

Overseas Investment Norms for Business Entities

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- ❑ Based out of Kolkata, New Delhi, Mumbai and Bangalore
- ❑ We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Outline

- Scope and applicability
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Scope and Applicability

- ❑ Rules, Regulations and Directions for Overseas Investment effective from August 22, 2022
- ❑ Rules framed by CG
 - ❑ 21 Rules and 5 schedules
 - ❑ Rules will be administered by RBI.
- ❑ Regulations and Directions by RBI
 - ❑ 12 Regulations
 - ❑ 4 Parts in Directions
- ❑ Regulations superseded :-
 - ❑ Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004
 - ❑ Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015
- ❑ Applicability
 - ❑ Overseas Direct Investment, Overseas Portfolio Investment, Financial Commitment by PRII
- ❑ Non - applicability
 - ❑ Investment outside India by financial institution in IFSC;
 - ❑ "financial institution" means a unit set up in an International Financial Services Centre and which is engaged in rendering financial services in respect of any financial product;
 - ❑ Acquisition or transfer of any investment outside India out of :-
 - ❑ Funds in Resident Foreign Currency Account
 - ❑ Foreign Currency resources held outside India by person employed in India for a specific duration, not more than 3 years
 - ❑ Investment in foreign security or immovable property acquired by inheritance or when person was PROI.



Concepts, Definitions and Modes of making OI



Foreign entity- 1/2

- ❑ Entity formed or registered or incorporated outside India
 - ❑ Including IFSC
 - ❑ With limited liability
 - ❑ Means a structure where liability is clear and limited
 - Exempt in case of entity engaged in Strategic Sector
 - ❑ Components of strategic sector
 - ❑ energy and natural resources sectors such as oil, gas, coal, mineral ores;
 - ❑ submarine cable system;
 - ❑ start-ups; and
 - ODI in start-ups can be only from internal accruals from Indian Entity or group or associate companies
- Indian Entity means a company, LLP, a body corporate & a registered partnership firm
 - ❑ any other sector or sub-sector as deemed necessary by CG
 - ❑ FE being a regulated investment fund or vehicle set up as a trust outside India
 - Liability of the PRII should be clear and limited
 - Not exceeding the interest or contribution in the fund in any manner;
 - Trustee of such a fund shall be a PROI.

