

# Overseas Direct Investments - FEMA Regulations

**Seminar on FEMA organised by :**

**Western India Regional Council - ICAI**

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# Statutory Framework

- ❑ Outbound Investment / Direct Investment Outside India is governed and regulated entirely by the RBI
- ❑ Section 6 of FEMA - Capital Account Transactions
- ❑ FEMA 120- FEM (Transfer or issue of any foreign security) Regulations, 2004 as amended from time to time , read with schedules.
- ❑ Master Direction on Direct Investment by Residents in JV/WOS Abroad  
*(updated as on 25<sup>th</sup> January, 2017)*
- ❑ Frequently asked Questions on Overseas Direct Investment Currently updated as on 12<sup>th</sup> April, 2017 Available on website ([www.rbi.org.in](http://www.rbi.org.in))

# Introduction

1. Overseas investments (or financial commitment) in :

- Joint Venture (JV) &
- Wholly Owned Subsidiaries (WOS)

have been recognized as important avenues for promoting global business by Indian entrepreneurs.

2. Joint ventures are perceived as a medium of:

- economic &
- business co-operation

between India and other countries.

3. Transfer of :

- Technology & skill
- Sharing of results of R&D
- Access to wider global market
- Promotion of brand image
- Generation of employment &
- Utilization of raw materials

available in India & in the host country are other significant benefits arising out of such overseas investments (or financial commitment).

# Introduction

4. They are also important drivers of foreign trade through increased exports of plant & machinery and goods & services from India and also a source of foreign exchange earnings by way of :
  - Dividend earnings, royalty, technical know-how fee and other entitlements on such investments (or financial commitment).

# Summary of Outward Foreign Direct Investment (OFDI)

Reporting date - Comparative Position : 01/01/2015-30/06/2017

(Amount in USD million)

Year	Equity	Loan	Guarantee Issued	Total Financial Commitment
	1	2	3	1+2+3
Jan'15-Dec'15	3,915.23	3,729.39	25,198.56	32,753.19
Jan'16-Dec'16	9,497.83	3,547.16	15,883.47	28,928.46
Jan'17-Jun'17	5,013.21	2,781.16	3,407.42	11,201.79
<b>Total</b>	<b>18,426.27</b>	<b>10,057.71</b>	<b>44,489.45</b>	<b>72,883.44</b>

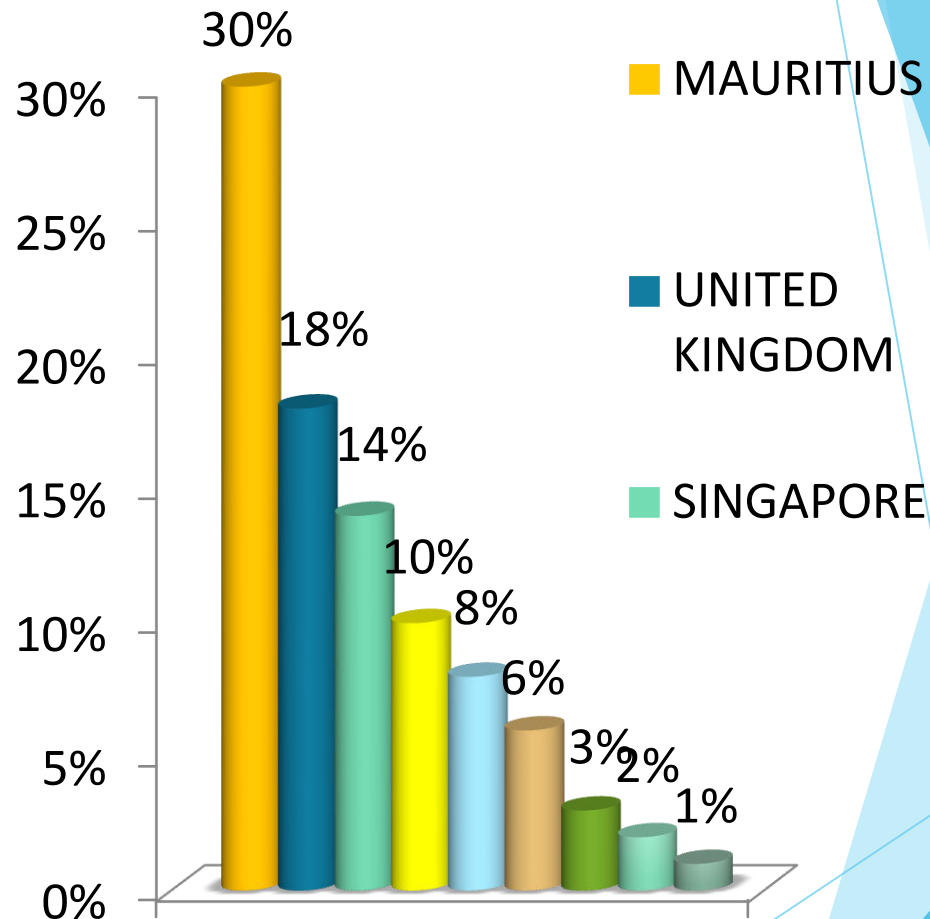
Source : [https://www.rbi.org.in/Scripts/Data\\_Overseas\\_Investment.aspx](https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx)

# Country wise Outward FDI from India (OFDI)

between January 1, 2017 and March 31, 2017

(Amount in USD Millions)

Country Name	Total Financial Commitment	Percentage
MAURITIUS	1,279	30%
UNITED KINGDOM	790	18%
SINGAPORE	599	14%
UNITED STATES OF AMERICA	451	10%
UNITED ARAB EMIRATES	332	8%
NETHERLANDS	260	6%
RUSSIA	131	3%
SWITZERLAND	98	2%
LUXEMBOURG	63	1%
OTHERS	300	7%
<b>Total</b>	<b>4,304</b>	<b>100%</b>



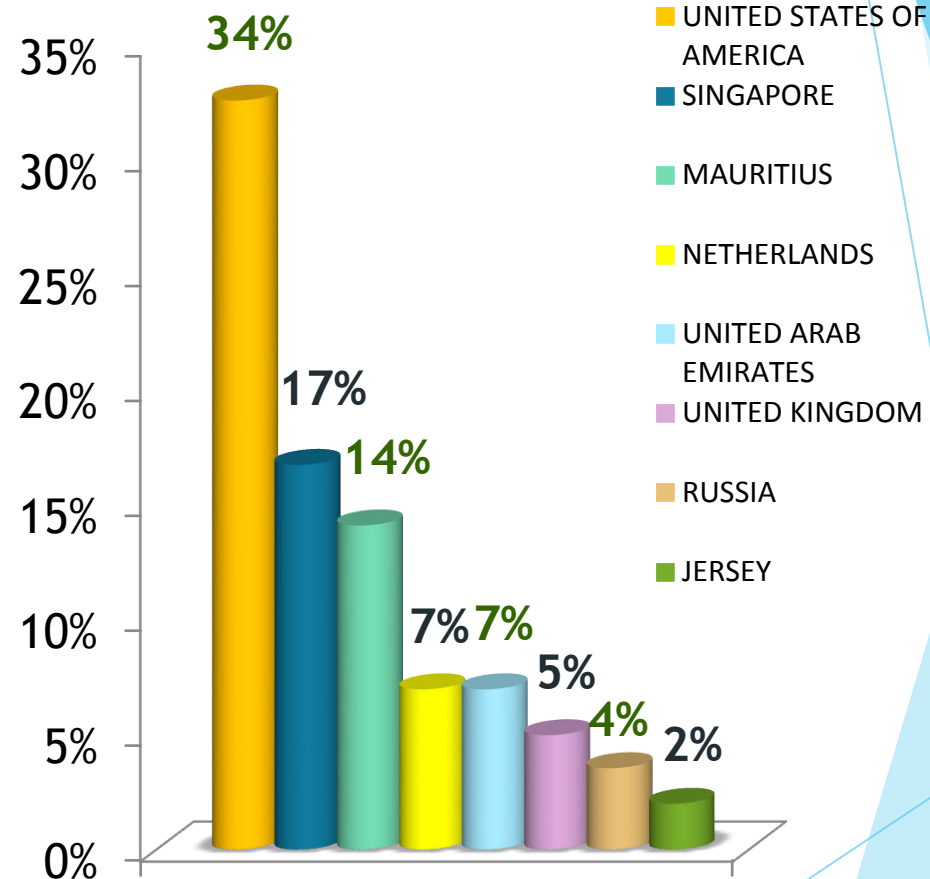
*Note : Remaining 7% forms party of various other countries. Hence we have not considered the same in the bar diagram.*

*Source : [https://www.rbi.org.in/Scripts/Data\\_Overseas\\_Investment.aspx](https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx)*

# Country wise Outward FDI from India (OFDI)

between April 1, 2017 and June 30, 2017  
(Amount in USD Millions)

Country Name	Total Financial Commitment	Percentage
UNITED STATES OF AMERICA	1,341	34%
SINGAPORE	657	17%
MAURITIUS	554	14%
NETHERLANDS	288	7%
UNITED ARAB EMIRATES	261	7%
UNITED KINGDOM	214	5%
RUSSIA	147	4%
JERSEY	71	2%
Others	393	10%
<b>Total</b>	<b>3,926</b>	<b>100%</b>



*Note : Remaining 10% forms party of various other countries. Hence we have not considered the same in the bar diagram.*

*Source : [https://www.rbi.org.in/Scripts/Data\\_Overseas\\_Investment.aspx](https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx)*



# Important Definitions

## Direct Investments Outside India

- Investment by way of contribution to the capital of a foreign entity ; or
- Subscription to the Memorandum of Association of a foreign entity; or
- By way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but
- Does not include portfolio investment

## Joint Venture

- means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party(IP) makes a direct investment

# Important Definitions

## Wholly Owned Subsidiary (WOS)

Means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian party.

