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Companies incorporated outside India

(Chapter XXII of companies act 2013)

Companies Incorporated Outside India (Chapter XXII of Companies Act 2013)

Foreign Company Definition:

As per Sec 2(42) of the companies act 2013, Foreign company means a company which is **incorporated outside India** which has a

a) **Place of business** in India whether by itself or through an **agent, physically** or through an **electronic mode and**
b) Conducts **any business activity** in India in any other manner

Electronic mode:

According to the Companies (Registration of Foreign Companies) Rules, 2014, “electronic mode” means carrying out electronically based, **whether main server is installed in India or not**, including, but not limited to –

(a) Business to Business and Business to Consumer transactions, Data interchange and digital supply transactions **(Business related)**
(b) Offering to accept or accepting deposits or inviting deposits or subscriptions in securities in India or from citizens of India.(**Deposits related**)
(c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;**(Operations and Marketing related)**
(d) online services such as telemarketing, telecommuting, telemedicine, education and information research; **(Online services related)**
(e) All related data communication services.

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Keywords for revision:

Definition: *Incorporated outside India, having place of business in India and doing business activity.*

Electronic mode: *Server is installed in India or not, Business related , Deposit related, Operations Marketing, Online services*

Past attempt questions: *Refer Question nos. 1 to 4 in Question bank.*

<u>Application of Act to Foreign companies (Sec 379)</u>

Companies which falls under definition of sec 2(42) of this act, needs to comply certain provisions of company law which is as follows:

Applicability

<u>Criteria:</u>

Where 50% or more of Companies Paid up share capital (Equity or Pref share capital) whether in full or in part held by

Indian Citizens or

one or more companies or body corporates incorporated in India or by combination of both

Criteria	Need to comply with Sec 380 to 386 and sec 392 and sec 393?	Need to comply with other provisions of Companies Act 2013?
If foreign company **satisfy** above criteria, then	Yes	Yes (In respect of its business in India)
If foreign company **does not** satisfy above criteria, then	Yes	No
If company is not a foreign company but 50% of PUSC held by Indian citizens	No	No

IMP NOTE: If a company is not a foreign company, then none of the provisions of chapter XXII and other provisions of companies act applicable to such company even though more than 50% of share capital held by Indian Citizens or domestic companies.

Key words for revision: *50% or more of PUSC by Indian citizens/ companies (or both) incorporated in India----→ Yes, then comply with Sec 380 to 386 and other provisions of this act. If not, then only comply with Sec 380 to 386 and sec 392 & 393.*

Past attempt questions*: Refer Question no.5 and 6 in question bank.*

DOCUMENTS ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES [SECTION 380]

According to section 380 (1) of the Companies Act 2013,
(i) Every foreign company shall, within 30 days of its establishment of its place of business in India, deliver to the Registrar the following information:

(Remember this code “CAP-DD” for quick recall during the exam)

Code	About	Document to deliver to Register
C	Constitution of company	Charter, Statute, Memorandum and Articles of company. Certified Translated copy in English if original copy is not English.
A	Address	Address of Principal office in country of origin of such Foreign company
P	Place of business	Principal place of business in India and history of opening and closing of place of businesses in past if any in India.
D	Directors and others list	List of Directors and secretary of Foreign company. Name and address of Authorized person in India who is authorized to accept notices or documents on behalf of such Foreign company.

D	Declaration	None of the Directors of the company or Authorized representative of the company convicted or debarred from formation of the company.

Any other information as may be prescribed.

As part of information related to directors and secretary, Foreign company needs to provide particulars provided below:(Think about basic KYC details)

Name and surname, Parents and spouse name, DOB, Nationality and Residential address, Passport number, PAN Number, DIN number, Email id, Occupation, Membership number(Only for Secretary), Other directorships if any held by him.

