



FEMA – Acquisition of Immovable Property in India by Non-Residents
&
Acquisition of Immovable Property Outside India by Residents

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Saturday 8th May, 2021

Agenda

- **Section 1 : Introduction**
- **Section 2 : Definition of Person resident in India, NRI & OCI**
- **Section 3 : Acquisition of Immovable Property In India**
 - By NRIs, OCIs, Foreign Nationals, Foreign Embassies or Diplomats & Consulate Generals & Foreign Companies
- **Section 4: FDI in Real Estate under FEMA (Non-Debt Instruments), Rules, 2019**
 - Chapter III- Schedule I- Foreign Direct Investment in Real Estate Sector
 - Chapter IX- Schedule IV- Investment in real estate on non-repatriation basis by NRI & OCI through Company/LLP
 - Schedule VIII- Investment by non-residents in real estate through an Investment Vehicle
- **Section 5 : Acquisition of Immovable Property by Residents Outside India**

SECTION-1

INTRODUCTION

Introduction

Immovable Property – Meaning & Governing Regulations under FEMA

- **Acquisition of Immovable Property in India or outside India is a ‘Capital Account Transaction’ :**
 - As per Section 2(e) Capital Account transaction means a transaction which alters assets or liabilities including contingent liabilities, outside India of person resident in India or assets and liabilities in India of persons resident outside India and includes transactions referred to in sub-section (3) of Section 6.
- **FEMA does not define the term ‘immovable property’:**
 - In general, the term will include all types of immovable property – residential, commercial, industrial or agricultural property, including an under construction property.
- **General Restrictions on acquisition of immovable property Under FEMA:**
 - General restriction under Rule 24 of FEMA (Non- Debt Instruments) Rules, 2019 on acquisition by way of purchase of agricultural land / plantation property / farm house in India by NRIs/OCIs.
 - Regulation 4(b) of **FEMA Notification No. 1- Permissible Capital Account Transactions Regulations, 2000** provides that no person resident outside India shall make investment in India in any form, in any company or partnership firm or any entity which is engaged in –
 - Real estate business or construction of farm house; or
 - Engaged in trading in TDRs

Note: Real Estate Business shall not include development of townships, construction of residential commercial premises and REITs registered with SEBI.

Introduction

Immovable Property – Authority and Governing Rules & Regulations

- GOI / RBI derive power under section 6 of the Foreign Exchange Management Act, 1999 to frame rules and regulations to regulate acquisition/ transfer of immovable property in India & abroad.
- **Rules governing acquisition/transfer of Immovable Properties in India**
 - FEMA (Non-Debt Instruments) Rules, 2019 dated 17th October 2019.
- **Regulation governing acquisition / transfer of Immovable Properties abroad**
 - Notification No. 7(R) - Acquisition and transfer of immovable property outside India) Regulations, 2015 dated January 21, 2016
 - Notification No. 120 - (Transfer or Issue of Any Foreign Security) Regulations, 2004 dated July 7, 2004 for investments in JV/WOS for undertaking construction / development projects abroad.

Introduction

Acquisition of Immovable Property – Thrust predominantly on Residential Status

- Under FEMA, the thrust is on residential status of a person determined under Section 2(v) of the Act and not on citizenship of a person. The regulations are therefore based on the residential status.
- However the above statement is subject to-
 - Restrictions on Citizens of eleven countries (viz. Citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan or Macau or Hong Kong or Democratic People’s Republic of Korea (DPRK)) (Rule 31)
 - Excludes OCIs and Citizen of Pakistan, Bangladesh and Afghanistan who are belonging to minority community in respective countries and residing in India on Long Term Visa) irrespective of their residential status.
 - However, they can acquire immovable property in India only with the prior RBI approval or on a lease for a period not exceeding five years.
 - General exemptions under Section 6(5) – discussed in next slide

Introduction

General Exemptions – Change in Residential Status – Sections 6(4) & (5)

- Section 6(4) - A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.
- Section 6(5) - A person resident outside India can hold, own, transfer or invest in immovable property situated in India if such property was acquired, held or owned by such person when he was a resident in India or inherited from a person who was a resident in India

SECTION-2

**DEFINITION OF PERSON RESIDENT IN
INDIA, NRI & OCI**

Person Resident in India

Section 2(v) - Person resident in India (PRI)

▪ Residential Status of an Individuals-

- Person being individual residing in India for > 182 days during the course of the preceding financial year but does not include: –
 - Person who has gone out of India or who stays outside India, in either case
 - For or on taking up employment outside India, or
 - For carrying on a business or vocation outside India, or
 - For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.
 - *[RBI Clarification on Residential Status of Students Abroad vide AP Dir. Cir. No. 45 dated 8.12.2003 - (Non resident – if stay abroad is of more than 182 days in a financial year, job abroad, financial independence and the intension to stay outside India]*
 - Person who has come to or stays in India, otherwise than
 - For or on taking up employment in India, or
 - For carrying on a business or vocation in India, or
 - For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

▪ Residential Status of Persons Other than Individuals-

- Any Person or body corporate registered or incorporated in India.
- An office, branch or agency in India owned or controlled by a person resident outside India.
- An office, branch or agency outside India owned or controlled by a person resident in India.