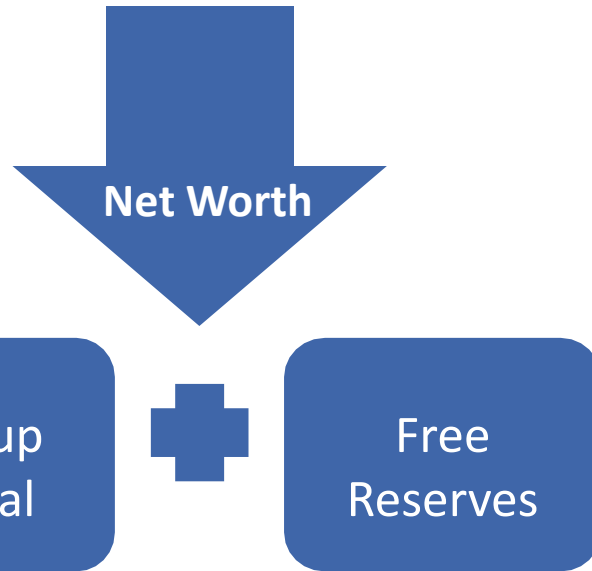
## Indian Party



Provided that :

Where more than one such entities make an investment in foreign entity, all such companies or bodies or entities shall together constitute the “Indian Party”

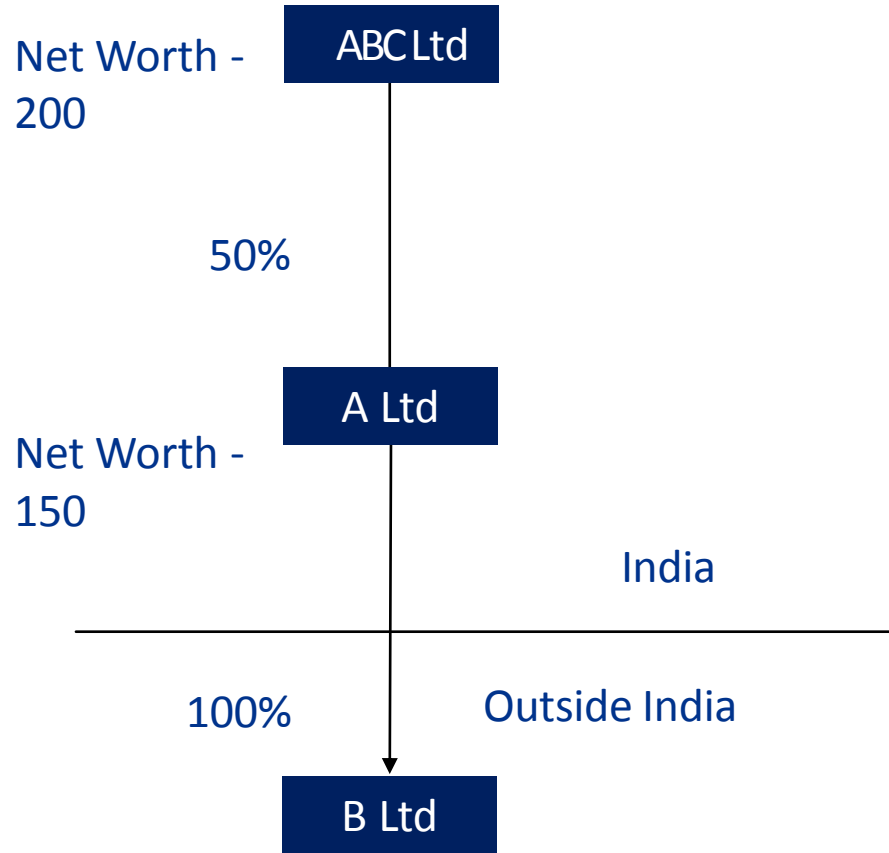
# Net Worth - Meaning



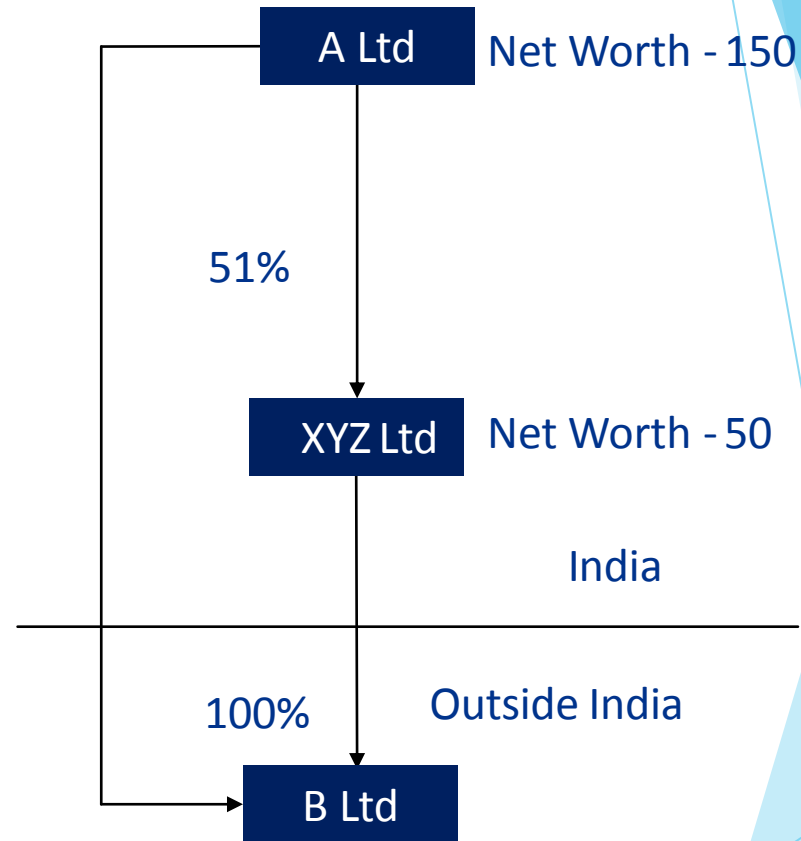
- For calculation of Net worth of the Indian party following to be considered:
  - Net worth of the Indian Investing company (say A Ltd).
  - Net worth of the Indian Holding company of A Ltd (which holds **at least 51% stake** of A Ltd.).
  - Net worth of the Indian Subsidiary Company of A Ltd (in which A Ltd holds **at least 51%**).
- The above facility is not available to partnership firms. Also partnership firm's net worth cannot be taken into account by an incorporated entity.
- The holding or subsidiary company furnishes letter of disclaimer in favour of the Indian Party.

*(As per FAQ No. 33 as on 12<sup>th</sup> April, 2017)*

# Net Worth - Meaning



Net Worth of A Ltd : 150



Net Worth of XYZ Ltd :  $150 + 50 = 200$   
*(FAQ No. 33 as on 12<sup>th</sup> April, 2017)*

# Restrictions

1. Investment cannot be in a foreign entity engaged in real estate business# or banking business, without prior approval of RBI
2. An overseas entity, having direct or indirect equity participation by an Indian Party
  - Shall not offer financial products linked to Indian Rupee without specific approval of the Reserve Bank
3. The Indian Party should not be:
  - Under investigation by any investigation / enforcement agency or regulatory body\*
  - On Reserve Banks's Exporters' caution list; or
  - On list of defaulters to the banking system circulated by the Reserve Bank, Credit Information Bureau (India) Ltd. (CIBIL) or any other credit information company; or

***\*UIN not issued unless investigation is completed***

*#Real Estate meaning buying & selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential / commercial premises, roads or bridges*

# Restrictions

4. Investments not permitted in countries identified by Financial Action Task Force (FATF) as non-cooperative countries and territories or countries notified by RBI *{inserted vide A.P. (DIR Series) Circular No. 28 dated January 25<sup>th</sup> , 2017}* *(As per FAQ No. 61 as on 12<sup>th</sup> April,2017)*
  - Iran and North Korea (Call for Action)
  
5. Investments in :
  - Pakistan only through approval route
  - Nepal only in Indian Rupees
  - Bhutan in Indian Rupees and freely convertible currencies

# General Permission

- ❑ **Persons(Individual) residents in India** shall purchase / acquire securities
  - Out of funds held in RFC Account
  - As bonus shares on existing holding of foreign currency shares
  - Out of their foreign currency resources outside India when not permanently resident in India. *(As per FAQ No. 3 as on 12<sup>th</sup> April,2017)*
- ❑ Not permanently resident means a resident person employed in India for a specific duration(irrespective of length) or specified job the overall duration of which does not exceed 3 years.
- ❑ General permission has also been granted to persons residents in India to sell the securities purchased by way of above modes.
- ❑ A person resident in India being a company incorporated in India or a partnership firm registered under Indian Partnership Act , 1932 , may undertake agricultural operations including purchase of land incidental to such activity either directly or through their overseas offices (within overall limits of Regulation 6)

***Section 6(4) of FEMA – Resident may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if acquired when he was NR or inherited from a NR***

# Valuation of Shares

- ❑ Requirement of valuation of shares:
  - Valuation required for investment in existing company outside India
  - No valuation required for newly set-up company outside India
  - Valuation not required for issue of right shares
- ❑ Remittance for outbound investments can be of an amount which is at or lower than the value of investment
  - Essentially foreign exchange utilized cannot be more than value per share
- ❑ No valuation methodology prescribed under FEMA – Internationally accepted method can be used
- ❑ **Valuation Certificate to be obtained from :**
  - In case of investment by way of partial or full acquisition of an existing company
    - If Investment is more than USD 5mn. – by a category I Merchant Banker registered with SEBI or a registered Investment Banker/ Merchant banker in host country
    - In all other cases by a CA or CPA
  - In case of investment is by way of swap of shares – irrespective of amount
    - By registered Category I Merchant Banker or Registered Merchant Banker in the host country



# How to make investment?

1. Indian Party  $\xrightarrow[\text{with FORM ODI}]{\text{to approach}}$  AD Bank

All transactions relating to a JV / WOS should be routed through one branch of an Authorised Dealer Bank

2. To check if all prior FEMA compliance for Indian Party should have been completed (filing of APR forms for other JV/WOS required too).

