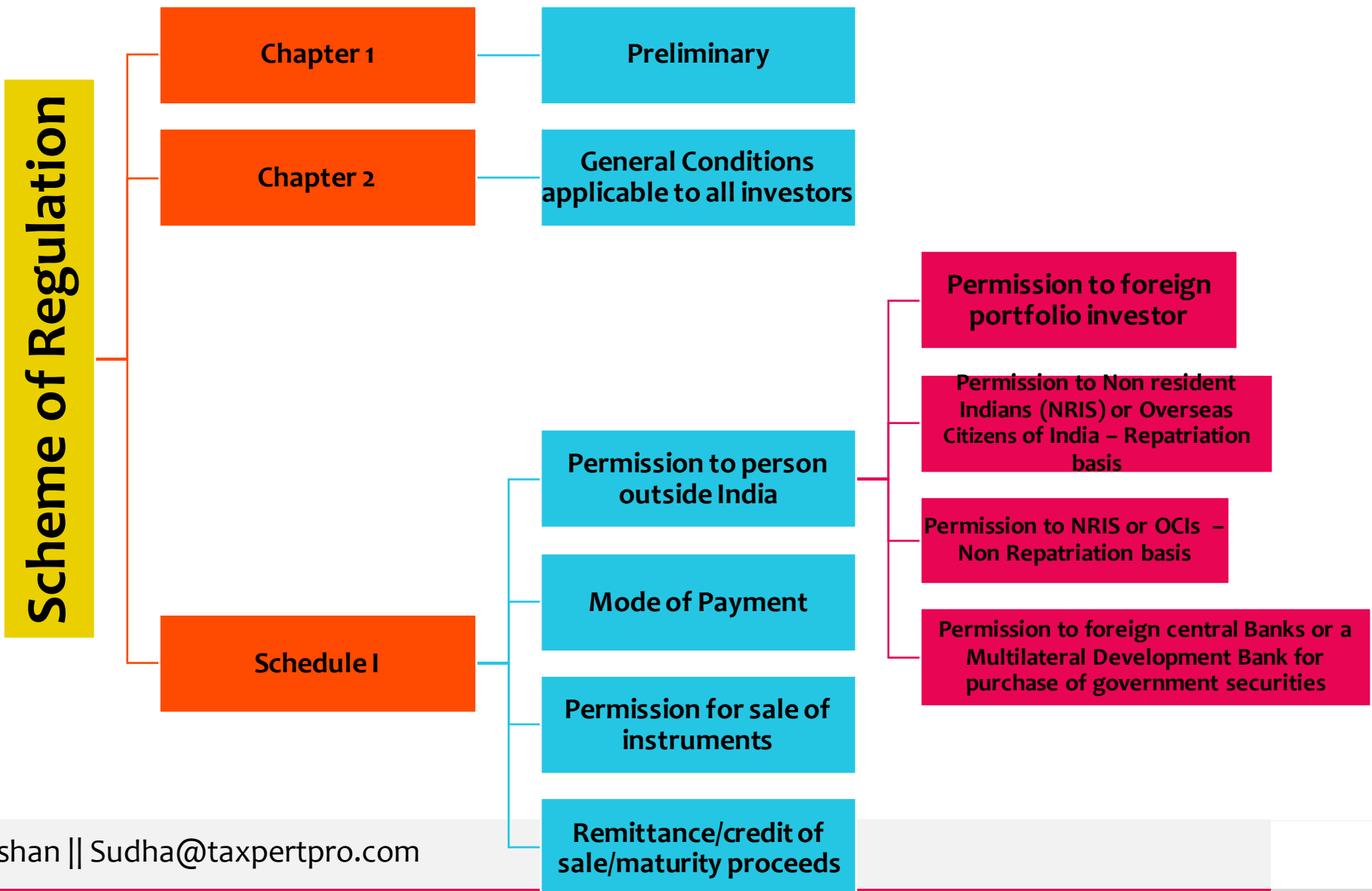
A, Indian co. has to pledge shares of its WOS, B in favour of foreign lender