All of the above information, need to be filed with registrar, New Delhi within 30 days of its establishment of place of business in **Form FC-1** along with prescribed fee. The application shall also be supported with an attested copy of approval from Reserve Bank of India under the Foreign Exchange Management Act or its regulations and also from other regulators, if any, such foreign company requires approval to establish a place of business in India or a declaration from the authorized representative of such foreign company, if such approval is not required.
If there is any alternation made or occurred in the documents, company should intimate to registrar in 30 days in **Form FC-2** along with prescribed fee.

Key word for revision: *within 30 days of formation, FC should file documents (Recollect "CAP-DD" code) in FC-1. Alternation in FC-2.*

Past attempt questions: *Refer Question nos. 7 and 8 in question bank.*

<u>ACCOUNTS OF FOREIGN COMPANY [SECTION 381]:</u>

A. **Financial statements:**
1. Every foreign company shall prepare and file a copy of balance sheet and profit and loss account In such

Form	**Having such particulars**	**Such documents annexed or attached therewith**

2. Financial statements prepared by foreign company shall be prepared in schedule III format or as near as practicable thereto.
3. All such documents specified in Chapter IX of Companies 2013 (Sec 128 to 138 of companies 2013) shall equally applicable to foreign companies as well.
4. All documents related Consolidated Financial Statements (CFS) filed in country of incorporation needs to be filed with Registrar, New Delhi.

<u>Additional Information to be filed along with Financials Statements</u>

Place of Business: Along with financials statements, every Foreign company shall file before registrar a list containing places of business in India in **Form FC-3** as on balance sheet date. If such foreign company ceases to have place of business in India, then same has be informed to registrar to get exemption from provisions of this section]

Other information: According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall, along with the financial statements, need to attach following documents; namely

Code: **RTP**

1. Statement of **r**elated party transactions
2. Statement of repatriation of **p**rofits
3. Statement of **t**ransfer of funds (including dividends, if any)

Time Limit

All Documents along with Financials Statements shall be filed in every calendar year within **6 months** from end of the Financial year.

In special circumstances, Registrar can provide an additional time of **3 months** to file required documents only on application by such foreign company.

Explanation related to Financial year:

Usually, Financial year in India end at 31st March of every year. However, on an application by foreign company, **central govt** may allow such foreign company to follow any other year as its financial year.

Further, a foreign company on an application made to **central govt**, can request to follow its holding, subsidiary or associate companies financial year whether or not that period is year.

Annual Return of foreign company:

Provisions related to annual return provided in **sec 92** shall subject such exceptions, applicable to foreign company as well.

Provisions contained in rule 7 of foreign company rules is as follows:

a. Every foreign company prepare its annual return in **FC-4**.
b. Annual return should be filed with **60 days** as on the last day of Financial Year.
c. Annual return should contain such particulars as on last day of Financial year.

IMP NOTE: In this chapter, Registrar means ROC, New Delhi. Where ever documents or information needs to be files, same needs be filed with ROC, New Delhi irrespective of the state where such foreign company is having place of business.

Audit of accounts:

Accounts of foreign company shall be audited by practicing Chartered Accountants or firm or LLP of practicing Chartered Accountants. Provisions of chapter X of companies act(Sec139 to 148) and rules made thereunder shall be applicable *mutatis mutandis* to the foreign company.

Power of CG: CG may notify such class or classes of companies provide exemption fully or partially from compliance of these provisions thorough a notification.

Key words for revision*: Every FC prepare and file BS+PL in sch III, docs specified in sec 128 to 138, CFS of FC and addl. info “RTP” within 6 months from end of FY. Shall be audited by practicing CA/Firm/LLP and Chapter X is also applicable.(FC-3 for list of place of business)*

Past attempt questions*: Refer Question nos. 9 to 11 in Question bank.*

DISPLAY OF NAME, ETC., OF FOREIGN COMPANY-Sec 382:

Every Foreign company shall exhibit outside every office and its business letters and bill heads etc. in legible English characters and one of the local language the following:

- Name of Foreign company
- Country of Incorporation
- Liability of members is limited

Past attempt questions*: Refer Question no. 12 in Question bank.*

Service of documents on foreign company-Sec 383:

Any document required to be served on a foreign company shall be deemed to be sufficiently served if it is addressed to any person whose name and address authorized in this behalf and it is left at address communicated to registrar under sec 380 by hand delivery, post or by electronic mode.

DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNT AND THEIR INSPECTION [SECTION 384]:

Certain provisions of companies act 2013 shall apply *mutatis mutandis* to foreign companies as well:

Section	Description
71	Provisions related to debentures
92	Provisions related to annual return
135	Corporate Social Responsibility (CSR)
128	Provisions about Books of Accounts
Secc77 to 87	Provisions related to registration of charges
206 to 229	Provisions related to Inspection, Inquiry and Investigation

Fee for Registration of documents(Sec 385):

To register any document under chapter XXII, Foreign company needs to pay such fee as may be prescribed.

Dating of prospectus and particulars to be contained therein (sec 387):

Matters to be stated in prospectus:

No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated outside India, unless the following conditions are satisfied:

a. Prospectus dated and signed
b. Prospectus should disclose all such matters specified in **Sec 26**.

c. Prospectus contains the following particulars: (Code: i.e. CA)

i.	Date and country of **I**ncorporation
e.	**E**nactment/Law under which the company was incorporated (A certified translation in English if original document is not in English.
C	Instrument constituting or defining the **C**onstitution of the company
A	**A**ddress in India where the said instrument can be inspected
	Address of principle place of business in India

Application form for securities of a company incorporated outside India shall not be issued to public unless same should be accompanied by prospectus.

***Keywords for revision**: Matters to be specified in prospectus (Dated and signed+ matters in sec 26+ Recollect code “i.e CA”)*

<u>Provisions related to expert consent and allotment(Sec 388):</u>

Where prospectus by which securities are issued for subscription contains a statement purporting to be made by an expert, no person shall issue such prospectus if

1. Expert has not given written consent for issue of prospectus.
2. Expert has withdrawn his consent before issue of prospectus.
3. If prospectus does not contain a statement saying “ Expert has given consent and the same was not withdrawn”

For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by any reference incorporated therein.

***Keywords for revision**: prospectus shall not be issued in case Expert consent withdrawn, not given or does not contain statement of expert*

<u>Registration of Prospectus(Sec 389):</u>

Before issuing any prospectus by a foreign company to public for subscription, company needs to fulfill below conditions:

Prospectus should be delivered to Registrar for registration.

Prospectus state the face that it was delivered to registrar.

Expert consent should be attached to prospectus.

Further to the above, as per Rule 11 following shall also be attached to the prospectus:

1. Copy of contract for appointment of MD or manager. If the same is not in writing, then a memorandum containing particulars thereof needs to be filed.
2. Copy of material contracts if any entered into by such company other than contracts in regular course of business **preceding 2 years** shall also be attached with prospectus.
3. Copy of underwriting agreement and

4. Copy of Power of attorney if prospectus signed by an agent of a director.

Chairperson **and** 2 other directors should sign prospectus.

Past attempt questions*: Refer Question no. 13 in Question bank.*

<u>Offer of Indian Depository Receipts (IDR) Sec-390:</u>

No company incorporated or to be incorporated outside India, shall make an issue of IDR unless such company complies with:

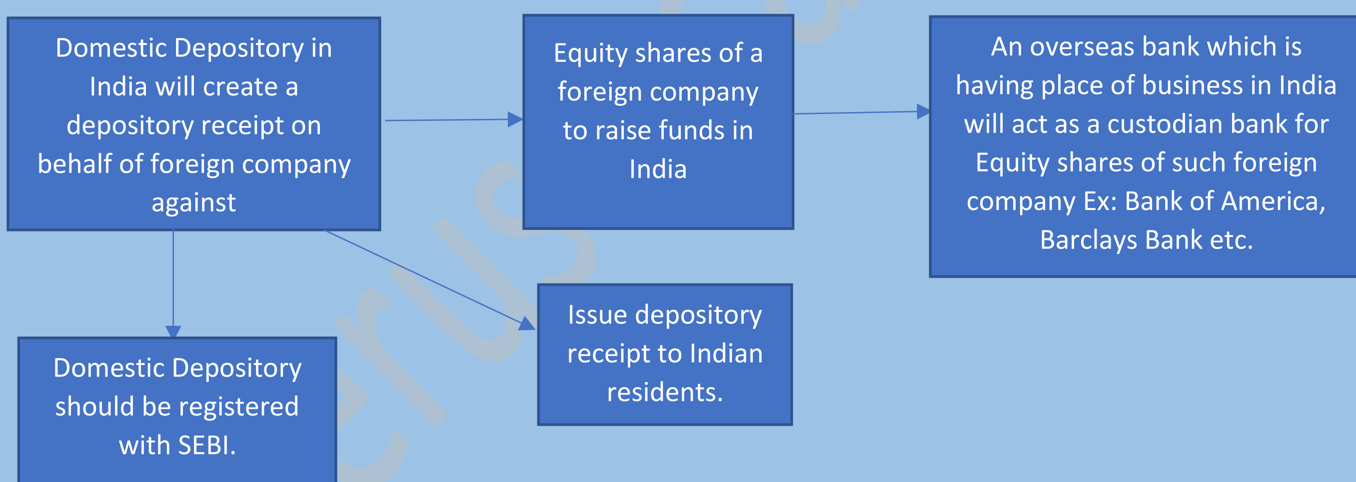
a. Conditions mentioned in Rule 13 of foreign companies rules 2014.
b. Complied with conditions which were specified by SEBI disclosure requirements.
c. Complied with directions if any specified by RBI.

<u>Concept of IDR:</u>

IDR is a document denominated in India Currency.

IDR’s can be purchased by any resident in India as defined under FEMA Act 1999.

Process of IDR:



Central government can make any rules relating to offer, disclosures, sale/transfer/transmission of IDRs and Manner in which IDR shall dealt with custodians and underwriters.

Keywords for revision*: Domestic depository create IDR against Equity shares of FC--→ Created IDRs will be issued to public in India---→ Foreign bank having POB in India acts as custodian----> Depository should register with SEBI*

Past attempt questions*: Refer Question no. 14 in Question bank.*

Application of Sec 34 to 36 and Chapter XX(sec 391):

Sec 34 to 36 of companies act, shall be applicable to foreign company as well with respect to issue of prospectus and IDR.

Similarly winding up provisions under chapter XX of companies act shall also be applicable *mutatis mutandis* to foreign company only in case such company raised funds from India and the same were not repaid.

Punishment for contravention(Sec 392):

If a Foreign company contravenes any of the provisions of chapter XXII of companies act 2013, the punishment shall be as follows:

On Company:

Fine- INR 1 Lakh to 3 Lakhs

INR 50000 in case of continuing offence.

Officer/ Employee of such company:

Officer in default punishable with minimum fine of INR 25000 to maximum of INR 500000.

Companies failure to comply with provisions of this chapter not to effect contracts etc.(Sec 393):

a. Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act 2013, **shall not affect the validity** of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof.
b. However, 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 the Companies Act, 2013, applicable to it.

Power of CG to grant exemptions-Sec 393A(New provision)

CG by a notification exempt any

i. Foreign company
ii. Company incorporated or to be incorporated outside India may or may not have any place of business in India.

Exemption is in respect of any of the provisions specified in Chapter XXII of this act.

Recently, in exercise of these powers, CG exempted compliance of sec 387 to 392 IFSC centers which was set up under sec 18 of SEZ Act.

Foreign company past attempts questions for practice:

Definition of Foreign company:

1. Robertson Limited is a company registered in Thailand.Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a foreign company?**(Nov 2015).**
   Ans/Clue: Yes it is a foreign company. Online telemarketing also covered in definition

2. In the light of the provisions of the companies act, 2013 explain whether the following companies can be considered as a foreign companies:
   (i) A company which has no place of business in India, yet is doing online business through telemarketing in India.
   (ii) A company which is incorporated outside India employs agents but has no place of business in India.
   (iii) A company incorporated outside India having share holders who are all Indian citizens.**(Nov 2018)**

Ans/Clue: (i) Yes it is a foreign company **(ii)** Just appointed agent not conducted any business activity. Not a foreign company. (iii) All shared holders are Indian citizens is irrelevant. It has not established any place of business. Not a foreign company.