3. AD may ask for details of investment abroad such as :

If not through SPV

- . Project Report / Feasibility Study

If through SPV

- . Project Report / Feasibility Study
- . Details of Underlying investment

4. Investments  $\longrightarrow$  SPV  $\longrightarrow$  allowed under Automatic Route

- All conditions applicable for direct investment apply also to investments through SPV
- Underlying investments through SPV to be reported to RBI through AD Bank

# Routes for ODI by Indian Parties

## Automatic Route

- An Indian party does not require any prior consent from RBI
- An Indian party is required to approach the AD category – 1 bank
- ODI investment within limit of 400% of Indian Party's Net Worth
- ODI by Indian Party engaged in financial services sector (subject to prescribed conditions)
- ODI in oil sector (subject to prescribed conditions)

## Approval Route

- An Indian party is required to take prior approval of the Reserve Bank for which a specific application in FORM ODI with prescribed documents.
- ODI not meeting conditions prescribed for automatic route
- Overseas investments by :
  - proprietorship concerns
  - unregistered partnership firms
  - Registered Trusts/ Societies satisfying certain eligibility criteria.
- Indian party undertaking financial commitment without equity contribution in JV/WOS

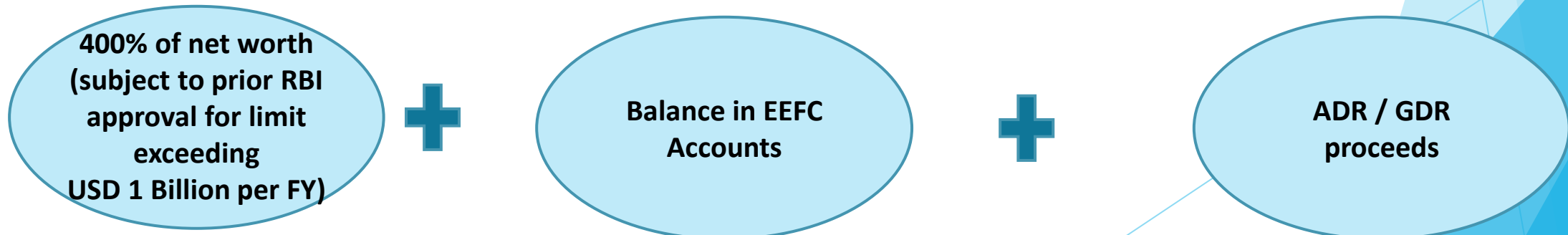
# Financial Commitment- Meaning

Financial Commitment is the sum total of the following:

- 100% of the amount of equity shares and/or Compulsorily Convertible Preference Shares (CCPS)
- 100% of the amount of other preference shares (*considered as loans*);
- 100% of the amount of **Loan**;
- 100% of the amount of **guarantee** including corporate and personal ( but other than performance guarantee) issued by the Indian Party;
- 100% of the amount of **bank guarantee** issued by a resident bank on behalf of JV or WOS of the Indian party and the bank guarantee is backed by a counter guarantee/collateral by the Indian party;
- 50% of the amount of **performance guarantee**.

**Ceiling not applicable for investments out of EEFC A/c or funds raised through ADRs / GDRs.**

**Maximum limit would be:**

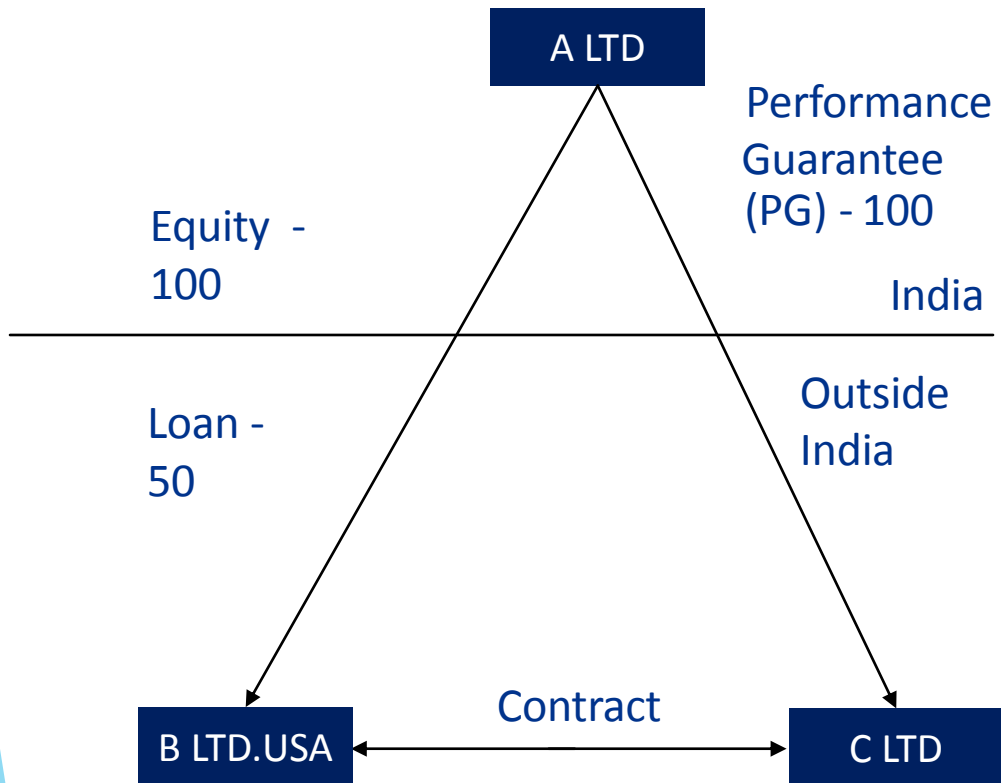


# Financial Commitment

## A Ltd, Indian Co.

Particulars	Option 1	Option 2
Net worth of A Ltd.	100	100
Balance in EEFC Account	100	300
Acquired B Ltd, USA at a cost of :	60	30
<b>What is the balance limit available to Indian Co. for further overseas acquisitions?</b>		
<b>Answer</b>	<b>440</b>	<b>670</b>

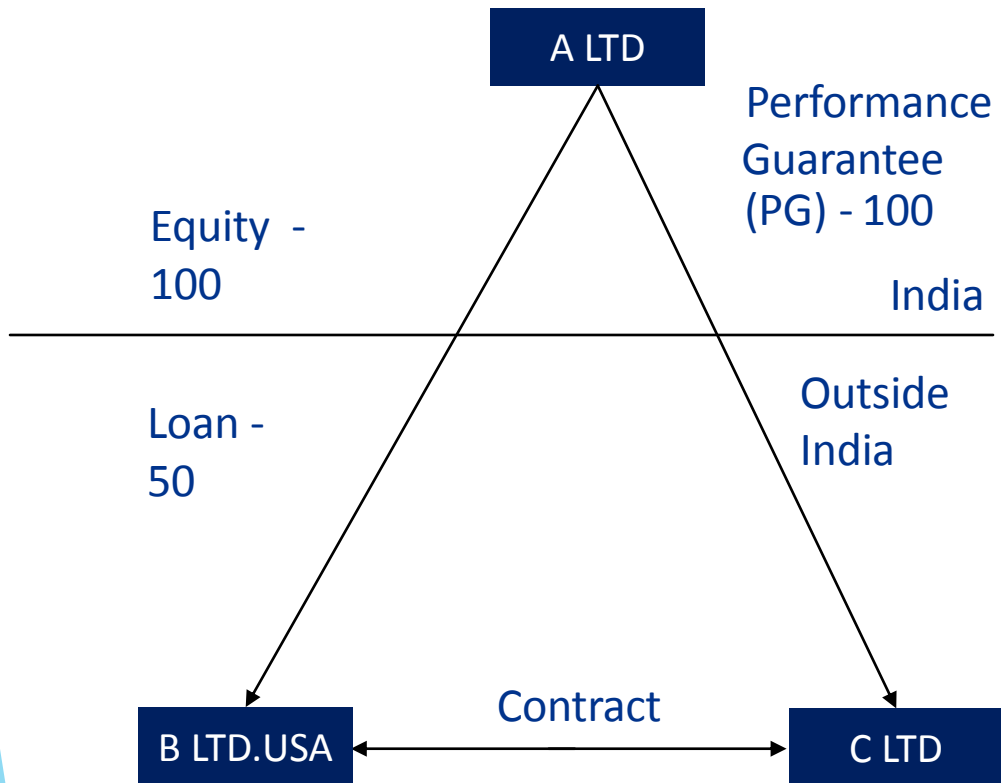
# Case Study - Financial Commitment (1/2)



## FACTS:

1. B Ltd., a company incorporated in USA is a wholly owned subsidiary of A Ltd. an Indian Co.
2. A Ltd.'s (with net worth of 50) investment in B Ltd are as under:
  - Equity Contribution -100 ; Loan – 50
  - A Ltd has also given PG of 100 to C Ltd on behalf of B Ltd

# Case Study - Financial Commitment (2/2)



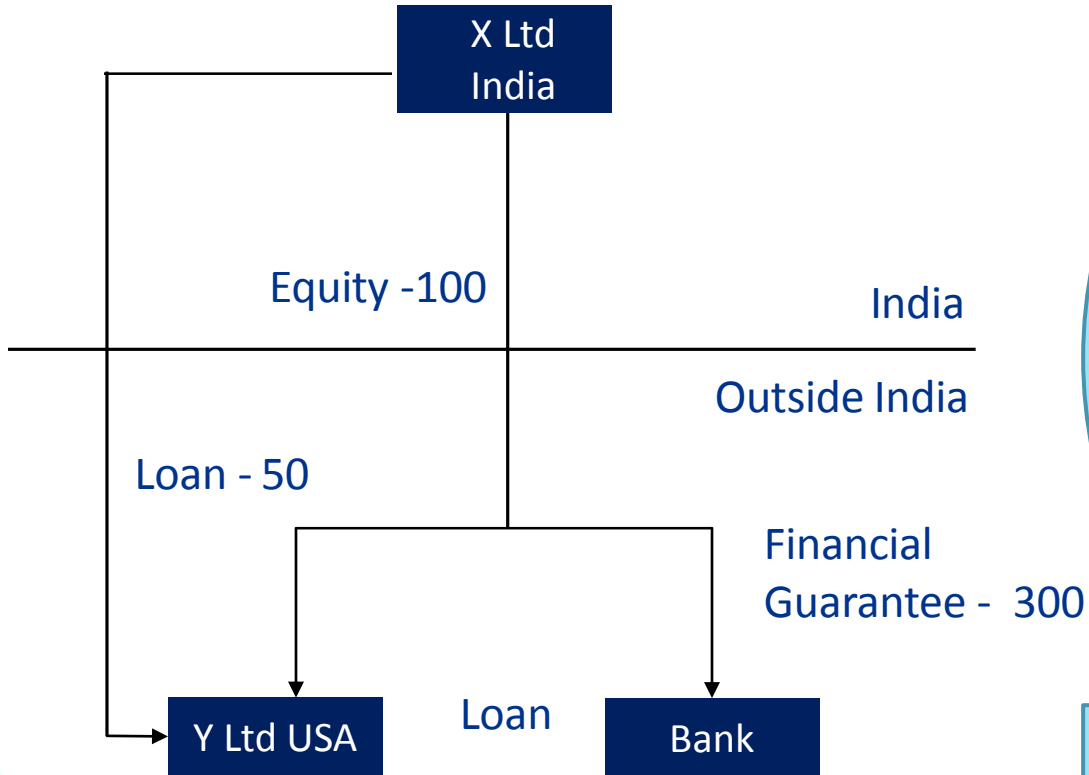
## ISSUE :

1. What is the financial commitment of A Ltd?
2. If the PG is invoked by C Ltd. whether A Ltd can remit funds from India on account of such invocation?