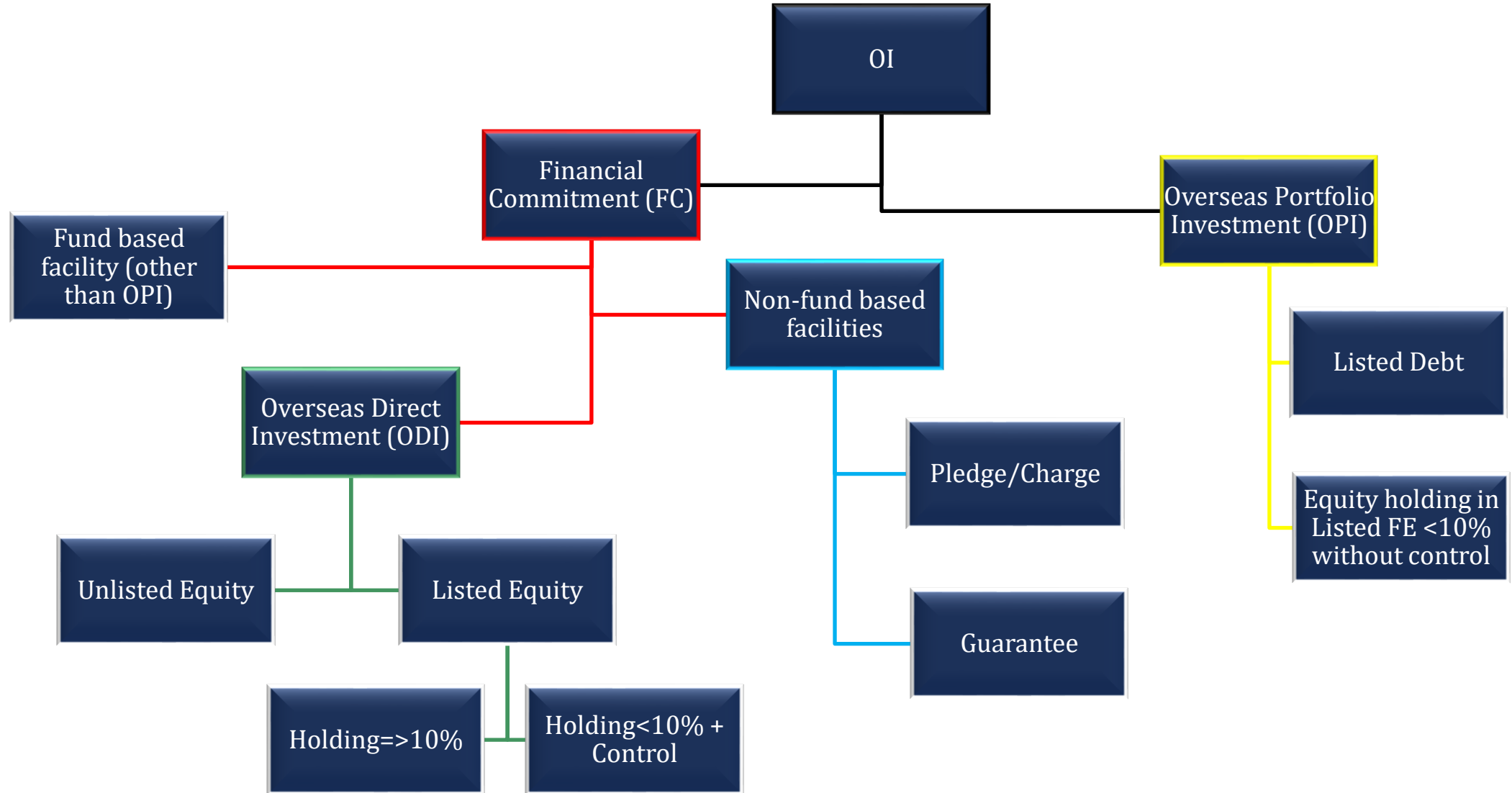
Foreign entity-2/2

- ❑ Should be engaged in *bona fide* business activity
 - ❑ Any business activity permissible under any law in force
 - ❑ in India and
 - ❑ host country or host jurisdiction.
 - Country or jurisdiction, including IFSC, in which FE is formed, registered or incorporated.
 - ❑ Structure of subsidiary/ SDS of FE should also comply with structural requirements of FE
 - ❑ Substitutes the concept of JV/WOS under the erstwhile regime.
- ❑ Prohibited sectors
 - ❑ Real estate activity
 - ❑ means buying and selling of real estate or trading in TDRs
 - ❑ but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.
 - ❑ Gambling in any form
 - ❑ Dealing with financial products linked to INR without specific RBI approval
 - ❑ non-deliverable trades involving foreign currency-INR exchange rates, stock indices linked to the Indian market, etc.

Control

- ❑ Means
 - ❑ the right to appoint majority of the directors; or
 - ❑ to control management or policy decisions
- ❑ By a person
 - ❑ acting individually; or
 - ❑ acting in concert
 - ❑ Directly or indirectly
- ❑ By virtue of
 - ❑ their shareholding; or
 - ❑ management rights; or
 - ❑ shareholders' agreements; or
 - ❑ voting agreements that entitle them to 10% or more of voting rights; or
 - ❑ causing confusion.
 - ❑ Control under CA, 2013 only refers to voting agreements.
 - ❑ in any other manner
- ❑ **Relevance of establishment of control**
 - ❑ Ability to lend or invest in debt or undertake non-fund based commitment
 - ❑ Identification of subsidiary/ step down subsidiary of FE
 - ❑ For IE, the test under CA, 2013 is relevant to determine subsidiaries.
- ❑ **Major impact**
 - ❑ **If RBI considers holding of 10% of voting rights as exercise of control, it will have far reaching effects.**
 - ❑ **This results in deviation from the usual interpretation.**
 - ❑ **Companies to ascertain if there are investments by JV/WOS that causes it to hold 10% or more of voting rights.**
 - ❑ **Need for RBI to revisit.**
 - ❑ **Control should be demonstrated either by way of**
 - ❑ **Right to appoint majority of directors; or**
 - ❑ **Control the management or policy decisions.**

Overseas Investment (OI)



Financial Commitment (FC)