Only if foreign lender is the Recognised lender

Issuance of Non convertible debentures

Fall under the Debt Instruments

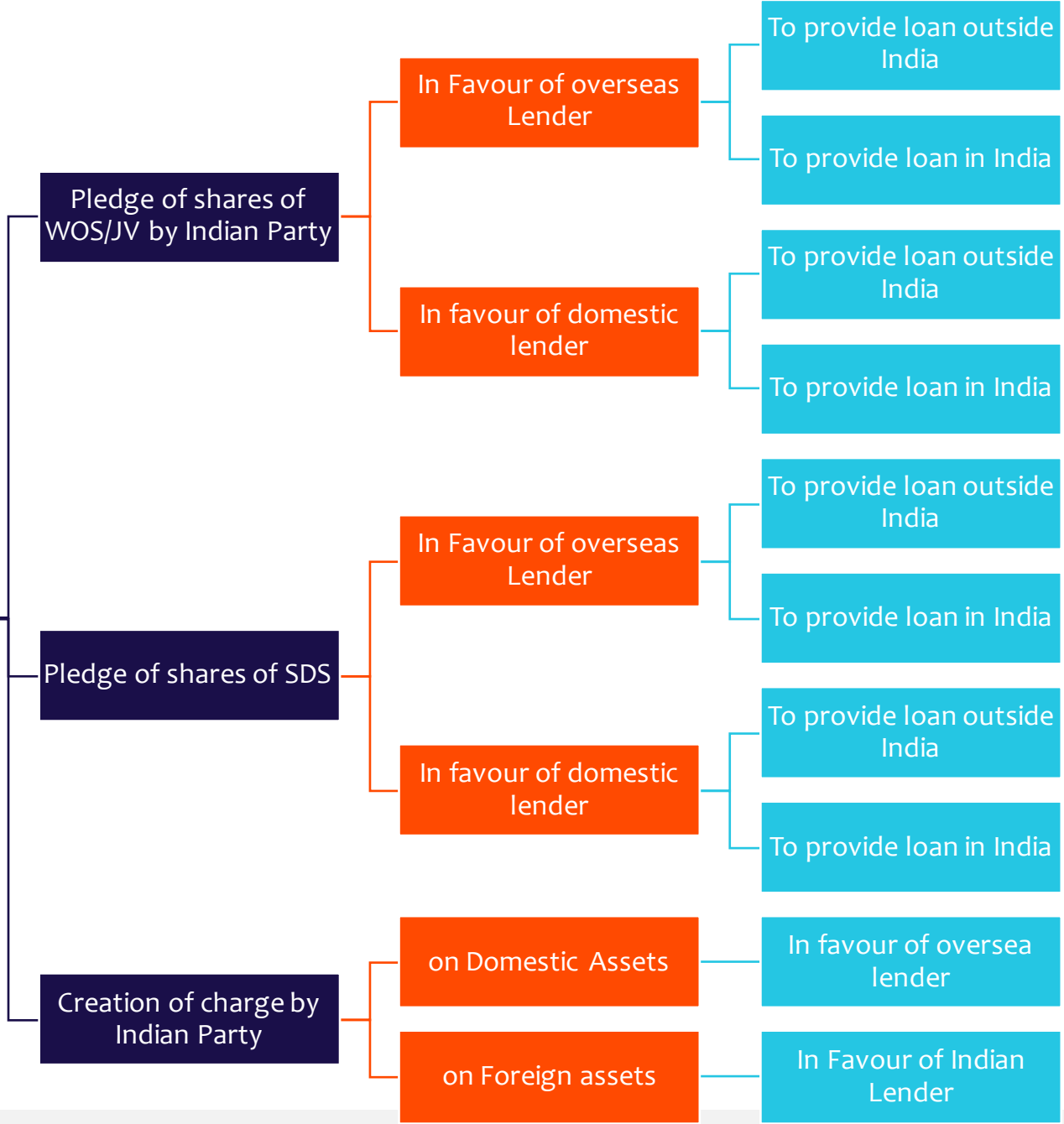


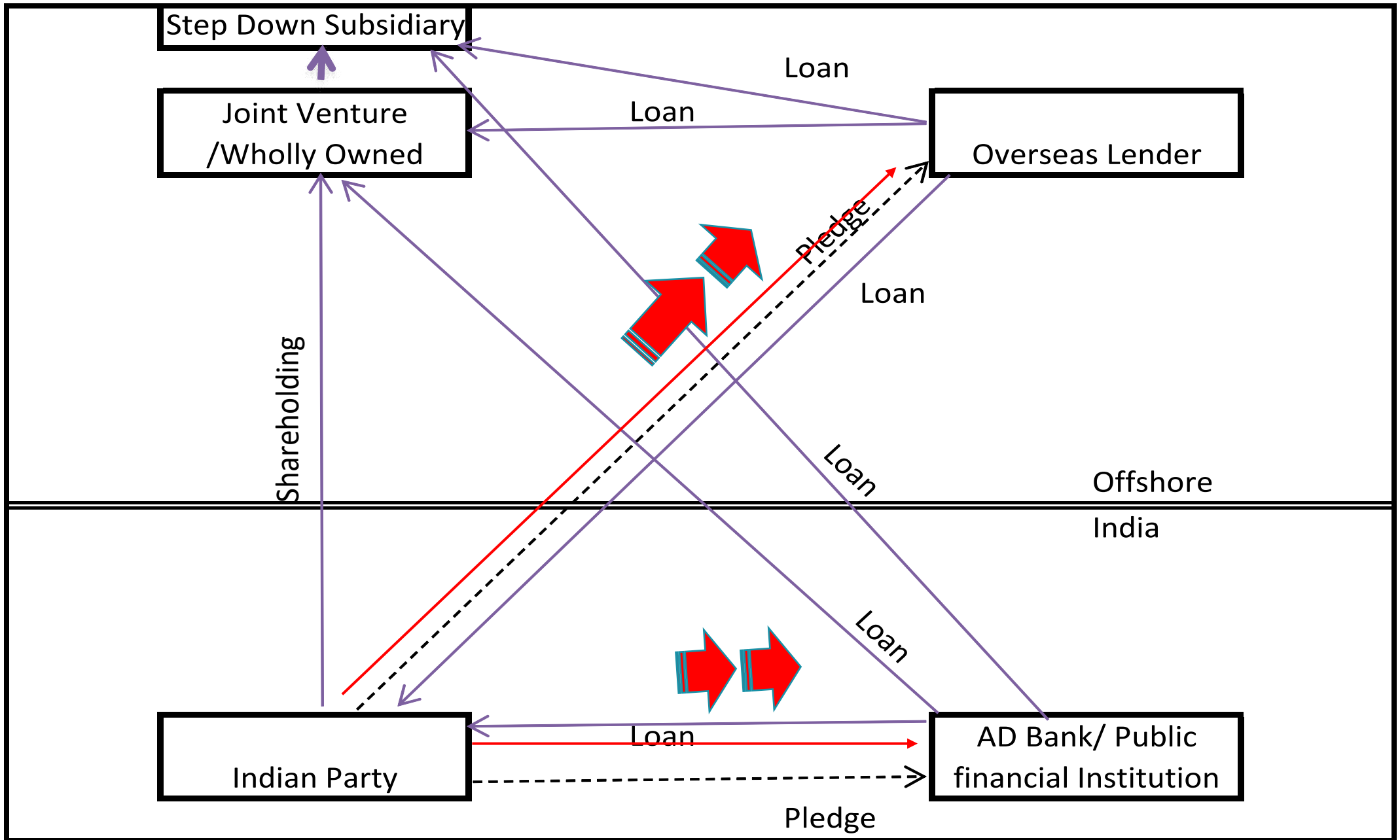


A has to pledge shares of B in favour of foreign lender

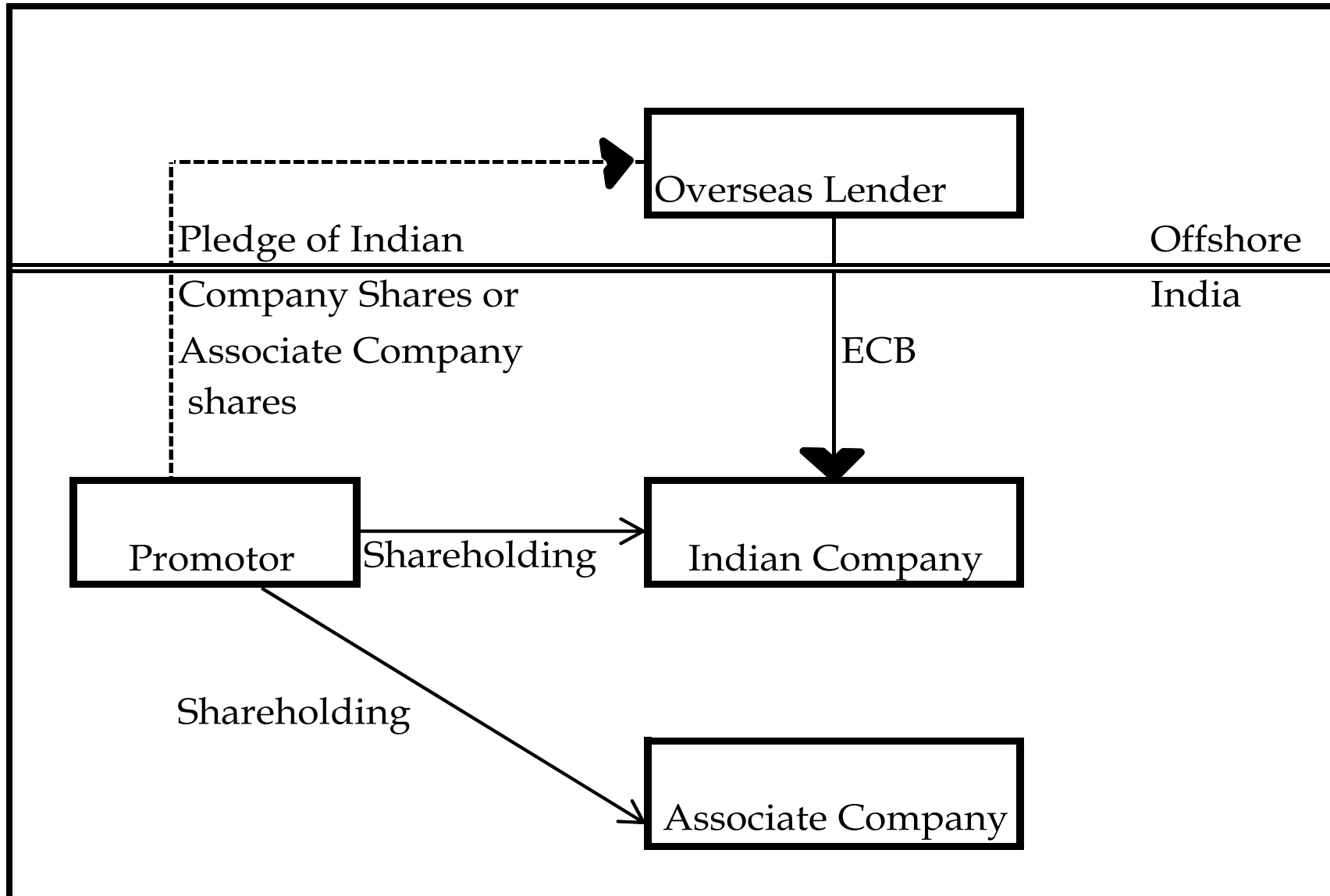
- **(i) Creation of charge on shares of JV / WOS / step down subsidiary (SDS) in favour of domestic / overseas lender**
- It has been decided that the designated AD bank may permit creation of charge / pledge on the shares of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic or overseas lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its JV / WOS / SDS (irrespective of the level) under the automatic route subject to the following:
 - a. The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification ibid for undertaking financial commitment;
 - b. Compliance to the provisions under Regulation 18 of the Notification ibid;
 - c. The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
 - d. The loan / facility availed by the JV / WOS / SDS from the domestic / overseas lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;
 - e. A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;
 - f. The invocation of charge resulting into the domestic lender acquiring the shares of the overseas JV / WOS / step down subsidiary shall be governed by the extant FEMA provisions / regulations issued by the Reserve Bank from time to time;
 - g. The facilities (funded or non-funded) extended by the domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS shall also be governed by the prudential norms and other guidelines issued by the Department of Banking Regulation (DBR, the erstwhile DBOD), Reserve Bank of India from time to time; and