## VIEW :

1. Financial Commitment of A Ltd :  
 $100 (E) + 50 (L) + 50 (PG) = 200$
2. In cases where invocation of the performance guarantee breach the limit of the prescribed financial commitment, the Indian Party is required to seek prior approval of the Reserve Bank before remitting funds from India, on account of such invocation.

# Case Study – Financial Commitment



## FACTS:

- Y Ltd., a company incorporated in USA is a wholly owned subsidiary of X Ltd., an Indian company.
- X Ltd.'s investment in Y Ltd are as under:
  - Equity contribution – 100
  - Loan – 50
  - Financial Guarantee of 300 to a Bank on behalf of B Ltd

What is the financial commitment?

**Financial Commitment of X Ltd: 100 (E) + 50 (L) + 300 (FG) = 450**

# Loan and Guarantee

## **With equity participation :**

- ❑ Indian Party/ entity can extend loan / guarantee only to JV/WOS in which it has equity participation

## **Without equity participation :**

- ❑ With prior approval, Indian Party can extend loan / guarantee without equity participation provided:
  - It as per business requirement of Indian Party ; and
  - As per legal requirement of host country



# Loan and Guarantee

## Loan

- ❑ Indian entity can extend loan only to JV/WOS in which it has equity participation.

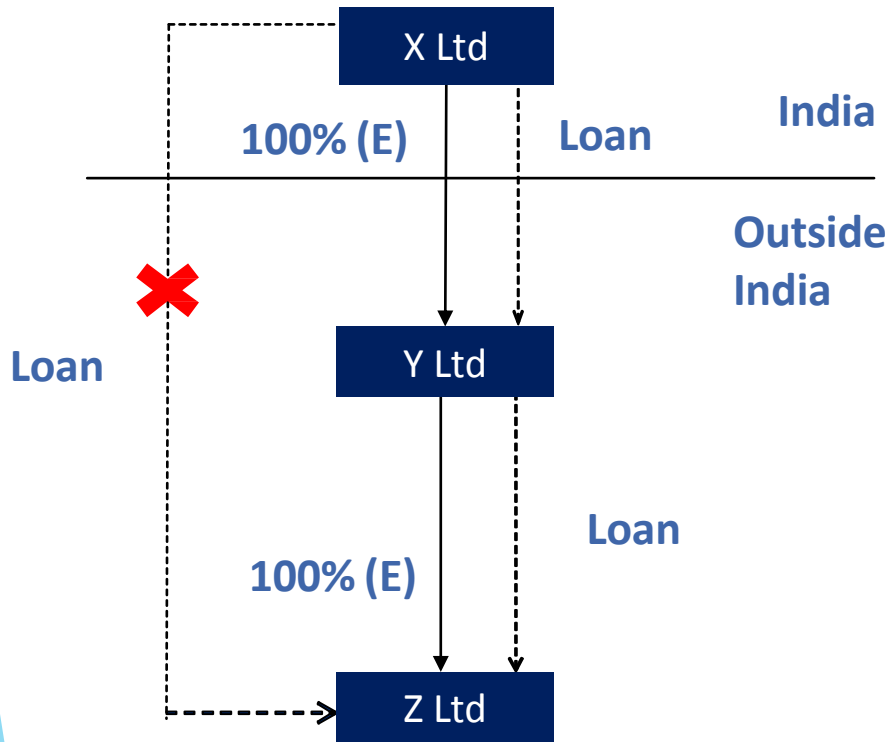
## Guarantee

- ❑ Indian Party can issue Guarantee (corporate or personal) (Primary or collateral ):
  - Personal guarantee by the indirect resident individual promoters of the Indian Party
  - Guarantee by the promoter company, group company, sister concern or associate company in India
  - Provided that :
    - All the financial commitments, including all forms of guarantees and creation of charge are within the overall ceiling prescribed for the Indian Party
    - No Guarantee should be 'open-ended'. The amount and period of guarantee should be specified upfront.

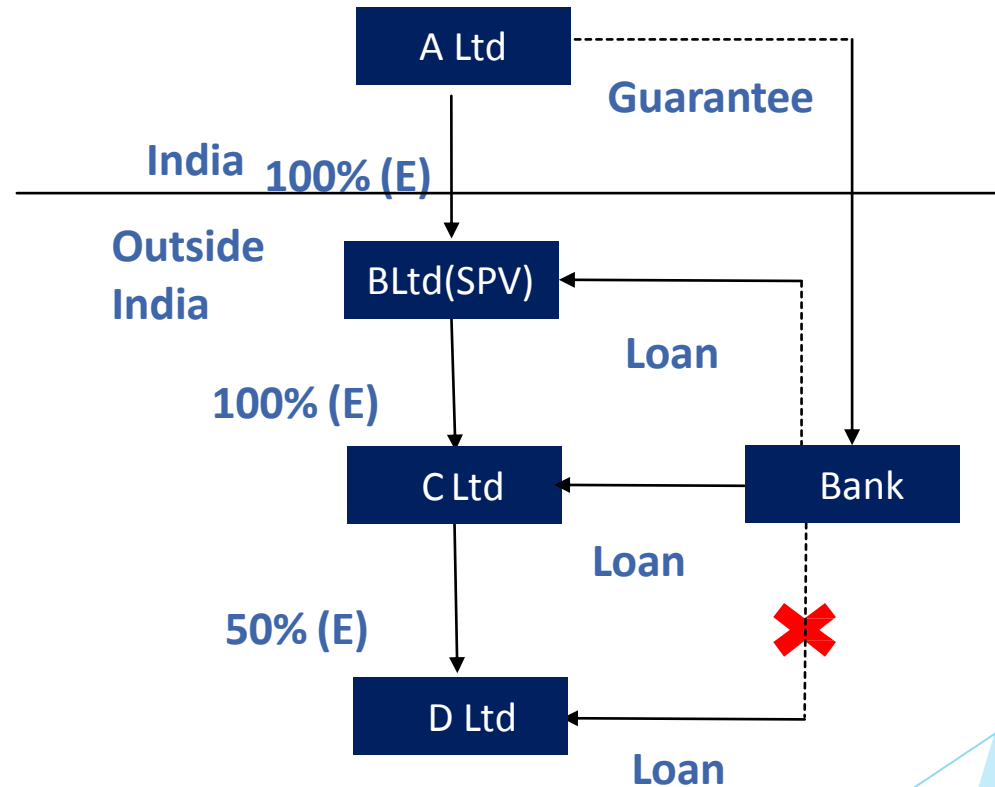
# Loan and Guarantee

- To its step-down first generation operating subsidiary – JV / WOS may be SPV or Operating company under automatic route within the prevailing limit.
- To its step-down second generation or subsequent level operating subsidiaries – Under the prior RBI approval route provided the Indian Party holds directly / indirectly 51% stake in the overseas subsidiary for which such guarantee is intended to be issued.
- AD in India may also give a Bank guarantee / issue SBLC.

# Case Study - Loan and Guarantee

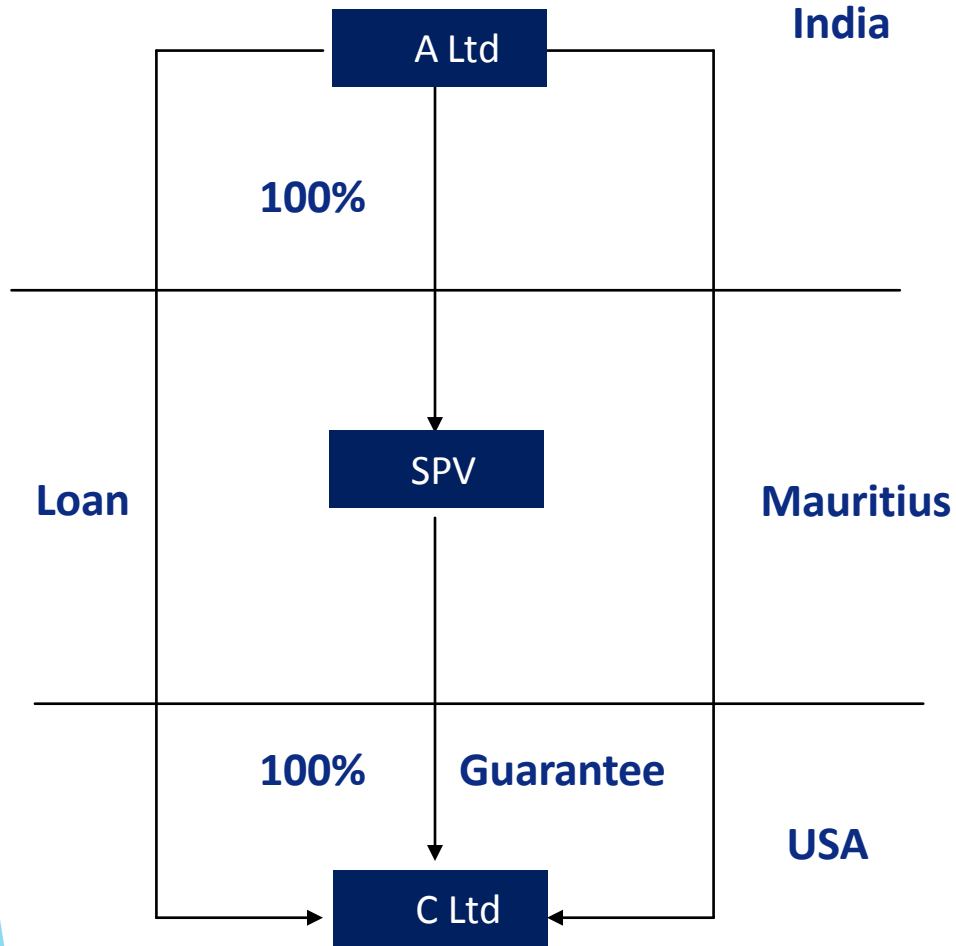


**Direct Loan from X Ltd to Z Ltd – Not Permissible**



**Shareholding of C Ltd in D Ltd 50% – Guarantee Not Permissible (i.e. should hold more than 51% or more)**  
*( As per FAQ No. 35 as on 12<sup>th</sup> April , 2017)*