3. Transtar Limited, a company incorporated in Thailand, has a place of business through an agent in Bangalore. The agent transacts the business on behalf of the company through electronic mode. As regards Transtar Limited, answer the following:
   (i) Whether Transtar Limited shall be called a foreign company within the meaning of the Companies Act, 2013?
   (ii) What are the regulatory requirements under the Companies Act, 2013 to be complied with by a company which has established its place of business in India with respect to delivery of documents etc. to Registrar? (4 Marks**)(Nov 2019)**

Ans/Clue: (i) Yes it's a foreign company (ii) Refer sec 380 list of information

4. In the light of the provisions of the Companies Act, 2013, examine whether the following Companies can be considered as a 'Foreign Company':

(i) M/s Red Stone Limited is a Company registered in Singapore. The Board of Directors meets and executes business decisions at their Board Meeting held in India .

(ii) M/s Blue Star Public Company Limited registered in Thailand has authorized Mr. 'Y' in India to find customers and to enter contracts with them on behalf of the Company.

(iii) M/s Xex Limited Liability Company registered in Dubai has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India. (8 Marks) (**Nov 2019)(Similar in Jan 2021)**

Ans/Clue: (i) Conducting BM in India does not constitute place of business. Not a foreign company (ii) Yes it's a foreign company (iii) It is a foreign company. Location of server is irrelevant.

Application of Act to Foreign companies (Sec 379)

5. Mr. Ziyan is an Indian citizen holds 25% of paid up share capital of Lauren Stevel Limited a company which has incorporated in Singapore with paid up capital of SG$10 MM. Swaraj Limited a company registered in India holds 30% of paid up capital of Lauren Stevel. Lauren Stevel recently established share transfer office at New Delhi. The company needs your advice as to what the formalities company has to comply with.**(Nov 2017)**

Ans/Clue: Lauren Stevel is a foreign company. Share transfer office considered as place of business. Ziyan and Swaraj Ltd. Cobindely owns 55% (25+30) of PUSC of Lauren Stevel. Hence foreign company needs to comply with all of the provisions of companies act.

6. Trans Asia is registered as a public company u/s 4(7) of the erstwhile companies act 1956 which is a subsidiary of Galileo Limited, a foreign company. Trans Asia Limited carries on business in India describing itself as a foreign company. Can it do so? State what is the action that can be taken against the company for improper use of the name as foreign company.**(Nov 2018)**

   Ans/Clue: Trans Asia is registered u/s4(7) of the act. Foreign company must be registered outside India. Hence, Trans Asia is not a foreign company.

   As per Rule 12, If any company wrongfully describes itself as foreign company, then company will face investigation under sec 210 of the companies act.

DOCUMENTS ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES [SECTION 380]

7. ABC Limited a foreign company failed to deliver some desired documents to ROC as required under sec 380 of the Act, state the penalty prescribed under the said act which can be levied.**(May 2015)**
   Ans/Clue: Penalty as provided in sec 392 will be applicable.

8. Qinghai heading industrial company Ltd, incorporated in china established a place of business at Mumbai. The charter the charter/ documents constituting the company is in Mandarian Chinese (chinese Local language). It is required inter alia to file a certified translation of above documents with the register of companies in India. Who can authenticate the translated charter/ documents as per the provisions of the companies act, 2013 and rules made there under governing foreign companies in case such translation is case such translation is made at Mumbai?**(May 2018)**
   Ans/Clue:
   This question was based on Rule 10 of foreign company rules. Answer for this question was not covered either in study material or RTP or MTP. However, this was asked in May 2018 exam and similar question in July-21 as well. Hence included here on safer side.