Pledge of shares by Indian company

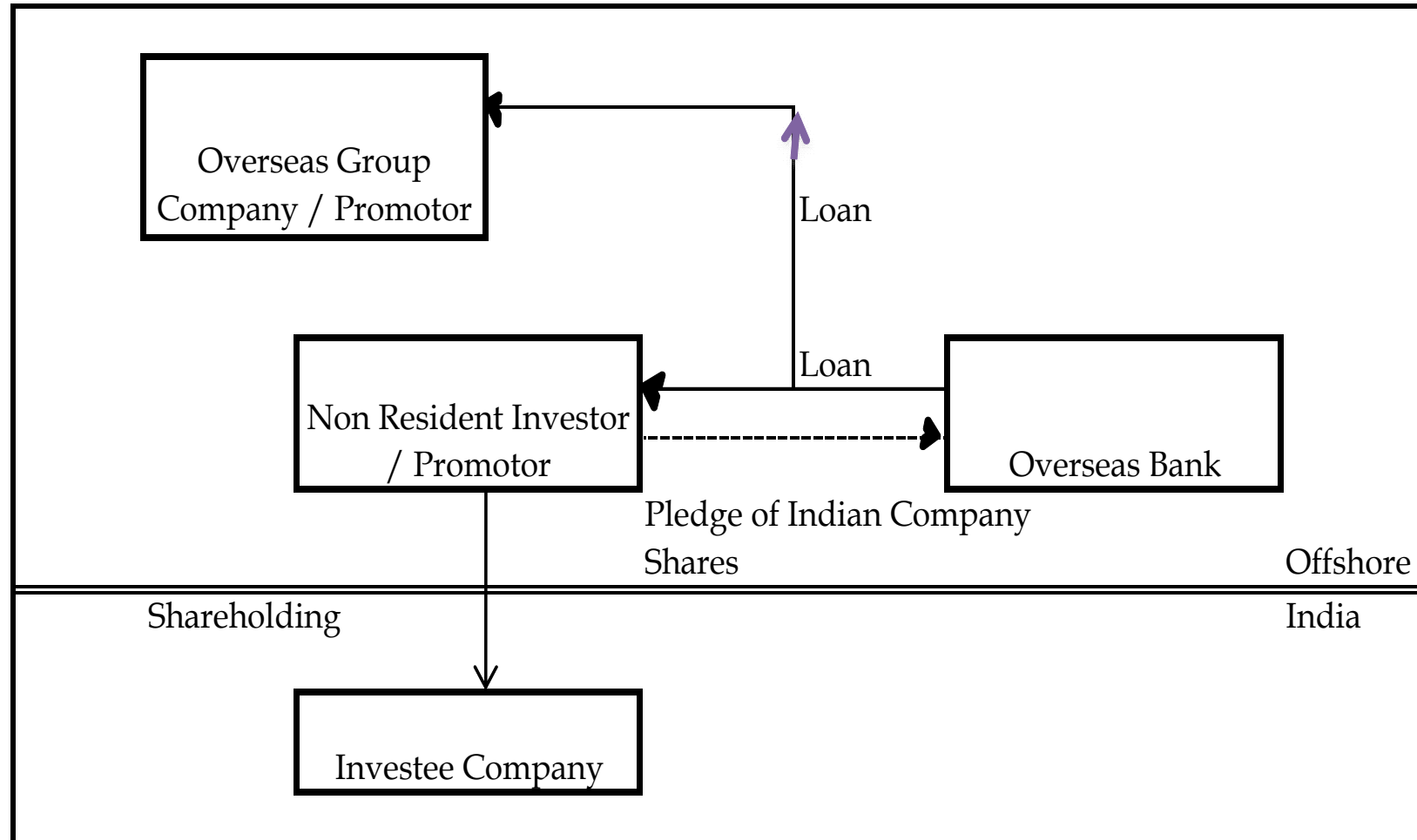




Pledge by promoter in favour of overseas lender of Indian Company:

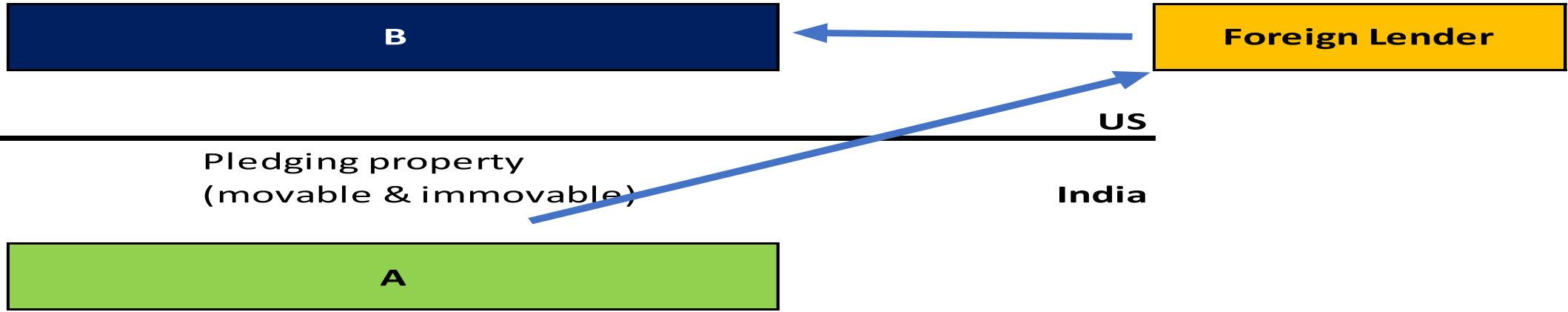


Pledge by Non Resident shareholders in favour of overseas lender to secure credit facilities to Non Resident shareholders itself or its Group Company



Case Study

(A is pledging its property in the US)



| <u>Balance Sheet as on 31st Mar 2021</u> | <u>Amount (INR in lacs)</u> |
|--|-----------------------------|
| Immovable property | 100 |
| <i>Apartment in the US</i> | |
| Movable property | 50 |
| Current Assets | 50 |
| Total Assets | 200 |
| | |
| Share Capital | 130 |
| Long Term Loans | 40 |
| Current Assets | 30 |
| Total Liabilities | 200 |

| CASE | CHARGE CREATED ON | HELD IN/ OF | IN FAVOR OF | Route |
|------|--------------------|--|--|--|
| 1 | SHARES | JV/WOS/SDS (IRRESPECTIVE OF LEVEL) | DOMESTIC/ OVERSEAS LENDER | AUTOMATIC |
| 2 | DOMESTIC ASSETS | IP (OR ITS GROUP/ SISTER/ ASSOCIATE CONCERN OR INDIVIDUAL PROMOTER) | OVERSEAS LENDER TO JV/WOS/SDS | APPROVAL (IF NOT AS PER CONDITIONS SPECIFIED) |
| 3 | OVERSEAS ASSETS | JV/WOS/SDS | DOMESTIC LENDER TO IP/ JV/WOS/ SDS | APPROVAL (IF NOT AS PER CONDITIONS SPECIFIED) |

Value of fund based or non fund based is reckoned as financial commitment for IP

Total FC remains within limit.

The overseas lender, should be regulated and supervised as a bank

'No objection' from domestic lender; or

In whose favor charge is already created on domestic assets.

'No objection' from domestic/ overseas lender

In whose favor charge is already created on overseas assets.