# Case Study - Loan and Guarantee



- A Ltd proposes to set up a SPV in Mauritius through which investments would be made in USA (C Ltd.).
- Whether investment through SPV is permitted under the automatic route?  
**YES ( ✓ )**
- Whether A Ltd can fund (Loan) to C Ltd directly?  
**NO ( ✗ )**
- Whether A Ltd can give guarantee to or on behalf of C Ltd for its business?  
**YES ( ✓ )**

# Investment in Oil sector

- ❑ AD Category – I banks, may permit investments in unincorporated / incorporated entities overseas in the oil sector (i.e. for exploration and drilling for oil & natural gas , etc.) without any limit by:
  - Navaratna PSUs,
  - ONGC Videsh Ltd (OVL) &
  - Oil India Ltd(OIL)

Provided :

such investments are approved by the competent authority

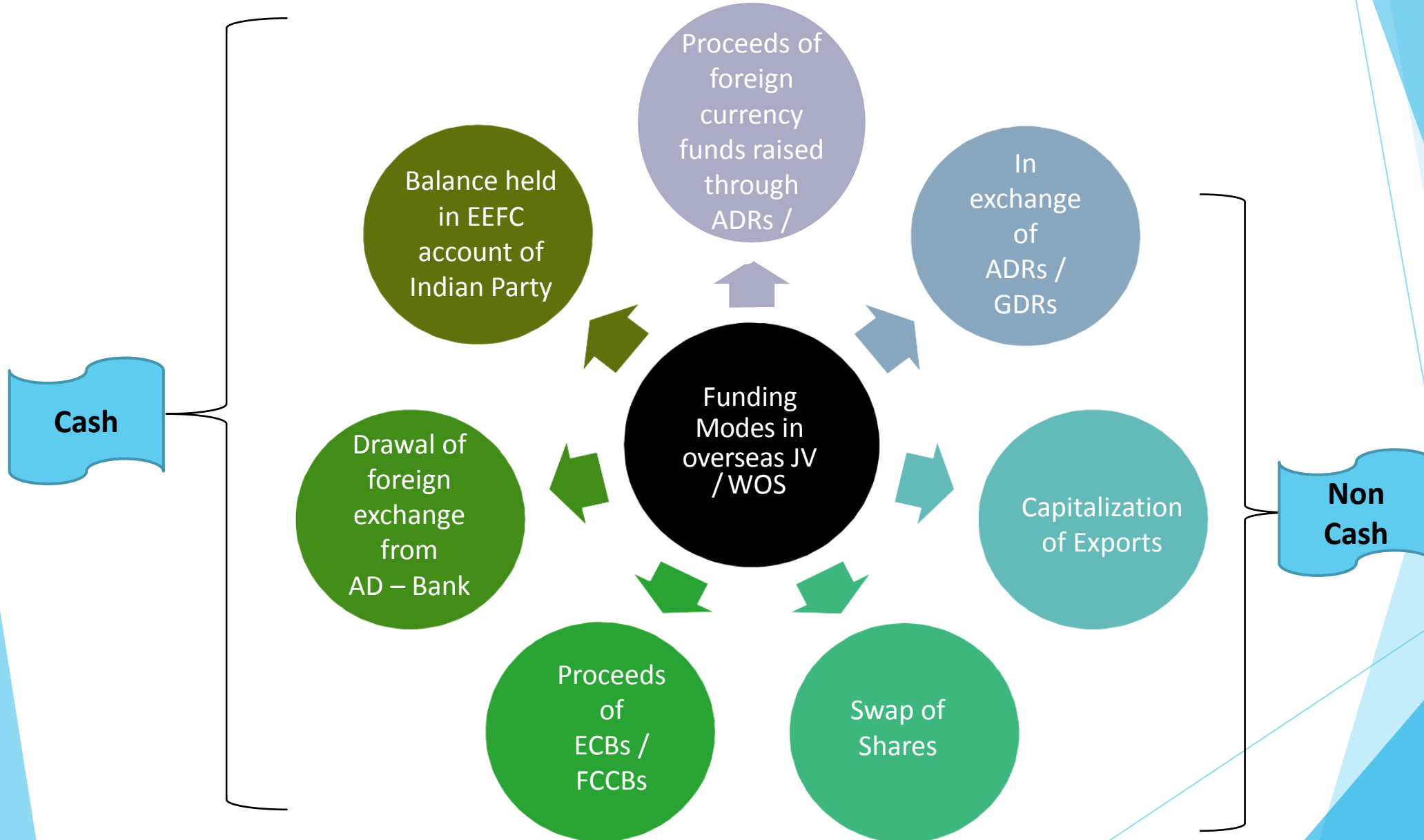
- ❑ Other Indian companies are also permitted under Automatic Route to invest in unincorporated entities overseas provided:
  - The proposal has been approved by competent authority &
  - Duly supported by certified copy of Board resolution approving such investment.

***(Investment in excess of the prescribed limit shall require prior approval of the Reserve Bank.)***

# Construction & Maintenance of submarine cable systems

- ❑ Indian Parties are also permitted to participate in a consortium with other international operators to construct and maintain submarine cable systems on coownership basis under the automatic route.
- ❑ AD Category -I banks may allow remittances by Indian companies for overseas direct investment, after ensuring:
  - that the Indian company has obtained necessary licence from the Department of Telecommunication, Ministry of Telecommunication & Information Technology, Government of India
  - to establish, install, operate and maintain International Long Distance Services and also by obtaining a certified copy of the Board Resolution approving such investment.
- ❑ These transactions may be reported by the Indian Parties investing in the consortium to the AD Category-I banks in Form ODI.

# Method Of Funding



# Capitalisation of exports and other dues

1. Indian Party is permitted to capitalise the payments due from the foreign entity
  - towards exports, fees, royalties or any other dues
  - for supply of technical know-how, consultancy, managerial and other services within the ceilings applicable
2. Capitalisation of export proceeds remaining unrealised beyond the prescribed period of realization will require prior approval of the Reserve Bank.
3. Indian software exporters are permitted to receive 25% of the value of their exports
  - to an overseas software start-up company in the form of shares
  - without entering into Joint Venture Agreements , with prior approval of the Reserve Bank



# ODI in Financial Service Sector

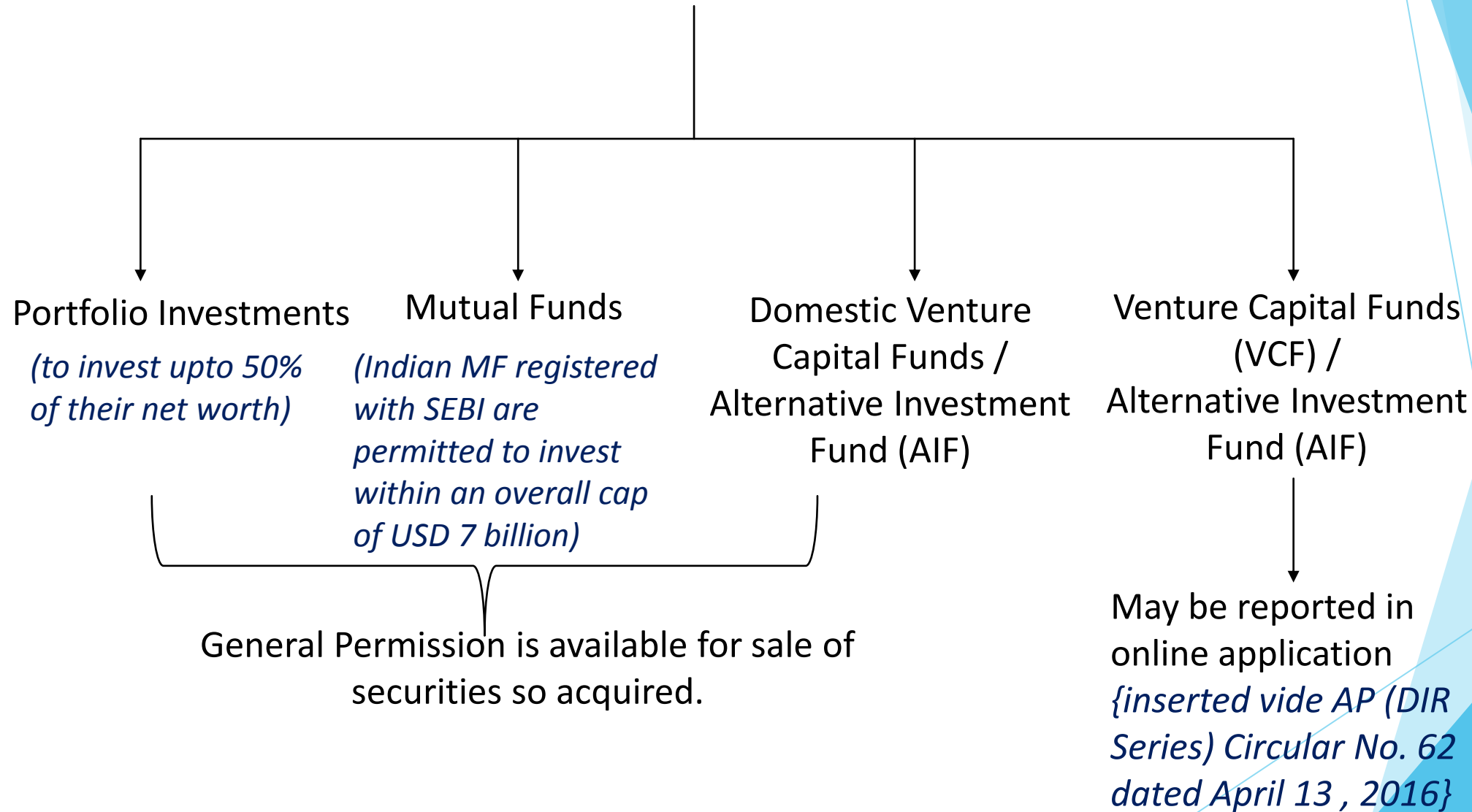
- Not defined in Outbound Regulations.
- Guidance can be taken from Inbound Regulations and ODI form
  - E.g. Banks, NBFC, Insurance, Asset management etc.
  - Trading in Commodities Exchanges overseas and setting up JV/WOS for trading in overseas exchanges will be reckoned as Financial services activity and require clearance from SEBI.