   Authentication of translated copy as per rule 10:
   1. An advocate or attorney who is entitled to appear in High court **or**
   2. An affidavit from competent person as per opinion of registrar having knowledge of English a well as original language.

ACCOUNTS OF FOREIGN COMPANY [SECTION 381]:

9. Galileo Ltd is a foreign company in Germany and it is established a place of business in Mumbai. Explain relevant provisions of companies act 2013 and rules made thereunder relating to preparation and filing of financial statements as also the documents to be attached along with Financial statements by Foreign company.**(May 2016)**
   Ans/Clue: Refer sec 381 in material.

10. Phil Heath Systems Incorporated (PHSI), is a foreign Company registered in Australia and has established a place of business in India. The financial statements pertaining to the Indian business operations for the year ended 31st March, 2020 were prepared by the Company. Referring to the provisions of the Companies Act, 2013, advise the Company on the following matters:
    (i) Whether the accounts of the Company pertaining to Indian business operations shall be audited ? If yes, by whom ?
    (ii) What is the due date for filing the audited financial statements with the Registrar of Companies (RoC) ?
    (iii) What is the effect of the contracts entered by an Indian Company with PHSI in case PHSI has not filed financial statements with the RoC?
    (iv) In which e-form and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies? (4 Marks) **(January-2021)**
    Ans/Clue: Refer 381 in material for (i), (ii) and (iv) refer material. For (iii), refer sec 393 in material.

11. MNO Ltd is a foreign Joint Venture company having its established place of business in India and following IFRS and its financial are being prepared in German language desires to know the following with regards to submission of its financials to ROC in India. Its area office is in Mumbai.
    A. Submission of Financials in German language
    B. Format of financial statements as per IFRS
    C. How authentication of its Financial is to be done
    D. Whether the documents can be submitted at the ROC Mumbai **(July-21)**

Ans/Clue: A. Financials should be in English language. If not a certified translation thereof should be submitted. **B**. Format should be in Sch III with such exceptions and modifications as necessary and applicable accounting standards.
C. Authentication can be done in India or outside India.

If it is **outside India**, Then same should be authenticated by

i. The officials of that country having custody of the original; or
ii. A Notary of the country where the company is incorporated:

If authentication is in India, Then same should be authenticated by

i. An advocate or attorney who is entitled to appear in High court **or**
ii. An affidavit from competent person as per opinion of registrar having knowledge of English a well as original language.

D. Documents needs to be filed with ROC Delhi only.

DISPLAY OF NAME, ETC., OF FOREIGN COMPANY-Sec 382:

12. The Liability of members of style limited, a company incorporated in Singapore is limited. The company plans to start a place of business in Mumbai from 01 Dec 2016. It has taken an office space in Andheri. The person who is to take care of Mumbai office needs your advice in respect of displaying of company name etc. at its Mumbai office as well as in its business letters and other documents. Advice him with respect to provisions of companies act.**(Nov 2016)**

Ans/Clue: Refer sec 382 in material.

Registration of Prospectus(Sec 389):

13. Chang Limited, a company incorporated in Singapore proposes to issue prospectus offering its securities in India. The Company has not established place of business in India.The officer in charge of the issue of the prospectus in India seeks your opinion regarding the provisions relating to registration of the prospectus under the Companies Act, 2013. List out the documents required to be enclosed with the prospectus.**(May 2018)**

Ans/Clue: Refer sec 389 in material

Sec 390_IDR:

14. North Sea Shipping Limited is incorporated in South Korea. It has established an office in Paradeep. Mr. Jonathan is the Branch in charge and the Compliance Officer in India. He has received a communication from the Chief Executive Officer in South Korea to explore the possibilities of issuing Indian Depository Receipts to the extent of ` 1,000 million in financial year 2020-21. He has approached you being financial consultant for your advice.

    Advise him as per the provisions of the Companies Act, 2013. **(Nov 2020)**

Ans/Clue: Need to write entire procedure specified in sec 390 for raising IDRs in India. Refer sec 390 in material.