- ❑ Conditions for FC by way of debt or non fund based commitment
 - ❑ IE is eligible to make ODI;
 - ❑ IE has made ODI in the FE;
 - ❑ IE has acquired control in the FE.
 - ❑ On or before making such FC.
 - ❑ Limit of FC - 400% of net worth of IE as on the date of the last audited balance sheet;
 - ❑ FC exceeding USD 1 billion (or equivalent) in a FY shall require prior approval of RBI.
 - ❑ Net worth as defined under CA, 2013
 - ❑ Reporting - Submit Form FC at the time of sending outward remittance or making FC, whichever earlier
- ❑ Modes of FC
 - ❑ ODI
 - ❑ Debt other than OPI
 - ❑ Loan agreement
 - ❑ Rate of interest charged on an arm's length basis
 - ❑ IE cannot lend directly to its overseas SDS
 - ❑ Non-fund based facilities extended to FE
 - ❑ By way of corporate guarantee (100%)
 - Earlier, permitted only till first level SDS under Automatic Route.
 - Now, can be extended to any limit without RBI approval.
 - ❑ By way of performance guarantee (50%)
 - ❑ By way of bank guarantee (100%)
 - ❑ Value of the pledge or charge or the amount of the facility, whichever is less
 - Excluding cases where the facility has been availed by the Indian entity for itself.

Financial Commitment (FC) by Indian Entity

- ❑ FC by way of guarantee
 - ❑ Who can give guarantee?
 - ❑ IE
 - ❑ Group company (Holding, subsidiary, promoter group which is a body corporate) (provided such entity is eligible to make ODI)
 - ❑ Resident individual promoter of IE
 - ❑ Bank guarantee backed by IE/group company
 - ❑ Guarantee by group company will be counted towards that entities FC limit & for resident individual promoter towards IEs FC limit.
 - ❑ In case of guarantee given by two or more IEs, 100% amount of guarantee reckoned towards the individual FC limits of such IEs
- ❑ In case of performance guarantee, 50% amount reckoned towards FC limit.
- ❑ No guarantee to be open ended
- ❑ Roll over of guarantee not treated as fresh FC
 - ❑ If the amount of roll over does not exceed original guarantee amount.
 - ❑ Other conditions for roll over under erstwhile regime, done away with.
- ❑ In case of invocation of guarantee, the amount will be considered as lending and cease to be non-fund based guarantee
 - ❑ File from FC at the time of invocation

Other conditions for FC

❑ FC by way of pledge or charge

Type of asset	Assets of	Facility for	Lender	FC Limit
Equity capital	FE/SDS	FE/SDS	AD Bank, Public Financial Institution	Amount of pledge/loan WEL
Equity capital	FE/SDS	IE	AD Bank, Public Financial Institution	Nil
Equity capital	FE/SDS	IE	Debenture Trustee	Nil
Other asset	IE/Group	FE/SDS	AD Bank, Public Financial Institution, Overseas Lender	Amount of charge/loan WEL
Other asset	FE/SDS	FE/SDS	AD Bank, Public Financial Institution	Amount of charge/loan WEL
Other asset	FE/SDS	IE	Debenture Trustee	Nil

Overseas Direct Investment (ODI)

❑ In case of listed foreign entity

❑ Means FE with equity or fully & compulsorily convertible instrument listed on stock exchange outside India.

❑ Equity capital means equity shares, perpetual capital or instruments that are irredeemable or contribution to non-debt capital of FE in the nature of fully and compulsorily convertible instruments.

❑ Investment in 10% or more of paid-up equity capital;

❑ Investment less than 10% with Control.

❑ Once ODI, continues to be ODI despite holding falling below threshold.

❑ In case of unlisted foreign entity

❑ By way of acquisition

❑ By way of subscription to MoA

❑ Modes

❑ subscription to MOA

❑ purchase of equity capital, listed or unlisted.

❑ acquisition through bidding or tender procedure

❑ acquisition by way of rights issue or allotment of bonus shares

❑ Not considered as fresh FC

❑ capitalisation of amount due to the IE from FE

❑ within the time period, if any, specified for realisation under the Act

❑ the remittance of which is permitted under the Act or

❑ does not require prior permission of the CG or RBI.

❑ swap of securities

❑ merger, demerger, amalgamation or any scheme of arrangement

❑ as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

ODI in Financial Services Activity (FSA)