Specific Conditions for Creation of Charge on Shares

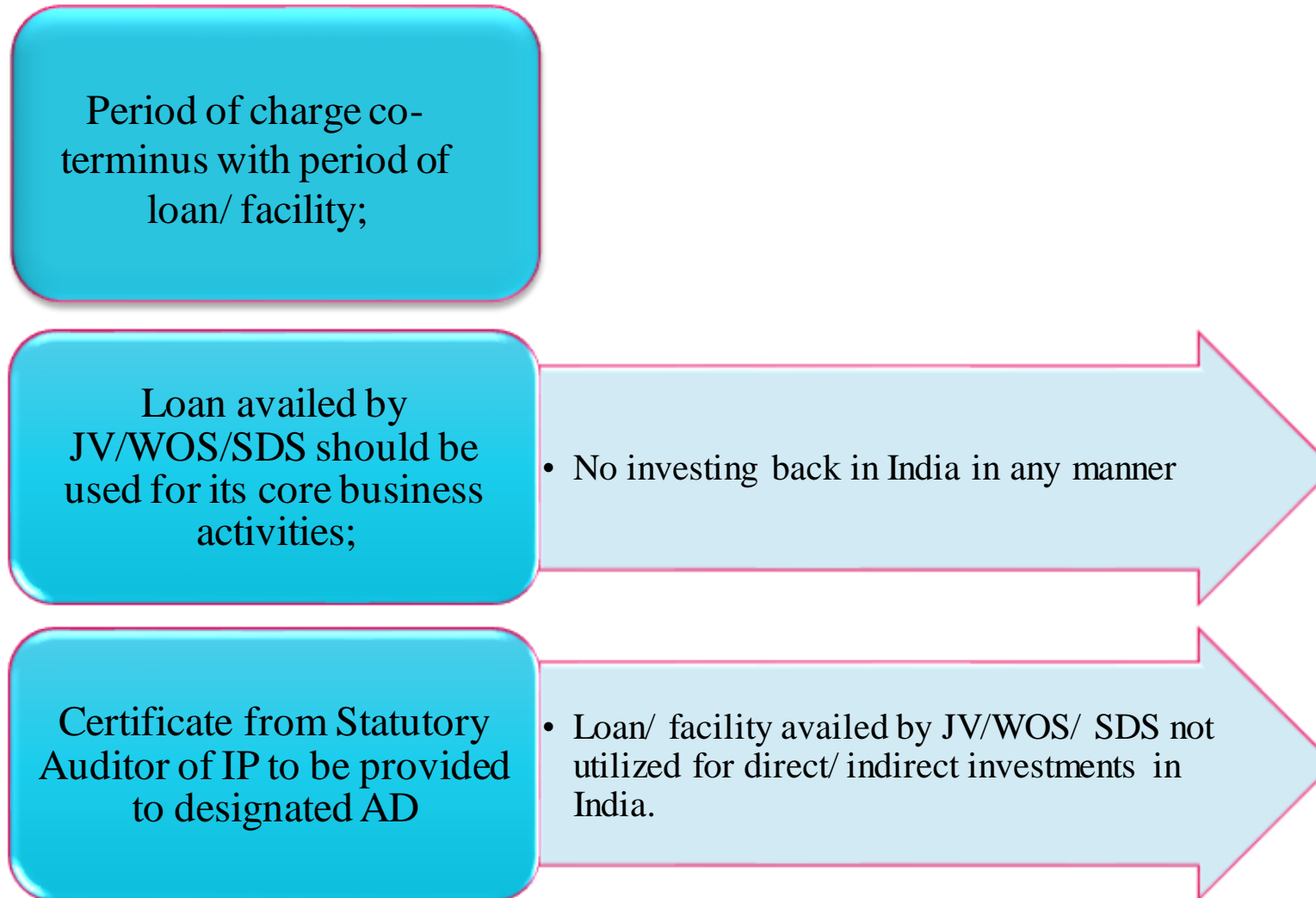


| CASE | CHARGE CREATED ON | HELD IN/ OF | IN FAVOR OF | Route |
|-------------|------------------------------|--|---------------------------------|--------------|
| 1 | SHARES | JV/WOS/SDS (IRRESPECTIVE OF LEVEL) | DOMESTIC/ OVERSEAS LENDER | AUTOMATIC |

**Specific conditions for
creation of charge on Shares**



Specific conditions for creation of charge on Shares



**Specific conditions for
creation of charge on
Domestic Assets**



| Case | Charge created on | Held in/ of | In favor of | Route |
|------|-------------------|---|-----------------------------------|---|
| 1 | Domestic Assets | IP (or its group/ sister/associate concern or individual promoter) | Overseas lender to JV/WOS/ SDS | Approval (if not as per conditions specified) |

Specific conditions for creation of charge on Domestic Assets

Domestic assets, are not securitized.

Period of charge co-terminus with period of loan/ facility

Loan availed by JV/WOS/SDS should be used for its core business activities

- No investing back in India in any manner

Certificate from Statutory Auditor of IP to be provided to designated AD

- Loan/ facility availed by JV/WOS/ SDS not utilized for direct/ indirect investments in India.

Overseas lender to undertake that they shall transfer the domestic assets by way of sale to a resident only;

- In the event of enforcement of charge.