## Additional conditions to be satisfied for ODI in financial services sector

- Registration with appropriate regulatory authority in India.
- Earned net profits during the preceding 3 years from financial services activities.
- Approval from concerned regulators in India and abroad for such investment.
- Compliance with prudential norms relating to capital adequacy norms as prescribed by the concerned regulatory authority in India.

***Regulated entities in financial sector making investments in any activity overseas are required to comply with additional conditions. Unregulated financial services sector entities can invest in non-financial sectors subject to compliance with provisions of Regulation 6 of FEMA 120.***

# Investment in equity of companies registered overseas / rated debt instruments



# Investment by Mutual Funds

**Indian Mutual Funds registered with SEBI are permitted to invest within an overall cap of USD 7 billion in :**

- i. ADRs / GDRs of Indian and foreign companies
- ii. Equity of overseas listed companies
- iii. Initial & follow on public offerings
- iv. Foreign debt securities in the countries with fully convertible currencies
- v. Money market instruments
- vi. Repos in form of investment (should not involve any borrowing of funds by mutual funds)
- vii. Government securities
- viii. Derivatives
- ix. Short term deposits with banks overseas
- x. Units / securities issued by overseas Mutual Funds or Unit Trusts registered with overseas regulators and investing in :
  - Aforesaid securities
  - Real Estate Investment Trusts (REITs) listed on recognized stock exchanges overseas
  - Unlisted overseas securities (not exceeding 10% of their net assets)

# ODI- Approval Route

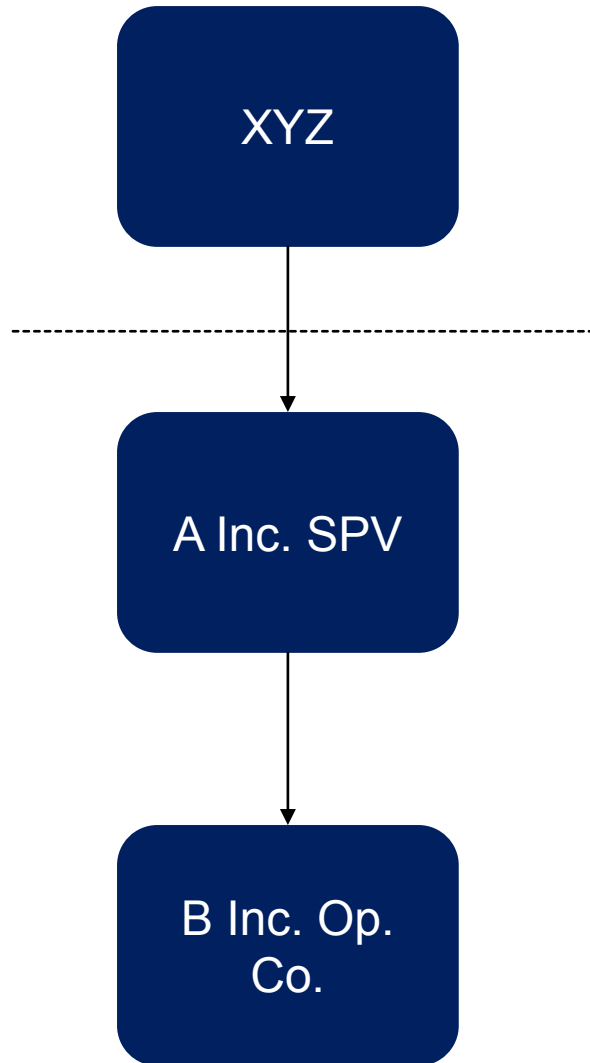
- ❑ Cases which are not covered under Automatic Route.
- ❑ Specific application to RBI with necessary documents in Form ODI through the designated AD – Bank.
- ❑ RBI would inter alia consider the following factors:
  - Prima facie viability of JV/WOS outside India;
  - Contribution to external trade and other benefits which will accrue to India through such investment;
  - Financial position and business track record of the Indian party and foreign entity;
  - Expertise and experience of the Indian party in the same or related line of activity of the JV / WOS outside India.

# ODI- Approval Route

## Details & Documents

- Applicant to approach designated AD with the proposal along with supporting documents.
- A letter from the designated AD of the IP in a sealed cover mentioning the following details :
  - Transaction number generated by the OID application
  - Brief details of the Indian entity
  - Brief details of the overseas entity
  - Background of the proposal, if any
  - Brief details of the transaction
  - Reason/s for seeking approval mentioning the extant FEMA provisions.
  - Observations / Recommendations of the designated AD Bank
- A letter from the IP addressed to the designated AD Bank
- Board Resolution for the proposed transaction
- Diagrammatic representation of the organizational structure with all subsidiaries of IP horizontally and vertically with their stake (direct & indirect) & status (whether Op Co. or SPV)
- Incorporation certificate and valuation certificate for the overseas entity (if applicable)
- Other relevant documents properly numbered, indexed and flagged
- Allotment of UIN does not constitute approval

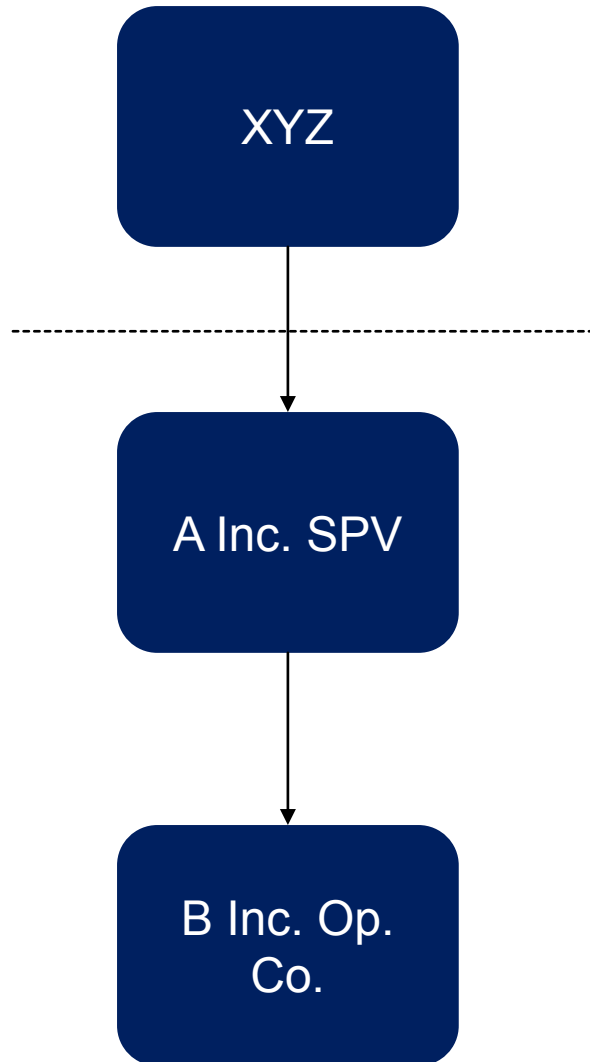
# Case Study – Investment without Remittance (1/2)



## FACTS:

- XYZ intends to invest directly in B Inc.
- Instead of remitting funds, XYZ proposes to wind-up its SPV A Inc.

# Case Study – Investment without Remittance (2/2)



## ISSUE :

Can XYZ invest in B Inc. without sending remittance from India?

## VIEW :

1. In case of Investment without remittance from India, ODI Form still required
2. No receipt of investment proceeds in India post winding-up of SPV.
3. Investment without remittance on account of corporate action allowed only under Approval Route
4. Need to justify bonafide purpose and intent

# Investments in Energy & natural resources sector

- ❑ Reserve Bank will consider applications for investment (or financial commitment) in JV/WOS overseas in the energy and natural resources sectors (e.g. oil, gas, coal and mineral ores) in excess of the prescribed limit of financial commitment.
- ❑ AD Category - I banks may forward such applications from their constituents to the Reserve Bank as per the laid down procedure.

## Investment through Bidding or tender procedure

- ❑ An AD Category - I bank in accordance with the provisions of Regulation 14 of the Notification may:
  - allow an Indian Party to remit earnest money deposit or issue a bid bond guarantee
  - for acquisition of a foreign company
  - through bidding and tender procedure.



# Overseas investments by Proprietorship concerns and Registered Trust / Society

- ❑ A Proprietorship concern / unregistered partnership firm in India are required to comply with following terms and conditions under approval route:
  - To be classified as 'Status Holder'
  - Has proven track record i.e. the export outstanding does not exceed 10% of the average export realization of the preceding three years and a consistently high export performance
  - Comply with KYC Norms
  - Does not come under the adverse notice of any Government agency
  - Amount of proposed investment does not exceed 10% of the average of last three year's export realization or 200% of the new owned funds of the proprietorship concern / unregistered firm in India, whichever is lower.

# Overseas investments by proprietorship concerns and registered Trust / Society

Registered Trusts and Societies engaged in manufacturing / educational/hospital sector are allowed to make investment with prior approval of Reserve Bank.

Following is the eligibility criteria :

## TRUST

- i. The Trust should be registered under the Indian Trust Act, 1882
- ii. The trust deed permits the proposed investment overseas
- iii. The proposed investment should be approved by the trustee/s
- iv. The AD category – I bank is satisfied that the Trust is KYC Complaint and is engaged in a bonafide activity.
- v. The trust has been in existence at least for a period of three years
- vi. The trust has not come under the adverse notice.