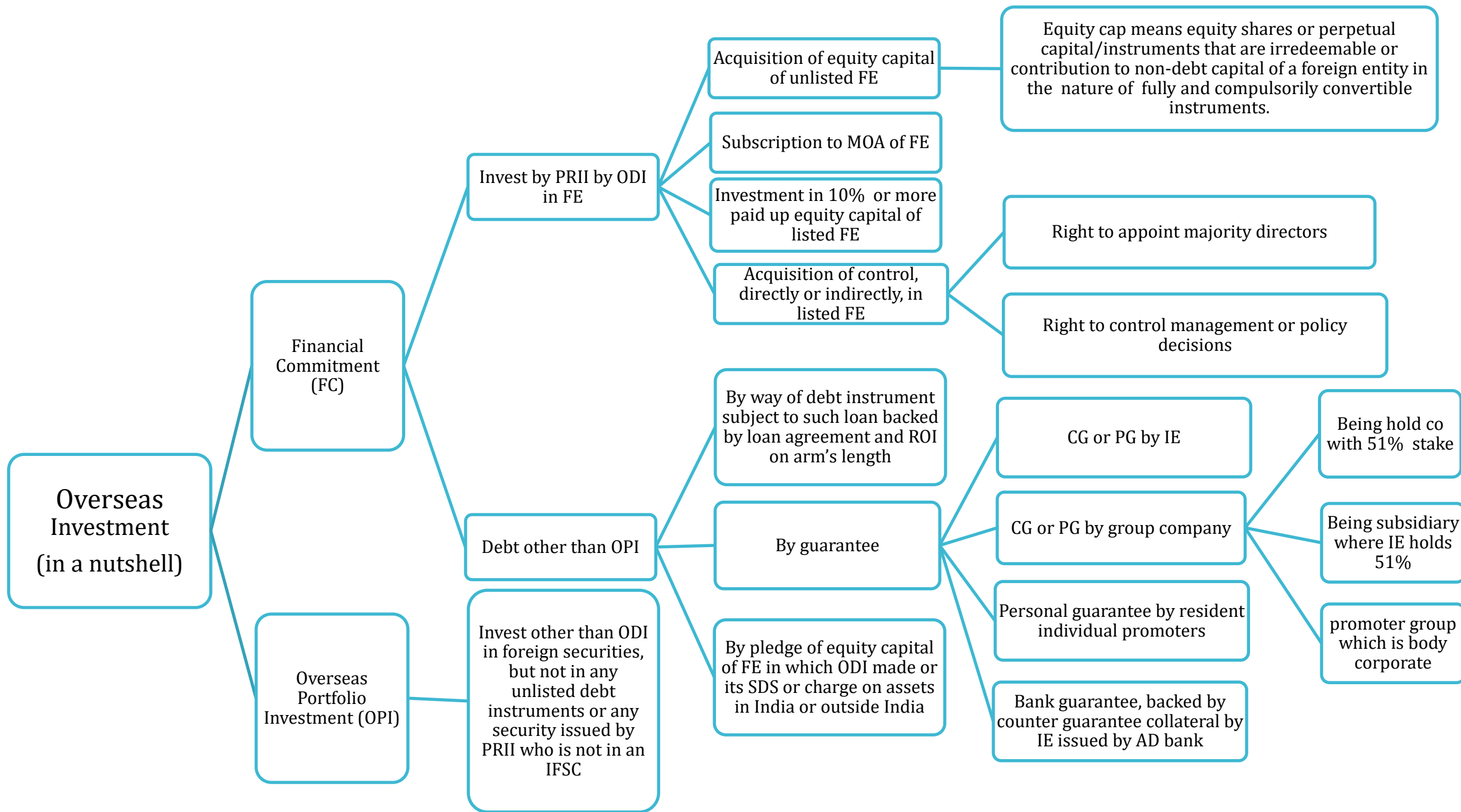
- ❑ FE to be engaged in FSA
 - ❑ if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.
- ❑ By IE engaged in FSA
 - ❑ if posted net profits during preceding 3 FY;
 - ❑ If profits are not posted in 20-21 & 21-22 due to covid-19 impact, then results for such period may be excluded.
 - ❑ If registered with or regulated by FSA regulator; and
 - ❑ If approval obtained from FSA regulator in India and host country, as the case may be.
 - ❑ In case of investment in IFSC, FSA to decide within 45 days from the date of receipt of complete application.
 - ❑ Failing which, it will be deemed approved.
- ❑ Where IE is bank or non-banking financial institution
 - ❑ Conditions laid down by RBI also to be complied with.
- ❑ By IE not engaged in FSA
 - ❑ ODI in FE engaged directly or indirectly in FSA
 - ❑ Except banking or insurance
 - ❑ If posted net profits during preceding 3 FY;
 - ❑ If profits are not posted in 20-21 & 21-22 due to covid-19 impact, then results for such period may be excluded.
 - ❑ 3 year profit track record not needed where such investment in IFSC.
 - ❑ If IE not engaged in insurance sector, ODI is permitted in general and health insurance
 - ❑ Where it is supporting the core activity undertaken overseas by the IE.
 - ❑ For instance, health insurance to support medical/hospital business, vehicle insurance to support the manufacturing/export of motor vehicles, etc.

