

Swamy demands cancellation of permit

The civil aviation ministry is keeping mum on a media report, which reveals that the aviation firm is being controlled by its Malaysian share holder

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A media report on Tuesday said AirAsia India is controlled by its Malaysian share holder (AirAsia Malaysia), in alleged contravention of foreign direct investment norms.

While the civil aviation ministry has not responded, Tata Sons (which, along with its executives, owns 51 per cent in the airline) denied any violation of norms. However, the revelations have come as ammunition for Bharatiya Janata Party leader Subramanian Swamy, who has been fighting a legal battle against the airline since 2013.

“I will write to the ministry and the Prime Minister’s Office, demanding scrapping of the permit granted to AirAsia India,” Swamy stated.

On Tuesday, Mint pointed out that a brand licensing agreement allows AirAsia Malaysia to exercise control on virtually all aspects of operations of AirAsia India. The agreement, the report said, was signed between the two entities in 2013 and gives the Malaysian partner the influence and control over key functions such as ancillary revenue, branding, revenue management engineering, finance, among others.

At the heart of the controversy is a government rule which states “substantial ownership and effective control” of an airline should vest with Indian nationals.

“AirAsia India is fully compliant with the requirements of Indian regulations. Majority ownership and effective control are with Indian parties as per the requirements of Department of Industrial Policy & Promotion. Further, all important decisions concerning the day-to-day operations of the airline are taken by the management team of the airline under the overall supervision, control and direction of board of directors (include a majority of Indian nationals). The board is chaired by long-time Tata veteran, S Ramadorai,” said a Tata Sons spokesperson.

Civil Aviation Secretary R N Choubey said he would not comment on media reports.

According to Simone Reis, co-head of mergers and acquisitions practice at Nishith Desai Associates, there is no objective criteria on what effective control means but arrangements that would deter the Indian partner’s ability to make decisions defeat the requirements of the law.

According to her, the agreements between AirAsia India and its Malaysian partner need to be studied for aspects pertaining to brand protection. “It is difficult to suggest that an entity that is also granting a brand

licence will be unable to protect its brand by requiring the licensee of the brand to follow certain criteria key to the brand. There is a difference (some may say a narrow line) between what amounts to protection of the brand and what amounts to controlling operations of a company.”

While it satisfies the “substantially owned” test, the question will be regarding the second test on effective control, says lawyer Nitin Sarin, who specialises in aviation law. “If 51 per cent ownership vests with Indians, they have majority shareholding and all decisions may be made or vetoed by them. Entering into a licensing agreement is a commercial decision, which would have been approved by the majority shareholders (Indian)... with this limited information, there seems no illegality whatsoever in AirAsia India.”

Globally, aviation has, since the 1940s, been developed on laws that state an airline must be “substantially owned and effectively controlled” by persons having the citizenship of the home base of the airline.

The initial rationale for this was that countries wished to keep tight control over airlines because at that time (1940s) aviation was used mainly for military purposes.

Over the years, the need to retain the “substantial ownership and effective control” clause has been diluted from the security angle, but it still remains inherent in air service agreements that stipulate traffic rights between two countries.