

Chapter 11

Companies Incorporated Outside India

AR	Authorised Representative	IDR	Indian Depository Receipts
BC	Body Corporate	POB	Place of Business
Biz	Business	PRI	Person Resident in India
Co.	Company	STO	Share Transfer Office
DH	Debenture Holders	SRO	Share Registration Office
FC	Foreign Company		



Foreign Company [Sec 2(42)]:

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FC means a company/body corporate **incorporated outside India** which:

- has a POB in India (itself/agent, physical/e-mode), **AND**
- conducts any **business** activity in India in any manner.

Conceptual Clarity Check:

- Would a company incorporated outside India conducting business in India without having POB in India be considered as a FC? - **Yes**. On literal interpretation of the definition, the word "and" shows that both POB and conduct of activity is needed. But this sec is to be interpreted under **Exception Construction**. i.e., the word "and" in definition is to be read as "or".
- FC is not a co. u/s 2(20) but is a BC u/s 2(11) because FC is incorporated outside India.
- Registrar has jurisdiction over FCs?** - Registrar having jurisdiction over **New Delhi**
- A FC has POB in West Bengal. To which RoC will it file necessary docs to? - **New Delhi RoC**
- If BoD of a co. incorporate outside India meets and executes business decision in India, would it make it a FC? - **No**.
- If a co. incorporated o/s India authorizes Mr. X in India to find customers and enter into contract on behalf of co., Is such co. a FC? - **Yes. Such arrangement establishes POB in India through agent.**
- Place of business includes **Share Transfer Office** and **Share Registration Office**
- If a person not being an FC carries on business or trade as FC - **Liable** for investigation u/s 210.
- Branch offices are considered as reflection of parent company's office.

Place of Business via electronic mode bole toh?

Carrying out following **business electronically**, whether or not the **main server** is in India or outside **[TDS OC]**:

- B2B or B2C **Transactions** (E.g., Udaan, Amazon), data interchange or other digital supply transaction (E.g., Netflix).
- Offering to accept, inviting or accepting **Deposits** or subscription to securities in India or from Citizen of India
- Following **Services**:

Fin. settlement
(E.g. Paypal)

Web based mkt.
[Eg. Google Ads]

Advisory and
transactional service

Database
services

Supply chain
Mgt.

➤ Online services:

Telemarketing

Telecomuting

Telemedicine [Online doc
consultation]Education &
info research➤ All related data **communication** via email/social media/mobile, etc.

Note - E-offering of securities, subscription, and listing of securities in **IFSCs** shall not be construed as an electronic mode for Foreign Cos. [**Amendment**]



Section 379: Application of Act to foreign companies

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1. Sec 380-386 and 392/393 shall apply to FCs (i.e., 387 to 391 - N.A.) [**Amendment**]
2. Where **not less than 50%** of PUSC (Equity/Preference) of Foreign co. is held (singly/aggregate) by:
 - a. one or more **citizen** of India
 - b. one or more companies or BC **incorporated** in India
 - c. one or more citizens of India and one or more cos. or BC incorporated in India, such co. shall comply with provision of this Chapter, in respect of its **Indian business**, as if it were company incorporated **in India**.

Conceptual Clarity:

1. An **Indian citizen** incorporated a co. in **Singapore** for business in Singapore. Is it a **FC**? - **No**. The fact that founder/promotor/owner of a co./BC is Indian would not impact the decision whether it is a FC or not.
2. A co. is incorporated in India having 100% Foreign Shareholding. Is it a **FC**? - **No**. Co. incorporated in India is a company u/s **2(20)** and not FC.



Section 380: Documents, etc., to be delivered to Registrar by foreign companies

1. Every FC shall **within 30 days** of establishment of POB in India deliver the following to **RoC** (New Delhi) for registration [**CA₂R PDC**]:

2 6 7 11

Certified **Charter** Docs - MoA/
AoA or any other instrument
defining constitution
[Certified translation in
English language]

Full **Address**
of principle
office of co.
(not in India)

Full **Address**
of office of
co. deemed to
be principal
POB in India

List of **all Directors**/
secretary of co.
[Name, Father's
Name, DOB, Address,
nationality, passport,
PAN, DIN, etc]

Name and Address of
PRI auth. to accept
notices/other docs
served on co.
[Auth. Representative]

Particulars
of Opening/
Closing of **POB** in
India in earlier
occassions

Declaration that none of
director/AR (not secretary)
are **Convicted**/debarred from
formatn of co./mgt. thereof -
India/Abroad

Other
prescribed
info.