Overseas Portfolio Investment (OPI)

- ❑ Other than ODI
- ❑ Investment in foreign securities
- ❑ Excludes investment in unlisted debt instruments
 - ❑ Debt instruments means
 - Government bonds
 - Corporate bonds
 - all tranches of securitisation structure which are not equity tranche;
 - borrowings by firms through loans; and
 - depository receipts whose underlying securities are debt securities;
 - ❑ Investment in Debt other than OPI to form part of FC
- ❑ Excludes investment in security issued by a PRII
 - ❑ Unless in an IFSC
- ❑ OPI in listed entity to remain OPI even after delisting
 - ❑ Until further investment is made.
- ❑ Investment in units of any regulated investment fund overseas
 - ❑ Including sponsor contribution
 - ❑ Will be considered as OPI
 - ❑ In jurisdictions other than IFSC
 - ❑ Listed Indian companies and resident individuals permitted
 - ❑ In IFSC
 - ❑ Unlisted Indian entity also eligible in terms of Schedule V
- ❑ Any investment by MFs, VCF and AIFs will be considered as OPI.

Manner of making OPI

- ❑ Limit for OPI
 - ❑ 50% of the net worth as on the date of its last audited balance sheet
 - ❑ Similar limit under earlier regime for portfolio investment by listed entities.
- ❑ Manner of making OPI
 - ❑ Listed Indian Company
 - ❑ Means equity listed Indian Company.
 - ❑ Including by way of reinvestment.
 - 'Reinvestment' means that the OPI proceeds are exempted from repatriation provisions as long as such proceeds are reinvested within the time specified for realisation and repatriation
 - In FEMA (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.
 - foreign exchange due or accrued as an income on assets held outside India, within 7 days from the date of its receipt.
 - ❑ Unlisted Indian Company
 - ❑ acquisition of equity capital by way of rights issue or allotment of bonus shares;
 - ❑ capitalisation of amount due to the IE from FE
 - within the time period, if any, specified for realisation under the Act
 - the remittance of which is permitted under the Act or
 - does not require prior permission of the CG or RBI.
 - ❑ the swap of securities;
 - ❑ merger, demerger, amalgamation or any scheme of arrangement
 - as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.



General Permission for OI by other PRII

- ❑ MFs, VCFs or AIFs
 - ❑ As stipulated by SEBI
 - ❑ Aggregate limit to be decided by RBI in consultation with CG
 - ❑ Overall cap for MF - USD 7 billion;
 - ❑ Overall cap for VCFs/ AIF - USD 1.5 billion
 - ❑ Individual limits by SEBI
 - ❑ Investment to be treated as OPI
- ❑ Registered Trust or Society
 - ❑ Engaged in hospitals or educational sector
 - ❑ ODI allowed with prior approval of RBI subject to
 - ❑ FE engaged in the same sector
 - ❑ Trust/Society in existence for last 3 financial years before the year in which such investments is made
 - ❑ Trust deed, MoA, bye-laws should permit ODI
 - ❑ Investment approved by the Governing Body
 - ❑ Special permission from MHA, GOI or from other authority, if any, obtained and submitted to AD Banks.

Pricing guidelines, transfers and disinvestments.

- ❑ Issue or transfer of equity capital of FE subject to arm's length pricing
 - ❑ PROI to PRII
 - ❑ PRII to PRII
 - ❑ PRII to PROI
- ❑ Certain transfers subject to approval of competent authority in India or host country
 - ❑ on account of merger, amalgamation or demerger; or
 - ❑ on account of buyback
- ❑ Liquidation of FE will be subject to approval of competent authority.
- ❑ Holding of any investment or transfer not permitted
 - ❑ If the initial investment was not permitted under the Act
- ❑ Conditions for disinvestment of ODI
 - ❑ The transferor must have stayed invested for at least 1 year;
 - ❑ No dues outstanding from the FE, which the transferor is entitled to receive as investor in equity and debt.
 - ❑ **Applicable in case of full disinvestment, other than by way of liquidation.**
 - ❑ Condition not applicable in case of merger, demerger or amalgamation
 - ❑ **between two or more foreign entities that are wholly-owned, directly or indirectly, by the IE; or**
 - ❑ **where there is no change or dilution in aggregate equity holding by the IE**