## SOCIETY

- i. The Society should be registered under the Societies Registration Act, 1860
- ii. The proposed investment should be approved by the governing body
- iii. The AD category – I bank is satisfied that the Society is KYC Complaint and is engaged in a bonafide activity.
- iv. The Society has been in existence at least for a period of three years
- v. The Society has not come under the adverse notice.

# Write-off of Capital and Receivable

- ❑ Indian parties which have overseas WOS or have at least 51% stake in overseas JV, may write off capital (equity / preference shares) or other receivables such as loans, royalty, technical know-how fees and management fees in respect of such JV / WOS, even while such JV / WOS continue to function as under:
  - Listed Indian Companies - upto 25% of the equity investment in JV / WOS under the Automatic Route; and
  - Unlisted Indian Companies - upto 25% of the equity investment in JV / WOS under the Approval Route.
- ❑ The Indian Party to apply to AD Bank and submit :
  - Certified copy of the balance sheet showing loss in the overseas JV/WOS
  - Projections for the next 5 years indicating benefit arising out of such write off / restructuring
- ❑ The write-off/restructuring have to be reported to the Reserve Bank through the AD – Bank within 30 days of write-off/restructuring.

# Compliances & Obligations

## On Investment / Financial Commitment file :

1. Form ODI along with :
  - Certified copy of Board Resolution for investment
  - Statutory Auditor's Certificate
  - Valuation report for the value of shares
2. Obtain UIN – required for all investments
3. Post investment ensure receipt of share certificates or any other document as evidence and submit within six months to AD from the date of remittance or date when it became due

## During Investment :

1. On Changes in investment report to RBI through AD bank within 30 days of approval by competent authority of JV/WOS
2. Repatriate to India all dues viz. dividends, royalty, technical fees, etc. within 60days of falling due.

## Annually File :

1. Annual Performance Report (APR) by 31<sup>st</sup> December\*
2. Annual Return on Foreign Assets & Liabilities (FLA) by 15<sup>th</sup> July

# Compliances & Obligations

\*Where law of host country does not require auditing of books of accounts of JV / WOS, the APR can be submitted based on un-audited annual accounts provided: ( As per FAQ No. 27 as on 12<sup>th</sup> April, 2017)

- Statutory Auditors of Indian Party certify that the un-audited annual accounts of the JV / WOS reflect true and fair picture.
- The un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian Party.

# Disinvestment in JV/WOS

## Transfer by way of sale of shares of JV/WOS outside India

- ❑ Indian parties, without prior RBI approval, may transfer by way of sale to another Indian Party or to any person resident outside India, any share or securities held by it in a JV / WOS outside India.

## Procedural Aspects

- ❑ Submission of necessary details to AD - Bank within 30 days of divestment closure / winding up / voluntary liquidation.
- ❑ Repatriation of sale proceeds of shares / securities within 90 days.

**Transfer by way of sale of shares subject to satisfaction of additional conditions (as per slide no 48)**

# Disinvestment in JV/WOS

## Transfer by way of sale of shares of JV/WOS outside India ( involving write off)

- Indian parties may disinvest, without prior RBI approval, where the amount repatriated after disinvestment is less than the original amount invested:
  - Overseas JV / WOS is listed on a overseas stock exchange;
  - Indian party is listed on an Indian stock exchange and has net worth of not less than Rs 100 Crores;
  - Indian party is unlisted and the investment in overseas venture does not exceed USD 10 million; and
  - Indian party is listed (with net worth of less than Rs 100 crore) but investment in overseas venture does not exceed USD 10 million.

## Procedural Aspects

- Submission of necessary details to AD - Bank within 30 days of divestment closure / winding up / voluntary liquidation.
- Repatriation of sale proceeds of shares / securities within 90 days.

**Transfer by way of sale of shares subject to satisfaction of additional conditions (as per slide no 48).**

# Disinvestment in JV/WOS

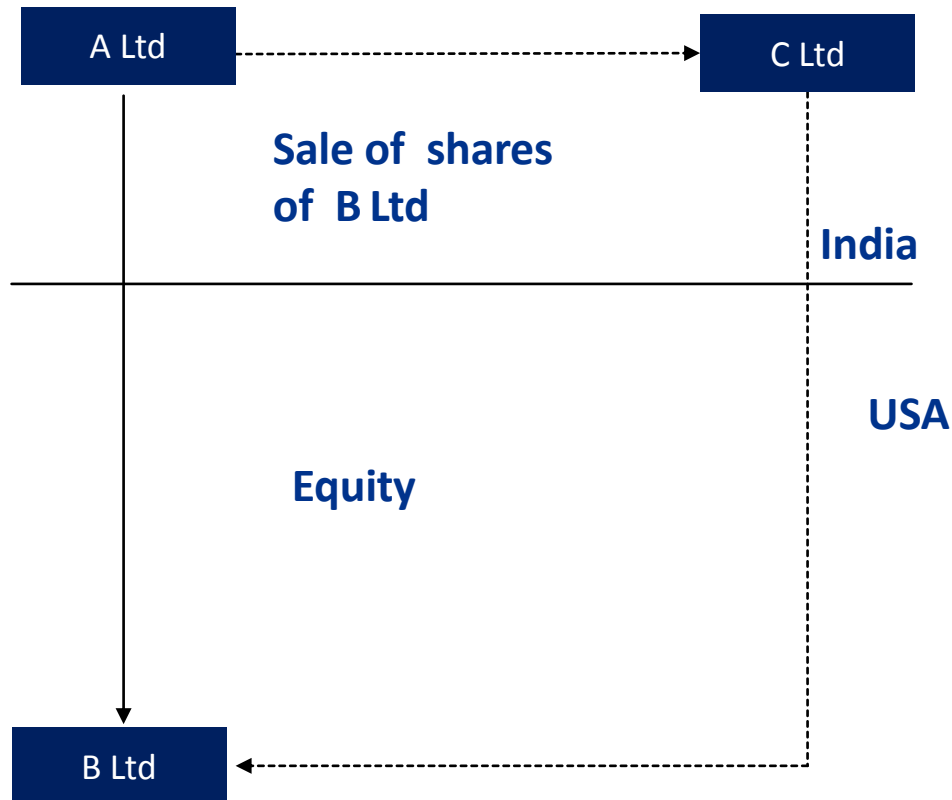
## Additional Conditions :

- The sale does not result in any write off of the investment (or financial commitment) made.
- Sale is effected through an overseas stock exchange where shares of JV/ WOS are listed.
- If shares of JV / WOS are unlisted, share price is not less than fair value as certified by Chartered Accountant or Certified Public Accountant based on last audited financial results of JV / WOS.
- The overseas concern has been in operation for **at least one full year** and the APR together with audited accounts for that year has been submitted to RBI.
- 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 / WOS.
- The Indian party is not under investigation by CBI /ED /SEBI / IRDA or any other regulatory authority in India.

**In all other cases specific approval of RBI needs to be obtained**



# Case Study - Disinvestment in JV/WOS



## FACTS:

1. A Ltd., an Indian unlisted company has subscribed to equity capital of B Ltd, a company incorporated in USA. In January 2015. The investment value is less than USD 10 million.
2. B Ltd. has commenced its operations in February 2015.
3. A Ltd. proposes to sell shares of B Ltd. To its group company C Ltd. in April 2015.

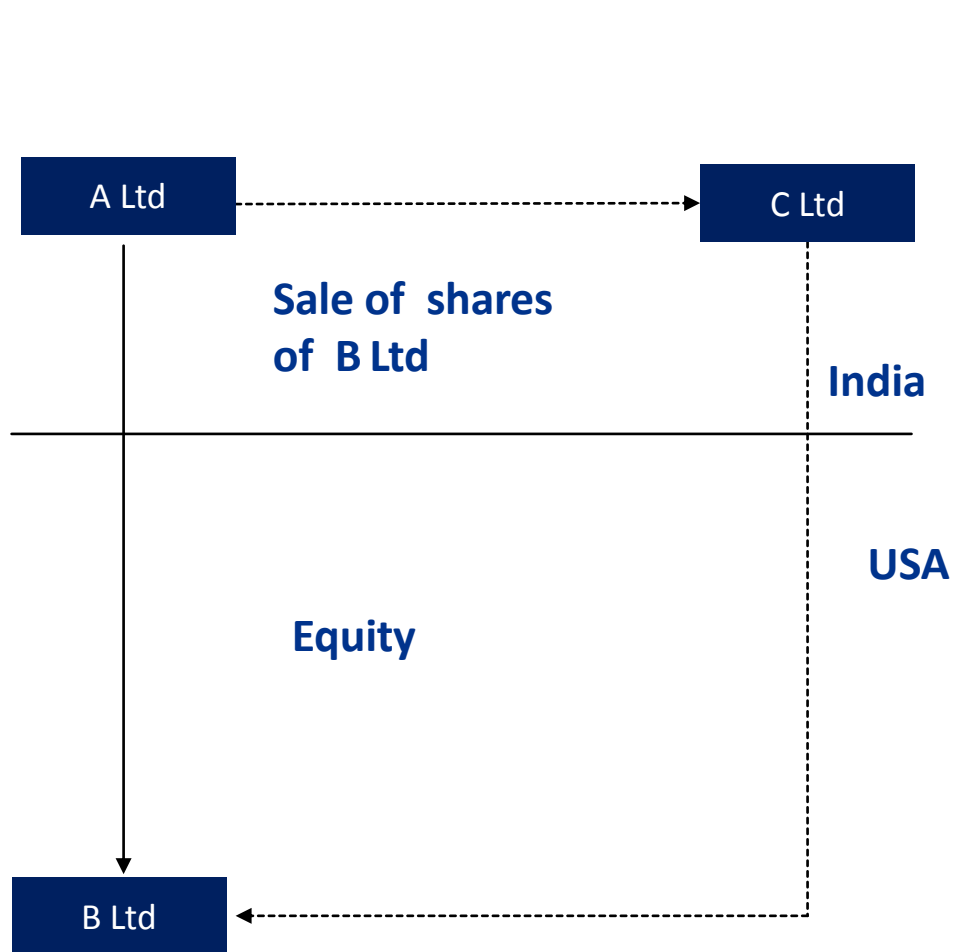
## ISSUE :

Whether A Ltd. can sell the shares without B Ltd. prior approval of the RBI ?

