

FDI Regulations – An Update



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Press Note 1 (2009 Series): 14 January 2009

Foreign investment in Print Media dealing with news and current affairs

- Policy for FDI in publication of facsimile edition of foreign newspaper
 - FDI up to 100% permitted with prior government approval.
- Policy for foreign investment in publication of Indian edition of foreign magazines dealing with news and current affairs
 - Foreign investment, including FDI and investment by NRIs/PIOs/FII upto 26%, is permitted with prior government approval.

Press Note 2 (2009): 13 February 2009

According to Press Note 2 (2009)

Definitions of “Owned” and “Controlled”:

For the purpose of computing indirect foreign investments, “Owned” by resident Indian citizens would mean that the resident Indian citizens on a look through basis beneficially own more than 50% of the equity interest of the Company A. “Controlled” by resident Indian citizens would similarly mean that the resident Indian citizens on a look through basis have the power to appoint a majority of directors of the Company A.

Principle for computing indirect foreign investment:

The Company B would not be treated as having indirect foreign investments as long as the Company A in which there are foreign investments, is ultimately ‘owned and controlled’ by Indian resident citizens. However, the foreign investments through the Company A would be considered for computing indirect foreign investments in the Company B if the Company A is not ‘owned and controlled’ by Indian resident citizens on a look through basis or if the Company A is ‘owned’ or ‘controlled’ by ‘non resident entities’. In these cases, the entire investment by the Company A into the Company B would be categorized as indirect foreign investments into the Company B. As a matter of added clarification, **Press Note 2 (2009) states** that in case of investment into an Company B which is 100% owned by the Company A, the extent of indirect foreign investment in the Company B, shall be taken to be the percentage of actual foreign investments in the Company A. It has also been clarified that the method of computation of indirect foreign investments would be made applicable at each layer of investments in Indian companies.

Types of Foreign investments

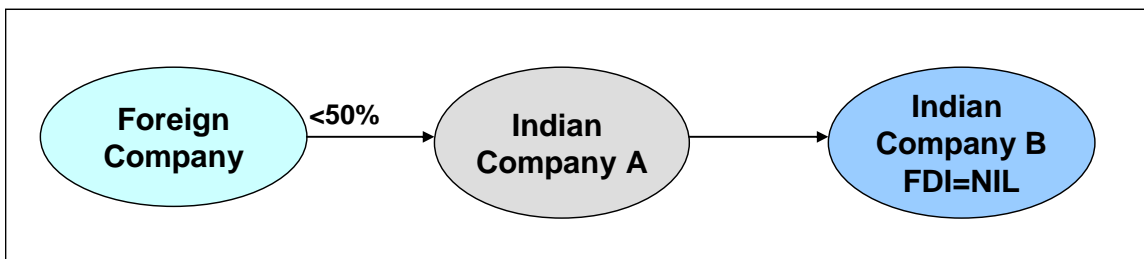
For calculating indirect foreign investment in a Company B, all types of foreign investments i.e. FDI, FIIs, FVCIs, NRIs, ADRs, GDRs, FCCBs, convertible preference shares and convertible debentures would be considered.

Treatment of beneficial interest:

A declaration under Section 187 C of Companies Act, 1956 provides that a person is holding the shares of a company as a nominee of the original investor (registered owner) then the beneficial interest in such shares would be vested in the original investor. Press Note 2 (2009) provides that if there is a declaration under section 187 C of Companies Act, 1956, the investment in such shares would be counted as foreign investment regardless of the fact that such investment was made by a resident Indian citizen.

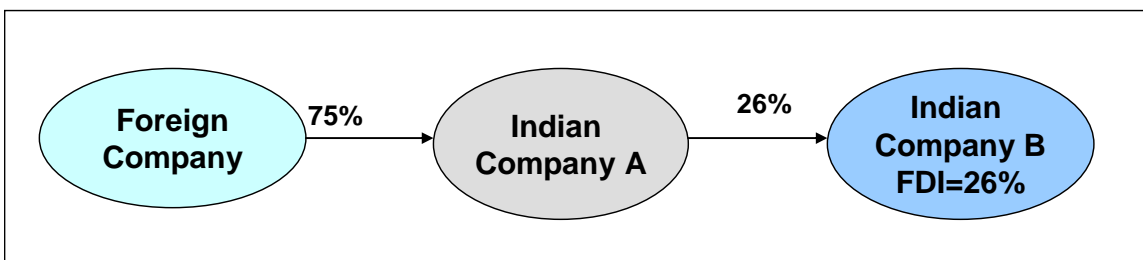
This can be illustrated by the following diagrams.