Deferred payment of consideration

- ❑ Payment of consideration for ODI may be deferred by PRII
 - ❑ Deferment should be for a definite period
 - ❑ From the date specified in agreement
 - ❑ Should be decided upfront
 - No specific time limit.
 - ❑ Deferred part to be considered as non-fund based commitment
 - ❑ Security to be transferred upfront by the seller to buyer
 - ❑ Consideration payable to be compliant of applicable pricing guidelines
 - ❑ Valuation to be done upfront.
- ❑ Payment of deferred consideration in case of incorporation
 - ❑ Remittance for acquisition of equity capital may be made post subscription of MoA
 - ❑ Period to be defined in the underlying agreement/documents/applicable laws
 - Otherwise, remittance to be made on or before acquisition/ setting up.
 - ❑ Subsequent payments to be reported in Form FC
 - ❑ As conversions from non-fund based FC to equity

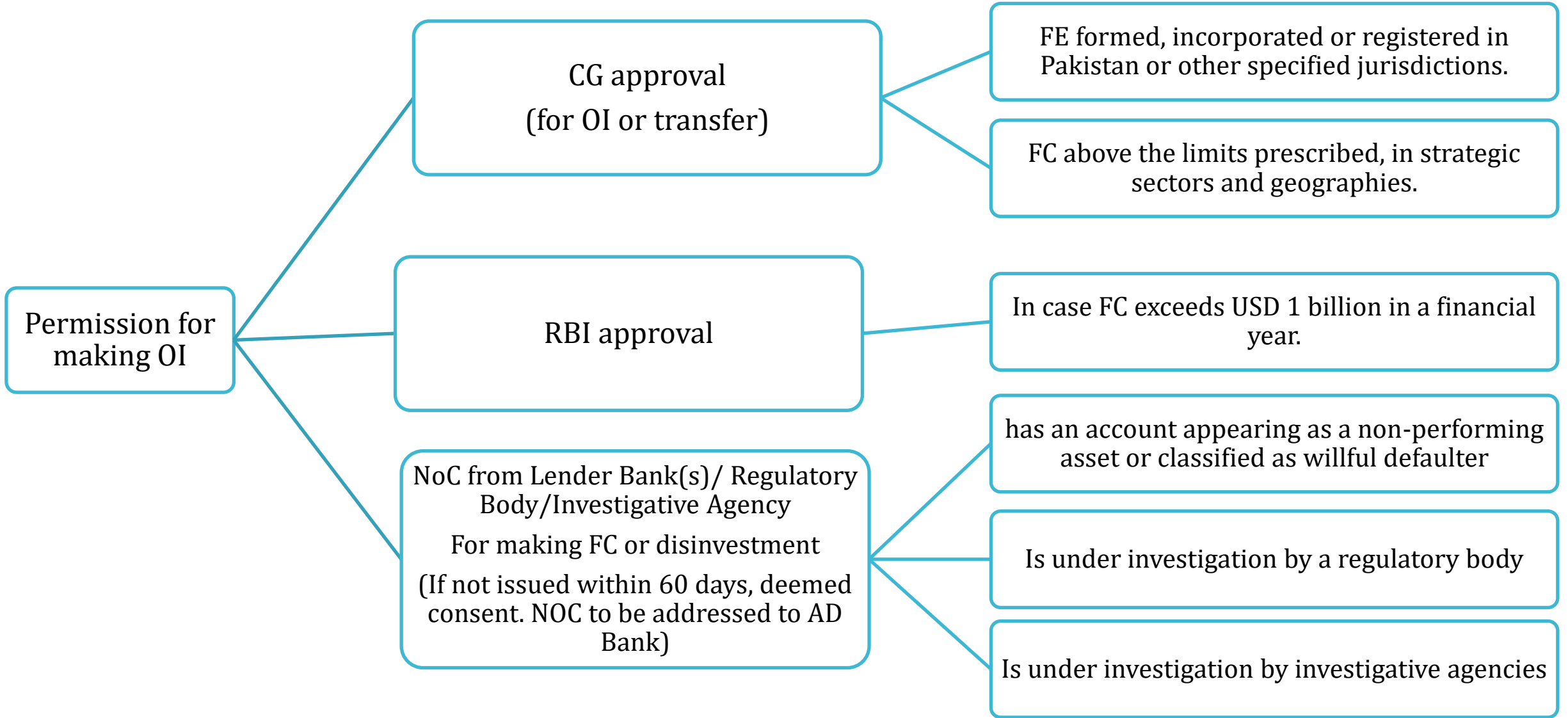
Obligations of PRII in case of ODI

- ❑ Submission of share certificates/ relevant documents to AD Bank
 - ❑ Within 6 months
 - ❑ from the date of remittance
 - ❑ From the date dues were capitalized.
- ❑ UIN to be obtained from AD Bank
 - ❑ before sending outward remittance or acquisition of equity capital in a foreign entity,
 - ❑ whichever is earlier.
 - ❑ All transactions to be routed through same AD Bank
- ❑ Realize all dues and repatriate to India
 - ❑ Within 90 days from
 - ❑ the date when such receivables fall due or
 - ❑ the date of such transfer or disinvestment or
 - ❑ the date of the actual distribution of assets made by the official liquidator.



Approval Requirement







Reporting Requirements



Reporting requirements of FC/OPI

FC - at the time of sending outward remittance or making a financial commitment, whichever is earlier, in **Form FC**

OPI (investment/transfer) -within 60 days from the end of the half-year in which investment or transfer is made in **Form OPI**

Disinvestment (in Section G of **Form FC**)

Restructuring (in Section F of **Form FC**)

Annual Performance Report for ODI in FE by PRII in **Form APR**

Annual return on FLA by an IE which has made ODI in **Form FLA**

Not applicable to resident individuals

In case of OPI pursuant to ESOP/EBS, reporting to be done as per Note 1.

Within 30 days of receipt of disinvestment proceeds

Within 30 days from the date of such restructuring

In case of Invt by more than one PRII, to be filed by the IE holding highest stake; in case of equal holdings, to be filed jointly.

No reporting where holding is <10% without control or where foreign entity is under liquidation.