On invocation of charge, resulting remittance exceeds prescribed limit of FC of IP (prevailed at the time of creation of charge)

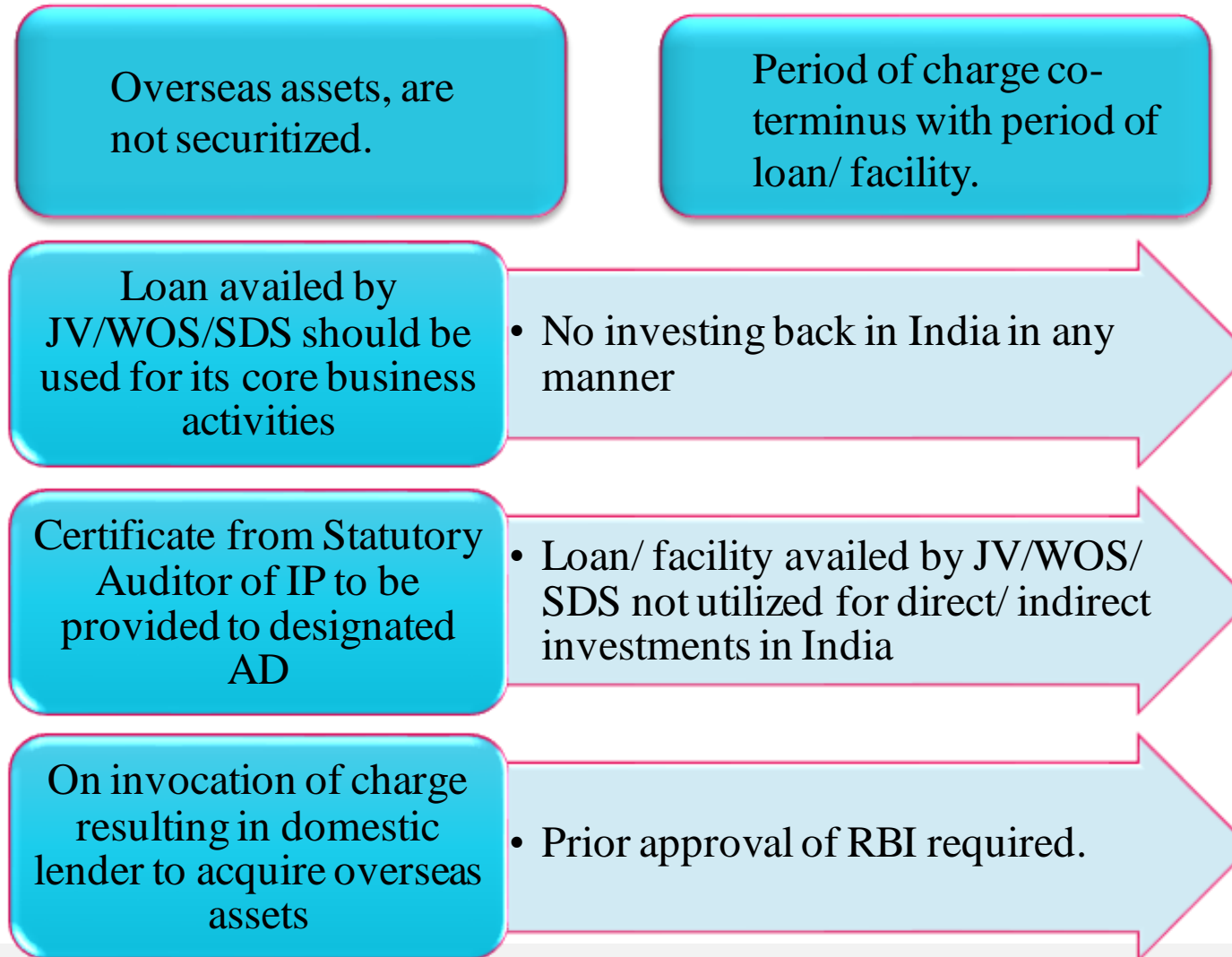
- Shall require RBI approval

**Specific conditions for
creation of charge on
Overseas Assets**



| Case | Charge created on | Held in/ of | In favor of | Route |
|------|-------------------|-------------|------------------------------------|--|
| 1 | Overseas Assets | JV/WOS/SDS | Domestic lender to IP/ JV/WOS/ SDS | Approval (if not as per conditions specified) |

Specific conditions for creation of charge on Overseas Assets



**Thanks
Your Queries**



Sudha@taxpertpro.com