2. Alteration to docs already submitted to RoC - Inform RoC within 30 days of alteration Form **FC-2**



**Companies (Registration of FC) Rules, 2014:**

1. Above info. to be filed with RoC in **Form FC - 1**
2. Above application to be supported with an attested copy of:
 - a. **approval of RBI** under FEMA and approval from other **regulators** if required **or**
 - b. declaration from AR that no such approval is required
3. If a FC **ceases** to have POB in India, it shall **forthwith** give notice to RoC and from date of such notice, obligation to file docs with RoC ceases, provided no other POB.

**Section 381: Accounts of foreign company**

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1. Every FC shall, in every **CALENDAR YEAR**,
 - a. Make BS, P&L in prescribed forms, particulars and annexures
 - b. Deliver a **copy** to RoC
 CG may exempt FC from applicability of this.
2. If not in English - **Certified Translation** thereof in English to be annexed
3. Along with above docs, FC to send to RoC - **List of POB** in India as on BS date (**in Form FC-3**)

**Companies (Registration of FC) Rules, 2014:**

1. FC to prepare FS for its Indian business operation **as per Sch III** for each **Financial** year
2. **Docs** to be annexed to FS - As per Chap **IX** - Accounts of Companies [Sec 128-138]
3. Docs relating to **CFS** of Parent FC also to be submitted (if not in English, certified translation)
4. Annex following additional docs/statements, **along with FS**:
 - Statement w.r.t, **RPT**
 - Statement of **Repatriation** of Profit
 - Statement of **Transfer** of Funds (incl. Dividend)
5. Time limit for delivery of above docs to RoC:
 - **Within 6m** from close of FY
 - RoC may on application, extend the time limit **by 3m**
6. **Audit** of books of Indian business ops - By practicing **CA** or Firm/LLP of CAs
7. Provision of **Chap X** (Sec 139-148) i.e., Audit and Auditors shall apply mutatis mutandis

Note regarding filing of **annual return** of the Indian operations of the foreign company:

As per Companies (Registration of FC) Rules, 2014, every FC shall prepare & file **Annual Return** in **Form FC-4 + Fees** within **60 days** from last day of FY **to RoC** containing particulars as on close of FY.

**Section 382: Display of name of Foreign Companies:**

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Every FC shall conspicuously exhibit:

Where?	Outside of every office or POB in India	Business letters, bill-heads, letter papers, & all notices and other publications,
What?	<ul style="list-style-type: none"> ➤ Name of the co. ➤ Country of incorp. ➤ State whether liability of members of co. is limited 	<ul style="list-style-type: none"> ➤ Name of the co. ➤ Country of incorp. ➤ State whether liability of members of co. is limited
Language?	<ul style="list-style-type: none"> ➤ Letters easily legible in English, and ➤ Local Language used in POB 	<ul style="list-style-type: none"> ➤ Letters easily legible in English, ➤ Local Language



Section 383: Service on Foreign Company:

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- Any notice/other docs required to be served on FC
- shall be **deemed** to be sufficiently served if:
 - o **Addressed** to Auth. Representative of such FC (as per Sec 380), **and**
 - o Left at or **sent** by post or **e-mode** at such address



Section 384: Applicability of other sections

Following provision of Companies Act shall apply to Foreign Co.:

Section	Provisions related to:	Applicable to Indian business of FCs
71	Debentures	Mutatis Mutandis
92 & 135	Annual Return and CSR	Subject to Exceptions, Modifications & Adaptations as per Rules
128	BoA to be kept by Co.	To the extent that BoA to be kept at POB in India
Chap VI	Registration of Charges	Mutatis Mutandis
Chap XIV	Insp., Inq. and Investigation	Mutatis Mutandis (Sec 228)



Section 386: Interpretation

1. "Certified" means certified to be a **true copy** or **correct** translation.

Translation can be done **in India** or **outside India**. Who shall **authenticate** such translation?

- 13 Where a translation is to made **within India**, it shall be authenticated by:
 - a. an **advocate**, attorney or pleader entitled to appear before any **High Court**; or
 - b. an **affidavit**, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.
- 17 Where translation is done **outside India**, it shall be authenticated by signature and seal of:
 - a. an official having **custody** of the **original**, or
 - b. **Notary** of the country where company is incorporated
2. "Director" w.r.t., FC includes person on whose direction or instruction, BoD is accustomed to act.
3. "Place of Business" includes Share Transfer Office & Share Registration Office (**STO and SRO**)



Section 387: Dating of prospectus and particulars to be contained therein.