Note 1: Reporting by

- the office in India or
- branch of an overseas entity or
- Branch of a subsidiary in India of an overseas entity or
- the Indian entity in which the overseas entity has direct or indirect equity holding, where the resident individual is an employee or director.

Late Submission Fees (LSF) for delay in reporting

- ❑ LSF option available only for
 - ❑ Non-submission of evidence of investment within 6 months; or
 - ❑ Filing delays
- ❑ To be availed within a maximum period of 3 years from due date of such submission or filing
 - ❑ Any existing delays as on August 22, 2022 can be regularized by August 21, 2025
 - ❑ Else the person will be liable to penal actions.
- ❑ LSF to be paid within 30 days from the date of issue of advice
 - ❑ In case not paid and re-approached for payment for same delayed reporting
 - ❑ **Date of receipt of such application will be considered for LSF computation afresh.**
- ❑ LSF payable to RBI regional officer
 - ❑ Tagged in the UIN

Sr. No.	Type of Reporting delays	LSF Amount (INR)
1	Form ODI Part-II/ APR, FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting	7500
2	Form ODI-Part I, Form ODI-Part III, Form FC, or any other return which captures flows or returns which capture reporting of non-fund based transactions or any other transactional reporting	$[7500 + (0.025\% \times A \times n)]$

- ❑ A = Amount involved in delayed reporting.
- ❑ n = number of years of delay rounded upwards to nearest month, upto 2 decimal points
- ❑ Maximum LSF will be limited to 100% of A.



ODI – FDI structure



ODI- FDI Structure or Round Tripping- Condition under the present regime

- ❑ Prohibition applicable only where it results in a structure of more than 2 layers of subsidiaries
 - ❑ Computation of layer will commence from the first FE.
 - ❑ Entity after FE will be layer 1
- ❑ Exemption to :
 - ❑ A banking company;
 - ❑ NBFC (systemically important, RBI registered)
 - ❑ Insurance company;
 - ❑ Government company.
- ❑ Determination of subsidiary
 - ❑ For Indian entity - as per Section 2 (87) of CA, 2013
 - ❑ For FE - on the basis of control
 - ❑ **That refers to voting agreements entitling to 10% of voting rights.**
 - ❑ Note given in Directions, 2022
- ❑ that subsidiary shall have the meaning as provided in the OI Rules i.e. an entity in which the foreign entity has control (**which includes a stake of 10% or more in an entity as per the OI Rules**).

ODI-FDI structures – some illustrations

a. If money doesn't come back to India despite several layers, there is no issue.