Case 1

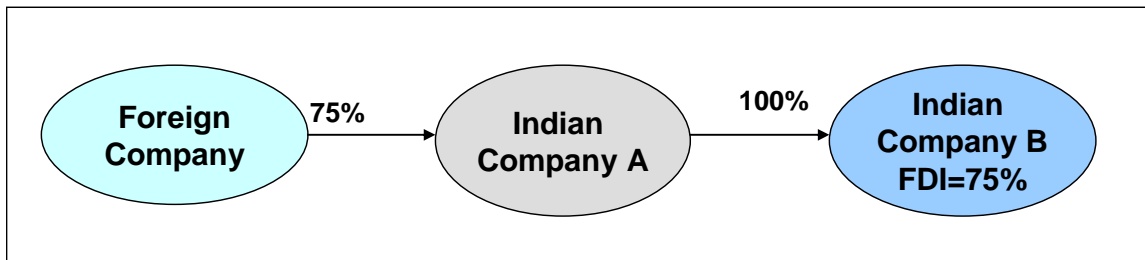


In the first scenario the Indian Company holds less than 50% foreign investment. The Company B will not be taken as having any indirect foreign investment through Company A. ie FDI=NIL

Case 2



In the second scenario if the Company A has foreign investment of 75% and invests 26% in the Company B, then the entire 26% will be treated as indirect foreign investment in Company B.

Case 3

If the Company A has foreign investment of 75% and Company B is the wholly owned subsidiary of Company A, then only 75% would be treated as indirect foreign equity and balance 25% would be treated as resident held equity.

The indirect foreign equity in Company B would be computed in the ratio of 75:25 in the total investment of Company A in Company B.

Exempt sectors/activities:

The sectors such as insurance where methodology for calculating foreign investment is prescribed under sector specific statute or rules, the policy and methodology under the Press Notes shall not be applicable.

Press Note 3 (2009): 13 February 2009

According to Press Note 3 (2009)

• Exempt sectors/activities:

The Press Note 3 (2009) does not apply to sectors/activities where there are no foreign investment caps.

• Transfer of 'ownership' or 'control':

In cases of Indian companies that are engaged in sectors that have prescribed sectoral caps, in the following situations, prior Foreign Investment Promotion Board ("FIPB") approval would be required:

- The Indian company has received foreign investments and is owned or controlled by non-resident entity;
- The control or ownership of the Indian company currently owned or controlled by resident Indian citizens on a look through basis, is being or will be transferred to non resident entities either through fresh foreign investment or when such transfer is effected through direct acquisition or through corporate reorganizations, i.e. amalgamations or mergers.

Defense Production: 17 February 2009

FDI up to 26% is permitted, under FIPB route for Defense Production subject to licensing under Industries (Development & Regulations) Act 1951 and guidelines on FDI in production of arms and ammunition.

FDI Policy for Air Transport Services Sector: 17 February 2009

Government has allowed the following:

- No foreign airlines would be allowed to participate directly or indirectly in the equity of an Air Service Undertaking;
- FDI up to 49% and investment by Non-resident Indians (NRI) up to 100% will be allowed on the automatic route in Domestic Scheduled Passenger Airline Sector;
- FDI up to 74% and investment by Non-resident Indians (NRI) up to 100% will be allowed on the automatic route in Non Scheduled airlines, Chartered airlines, and Cargo airlines;
- FDI up to 74% and investment by NRI up to 100% will be allowed on the automatic route in Ground Handling Services; and
- FDI up to 100% will be allowed on the automatic route in Maintenance and Repair organizations; flying training institutes; technical training institutions; and helicopter services/seaplane services.

Telecommunications: 17 February 2009

	Sector	Equity Cap	Entry route	Other Conditions
a)	Basic and cellular, Unified Access Services, National/ International Long Distance, V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS) and other value added telecom services	74% (Including FDI, FII, NRI, FCCBs, ADRs, GDRs, convertible Preference shares, and proportionate foreign equity in Indian promoters/ Investing Company)	Automatic Up to 49%. FIPB beyond 49%.	Subject to guidelines notified in the PN 3(2007)
b)	ISP with gateways, radio-paging, end-to-end bandwidth.	74%	Automatic up to 49%. FIPB beyond 49%.	Subject to licensing and security requirements notified by the Dept. of Telecommunic

				ations.
c)	(a) ISP without gateway, (b) infrastructure provider providing dark fiber, right of way, duct space, tower (Category I); (c) Electronic mail and voice mail.	100%	Automatic up to 49%. FIPB beyond 49%.	Subject to the condition that such companies shall divest 26% of their equity in favor of Indian public in 5 years, if these companies are listed in other parts of the world. Also subject to licensing and security requirements, where required.
d)	Manufacture of telecom equipments	100%	Automatic	Subject to sectoral requirements.