## VIEW :

No (X) as B Ltd. Is not operational one full year

# Case study - Disinvestment in JV/WOS



## FACTS:

1. A Ltd., an Indian unlisted company has invested USD 15 million in B Ltd, USA.
2. A Ltd proposes to divest its holding in B Ltd. (after some write off) to C Ltd, an Indian company.

## ISSUE :

Whether A Ltd. can sell the shares without approval of the RBI?

## VIEW :

No(X) as disinvestment involving write off by unlisted Indian Party requires RBI approval

# Pledge of shares of JV/WOS/SDS

- ❑ Indian Party may create charge, by way of pledge on the shares of JV/WOS/SDS (irrespective of level):
  - As a security in favour of AD, Indian public financial institution or overseas lender
  - For availing of fund based or non-fund based facility
  - For itself, its group companies, sister concerns or associate concerns
  - For any of its JV/WOS/SDS of Indian Party

***subject to terms & condition as specified below:***

- Value of facility will be part of Financial Commitment of Indian Party and should be within limit of 400% of net worth
- The overseas lender should be regulated and supervised as a bank, as per the law of the host country.

# Pledge of shares of JV/WOS/SDS

- Indian Party must be in compliance with ODI Regulations.
- The period of charge, if not specified upfront, may be co-terminus with the period of end use
- The loan/ facility shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever
  - Statutory Auditors certificate to the effect that the loan/ facility has not been utilized for direct or indirect investments in India is to be obtained and kept by the designated AD

# Charge on domestic and foreign assets

- ❑ Indian Party may create charge, by way of mortgage / pledge / hypothecation etc.
  - On its assets or on the assets of its group company, sister concern or associate company in India, promoter and / or director
  - In favour of an overseas lender
  - As security for availing fund and / or non fund based facility for its JV / WOS / SDS(irrespective of the level) outside India.

## ***subject to terms & condition as specified below:***

- Indian party may create charge (mortgage / pledge / hypothecation or otherwise) on the assets of its overseas JV / WOS / SDS in favour of AD – Bank in India as security for availing of fund based and / or non fund based facility for itself or its JV / WOS / SDS outside India.
- A “No Objection” is obtained from the domestic lender
- The domestic assets, on which charge is being created, are not securitized.
- Other conditions as per previous slide applicable.

# Rollover of guarantees

- ❑ An existing / original guarantee, which is part of the total financial commitment of the Indian Party, should not be treated / reckon the renewal / rollover, as a fresh financial commitment, provided that:
  - 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 Indian Party is under investigation by any investigation / enforcement agency or regulatory body, the concerned agency / body shall be kept informed about the same.
  
- ❑ However if the above conditions are not met, the Indian Party shall obtain prior approval of the Reserve Bank for rollover / renewal of the existing guarantee through the designated AD bank.

# Overseas Direct Investments by Resident Individuals

**14 Aug 2013 onwards**

**LRS limit  
reduced to USD  
75,000 p.a.**

**3 June 2014 onwards**

**LRS limit  
enhanced to USD  
125,000 p.a.**

**26 May 2015 onwards**

**LRS limit  
enhanced to USD  
250,000 p.a.**

- ❑ **Two Routes for Outbound Investments by Resident Individuals - LRS and ODI**
- ❑ **ODI Route introduced by FEMA 263 dt. 5.8.2013 vide Circular No. 24 dt. 14.8.2013**
  - Investment in overseas JV / WOS only by way of equity / compulsorily convertible preference shares
  - JV / WOS to be engaged in bonafide business activities except real estate / banking / financial services
  - ODI in “non-co-operative countries and territories” as per FATF not permitted
  - Resident individual not to be on RBI caution / defaulters list
  - Limit of investment in JV / WOS as per LRS limit (currently USD 250,000 per annum)
  - Investment made from EEFC / RFC account also included in prescribed LRS limit
  - JV / WOS to be operating entity only - No step down subsidiary to be acquired or set up by JV / WOS
  - Valuation /Reporting and Post investment obligations same as applicable to ODI by Indian Companies
  - Write off not permitted in cases of disinvestments

# General Permission for Individuals

- ❑ to acquire foreign securities as a gift from any person resident outside India;
- ❑ to acquire shares under cashless Employees Stock Option Programme (ESOP) issued by a company outside India, provided it does not involve any remittance from India;
- ❑ to acquire shares by way of inheritance from a person whether resident in or outside India;
- ❑ to purchase equity shares offered by a foreign company under its ESOP Schemes, if he is :
  - an employee, or,
  - a director of an Indian office or
  - branch of a foreign company, or, of a subsidiary in India of a foreign company, or,
  - an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle (SPV) irrespective of the percentage of the direct or indirect equity stake in the Indian company.



# General Permission for Individuals

Residents are permitted to acquire a foreign security, if it represents –

- ❑ qualification shares for becoming a director of a company outside India to the extent prescribed.
- ❑ part / full consideration of professional services rendered to the foreign company or in lieu of Director's remuneration;
- ❑ rights shares provided that the rights shares are being issued by virtue of holding shares in accordance with the provisions of law for the time being in force;
- ❑ purchase of shares of a JV / WOS abroad of the Indian promoter company by the employees/directors of Indian promoter company which is engaged in the field of software where the consideration for purchase does not exceed the ceiling as stipulated by Reserve Bank from time to time,
  - the shares so acquired do not exceed 5 per cent of the paid-up capital of the JV / WOS outside India
  - and after allotment of such shares, the percentage of shares held by the Indian promoter company, together with shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment. (*As per FAQ No. 45, 46 & 47 as on 12<sup>th</sup> April, 2017*)

# Hedging of overseas direct investments

- ❑ Resident entities having overseas direct investments (or financial commitment) are permitted to hedge the foreign exchange rate risk arising out of such investments (or financial commitment).
- ❑ AD Category - I banks enters into forward / option contracts with resident entities to hedge their overseas direct investments (in equity and loan), subject to verification of such exposure.
- ❑ If a hedge becomes naked in part or full, owing to shrinking of the market value of the overseas direct investment (or financial commitment), the hedge continues to the original maturity.
- ❑ Rollovers on the due date are permitted up to the extent of market value as on that date.

# Opening of Foreign Currency Account abroad

- ❑ Eligible Indian Party may open, hold and maintain Foreign Currency Account (FCA) abroad for the purpose of overseas direct investments subject to the following terms and conditions as stipulated under A.P. (DIR Series) Circular No. 101 dated April 02, 2012:
  - The host country regulations stipulate that the investments into the country are required to be routed through a designated account.
  - FCA shall be opened, held and maintained as per the regulation of the host country.
  - The remittances sent to the FCA by the Indian party should be utilized only for making overseas direct investment into the JV / WOS abroad.
  - Any amount received in the account by way of dividend and / or other entitlements from the subsidiary shall be repatriated to India within 30 days from the date of credit.
  - The Indian Party should submit the details of debits and credits in the FCA on yearly basis to the designated AD bank with a certificate from the Statutory Auditors of the Indian party certifying that the FCA was maintained as per the host country laws and the extant FEMA regulations / provisions as applicable.
  
- ❑ The FCA so opened shall be closed immediately or within 30 days from the date of disinvestment from JV / WOS or cessation thereof.

# Routing of funds raised abroad in India

## ***Routing of funds raised abroad in India - A.P. (DIR Series) Circular No. 41 dated 25 November 2014***

### **Background:**

- RBI observed that Indian companies have been accessing overseas market for debt funds through overseas holding / associate / subsidiary / group companies.
- Borrowings have been raised at rates exceeding ceiling rates under FEMA.
- Funds so raised were routed to the Indian companies.
- Under the extant ECB guidelines, there are restrictions on the cost at which Indian firms raise overseas borrowings.
- If funds are routed easily to the Indian arm, then such foreign – raised funds may be used for all kinds of purposes which may not be allowed under present regulation.

# Routing of funds raised abroad in India

## Clarification by the RBI:

- Indian companies not allowed to issue any direct / indirect guarantee or create contingent liability or offer any security in any form for such borrowings by their overseas holding / associate / subsidiary group companies – except for purposes explicitly permitted under the regulations.
- Funds raised abroad by overseas holding / associate / subsidiary group companies of an Indian companies with the support of Indian companies cannot be used in India unless it conforms to the general or specific permission granted under the relevant regulations.
- Indian companies using structures which contravene the above will be liable for penal action.

# Form ODI

Form ODI is divided into three parts :

**Part I – Application for allotment of Unique Identification Number (UIN) & reporting of Remittances / Transactions**

**Part II – Annual Performance Report**

**Part III - Report on Disinvestment**

## **Part I – Application for allotment of Unique Identification Number (UIN) & reporting of Remittances / Transactions :**

1. Section A – Details of Indian Party (IP)/ Resident Individual (RI)
2. Section B – Capital Structure & other details of JV/WOS/SDS
3. Section C - Details of Transaction / Remittance / Financial Commitment of Indian Party (IP)/ Resident Individual (RI)
4. Section D - Declaration by Indian Party (IP) / Resident Individual (RI)
5. Section E - Certificate by the Statutory Auditors of the Indian Party (IP) / self- certification by Resident Individual (RI)

# Form ODI

## **Part II – Annual Performance Report**

1. Based on unaudited annual accounts of preceding year
2. Where law of host country does not require auditing, APR can be submitted based on unaudited annual accounts of the JV/WOS provided :
  - Statutory Auditors of the Indian Party certify that “ the un-audited annual accounts of the JV/WOS reflect the true & fair picture of the affairs of the JV/WOS” ; and
  - The unaudited annual accounts of the JV/WOS are adopted and ratified by the Board of the Indian Party

## **Part III - Report on Disinvestment by way of**

1. Closure / Merger / Voluntary Liquidation / Winding up / Amalgamation of overseas JV / WOS or Indian Party;
2. Sale/ Transfer of the shares of the overseas JV/WOS to another eligible resident or non-resident;
3. Buyback of shares by the overseas JV/WOS



**Thank You**