X Ltd -----> Y Inc -----> Z GmbH -----> A Pte -----> B FZ LLC = No restriction
Holds 51% Holds 51% Holds 51% Holds 51%

b. If money went overseas in a single layer outside and came back to India following with multiple layers in India

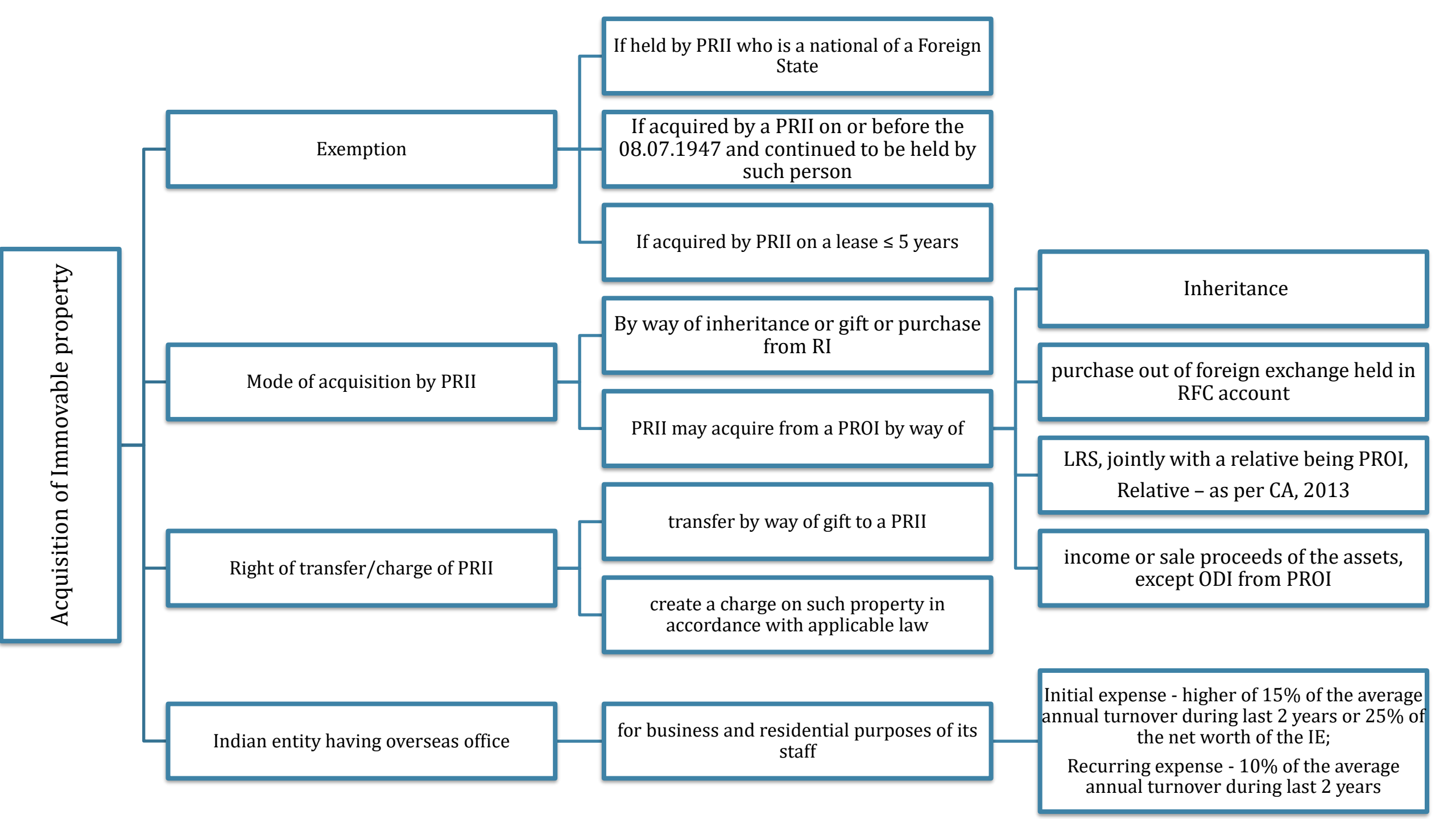
Case 1: X Ltd -----> Y Inc -----> Z Ltd -----> A Ltd = **No more Layers possible**
Holds 51% Holds 51% (L1) Holds 51% (L2)

Case 2: X Ltd -----> Y Inc -----> Z Ltd -----> A Ltd = **RBI to regard Z Ltd and A Ltd as SDS.**
Holds 51% Holds 10% (L1) Holds 10% (L2)
No more layers possible



Acquisition of immovable property





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