1. No **prospectus** offering to subscribe to any securities shall be issued or circulated by a Co. incorporated o/s India (**not FC**) unless such prospectus:
 - a. is dated and signed.
 - b. contains particulars w.r.t., following matters [**Instrument Incorp.** karne ke liye ACP ko bulaya]:
 - i. **Instruments** defining constitution of the co.
 - ii. Enactments/provisions under which co. was **incorporated**.
 - iii. **Address** where (i) and (ii) above or English translation thereof can be **inspected**
 - iv. Date and **country** of incorporation
 - v. Whether co. has estb. POB in India. If so, address of **principal POB**
 - c. states matter specified u/s **26** (Matters to be stated in Prospectus)
- Note: Points of b (i),(ii) and (iii) N.A. if prospectus is issued **> 2 years after** co. is entitled to commence business [Agar nayi taazi co. (<2 years) hai to declare karo, warna mat karo]

2. Compliance with conditions mentioned u/ss (1) **cannot be waived off** on any grounds.
3. **Application forms** for securities of a Co. incorp. o/s India shall be **issued** subject to following:
 - a. Such appln is **issued with prospectus** which is in compliance with this Chap
 - b. Such issue **does not contravene** provision of sec 388 (Expert's consultation)

Exception: Where such form for appln. is issued to a person to enter into underwriting agreement.
4. Sec 387 **N.A.** (except for dating of prospectus) to issue of prospectus:
 - a. relating to issue of sec. of co. to **existing members or DH**, or
 - b. offering securities which is **uniform** with sec. previously issued and listed on RSE



Section 388: Provisions as to expert's consent and allotment:

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1. Where the prospectus includes **expert's statement**, no such prospectus shall be issued or circulated by a Co. incorporated o/s India (**not FC**), unless such expert:
 - has given **written consent** to issue
 - has **not withdrawn**, before delivery of the prospectus for registration, such written consent
 - a **statement** appears in the prospectus that expert's written consent is given and not withdrawn
2. A statement shall be **deemed included** in prospectus, if it is contained in any report/memorandum appearing on the face thereof or by reference incorporated therein.



Section 389: Registration of prospectus:

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No prospectus shall be issued/circulated unless all the following conditions are satisfied:

- a. A certified copy has been delivered for **registration** to **RoC**
Certification to be done by Chairperson **and** 2 dir. (as approved by resoln. of managing body)
- b. Prospectus **states** on the face that a copy has been so delivered,
- c. **Consent** (of **expert**) to issue the prospectus is attached.
- d. Such **other** prescribed docs is attached



Companies (Registration of FC) Rules, 2014: [EC2UA]

Following docs to be annexed to prospectus:

- a. **Expert's** consent u/s 388
- b. Copy of **contract** or memorandum for appt. of **MD/Manager**
- c. Copy of **material contracts** in last 2 years **not** in OCOB
- d. Copy of **underwriting** agreement
- e. Copy of **power of attorney** if prospectus is signed by auth. agent of directors



Section 390: Offer of IDRs

Indian Depository Receipts (IDR) means any instrument in the form of a **depository receipt** created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the CG may make rules applicable for:

- (i) the offer of IDR;
- (ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;
- (iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and
- (iv) the manner of sale, transfer or transmission of IDR, by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

As per Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014, foreign companies **cannot issue Indian Depository Receipts** (IDRs) without complying with the specified conditions, alongside adhering to regulations by SEBI and directions from RBI.

Chapter XV provisions apply to schemes of mergers and amalgamations between companies registered under the Act and those incorporated in notified foreign jurisdictions. The Central Government, in **consultation** with **RBI**, may **create rules** for such mergers and amalgamations.

Foreign companies can **merge** with companies registered under the Act, or vice versa, with prior **approval from RBI**. The scheme of merger may provide consideration to shareholders in cash or **Depository Receipts**, as per the scheme's terms.

Explanation: For the purposes of sub-section (2) above, the expression "foreign company" means any co. or BC incorporated outside India whether having a place of business in India or not.



Section 391: Application of Sec 34 to 36 and Chap XX (Winding up)

1. The provisions of sections 34 to 36 (both inclusive) shall apply to—
 - (i) issue of a **prospectus** by a co. incorporated outside India u/s 389 as they apply to prospectus issued by an Indian co.;
 - (ii) issue of **Indian Depository Receipts** by a foreign co.
2. Winding up provision shall also apply to FC.



Section 392: Punishment for Contravention

[Very important penalty]: ①

If a FC contravenes prov. of this chapter:

	Foreign Co.	OID
Fine	Rs. 1 lakh to Rs. 3 lakhs	Rs. 25,000 to Rs. 5 lakhs
Additional Fine	Rs. 50,000/day	NA
Jail	NA	NA [Amendment]



Section 393:

Co's failure to comply with prov. of this Chapter not to affect validity or contracts, etc entered into by such co. or its liability to be sued in respect thereof, **but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim** or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has **complied** with the provisions of this Act applicable to it.



Section 393A: Exemption by CG

CG may, by notification, exempt from provision of this chap:

- Foreign company
- Co. incorp o/s India whether or not having POB

insofar as they related to offering of securities, relating to prospectus or incidental matters in the International Financial Service Centers set up u/s 18 of SEZ Act, 2005

Copy of such notification should be laid before HoP.

→... The End ...←