Section 2(w) - Person resident outside India (PROI)

- Person resident outside India means a person who is not resident in India.

Person Resident in India

Section 2(v) - Person resident in India (PRI)

- In a case when a non-resident individual comes for employment in India, RBI appears to have ignored the requirement of 182 days stay in India during the course of the preceding financial year and treat such person as a person resident in India immediately upon return to India.
- Refer **Para 4.9** of the **RBI Master Direction on “Deposits and Accounts”** dated January 1, 2016 reproduced below-

*“NRE accounts should be **designated as resident accounts** or the funds held in these accounts may be transferred to the RFC accounts, at the option of the account holder,
i) **immediately upon the return of the account holder to India for taking up employment** or
ii) **on change in the residential status.**”*
- When it comes to determination of residential status for acquisition of Immovable property in India, RBI strictly follows arithmetic condition and requires stay in India by the individual for a period of more than 182 days during the preceding financial year.
- The onus is on an individual to prove his / her residential status, if so questioned by any authority.

GOI Advisory on Acquisition of Property by Foreign Nationals

GOI Press Release of February, 1, 2009 - Annexed to **Master Direction No. 12 - Acquisition and Transfer of Immovable Property under Foreign Exchange Management Act, 1999**

- It has come to the notice of the Central Government that foreign nationals are buying immovable property illegally in some parts of the country, particularly in Goa, which has raised concerns.
- To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him to clearly indicate the intention to stay in India for an uncertain period. In this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa.
- It has also been observed that foreign nationals coming to India and staying beyond 182 days on a tourist or other visa meant for a certain period are illegally acquiring immovable property in India in violation of the extant rules and regulations under FEMA.
- **Summary of Requirements as per GOI Advisory:**
 - Residing in India for >182 days during preceding financial year.
 - Purpose of stay - Employment, Business or stay in India for an uncertain period.
 - The type of visa to clearly & unambiguously establish the intention to stay in India for an uncertain period.
 - Onus to is on the foreign national to prove his residential status in India

Person Resident in India

Resident Vs. Non-resident – Intention - Practical Issues with examples

1. Mr. Rakesh, an Indian national, takes up employment with a Company in US) and migrates to New York, Mr. Rakesh is a Non Resident from the day of his taking up employment in USA.
2. Mrs. Rakesh shifts to New York to stay with her husband & settle down in USA. She also becomes a Non-Resident as soon as she shifts to USA.
3. On retirement of Mr. Rakesh, Mr.& Mrs. Rakesh return to India for permanent settlement. They become Residents upon return to India.
4. Mr. Vijay, a Development Manager with a company in Mumbai goes for six months to USA on export promotion tour. He continues to be a Resident.
5. Mr. Vijay joins a company in New York as a partner and shifts his residence to USA. He becomes Non Resident.
6. Mr. Dilip, Manager in CCI is deputed to New York office. He is a Non-Resident during his posting to New York.
7. Mr. A, an Indian citizen and Mr. B an American national are employed with Bank of America, Mumbai and obtained resident permit. Both are residents in India.
6. Mr. Aachyut, a student, goes abroad for higher studies for a period of 3 years .Based on the beneficial circular No. 45/2003 dated 8.12.2003 issued by RBI, Mr. Aachyut will become non resident if his stay abroad is more than 182 days during the preceding financial year
7. Mr. Anil, who is American citizen, comes to India as a tourist. He will continue to be Non-Resident.
8. Mr. Anil takes admission in one year course in Mumbai University. He is a Non-Resident. .
9. Mr. Anil marries his co-student, an Indian girl and settles down in India permanently. **He becomes a resident.**
10. Mr. Anand, a non-resident comes to India for marriage of his two children and intends to leave India soon thereafter. His total stay in India continues for more than eighteen months and more than six months in each of the two years.

Mr. Anand has not taken up any employment in India nor does not have business in India. He is a non-resident, The onus is on him to establishes that he does not intend to stay in India for an indefinite period,

FEMA Principal – Intention has to be supported by the facts

Non Resident Indian

Non Resident Indian (NRI)

- Non-resident Indian (NRI) is not defined under the FEMA Act, 1999.
- Under Notification No. 5(R) - **Deposits** - Regulation 2(vi) – NRI is defined as under-
 - vi) 'Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India [Person of Indian Origin 'PIO' is not considered as NRI – is defined separately under Notification 5(R)] – discussed in the next slide
- Under **Foreign Exchange Management (Non-Debt Instruments) Rules, 2019** – Rule 2(aj), the term is defined as under-
 - (aj) 'NRI' or 'Non-Resident Indian' means an individual resident outside India who is a citizen of India;
- Therefore, under all FEMA Notifications/ Rules, the term NRI now uniformly means a citizen of India who is resident outside India and does not cover POIs/OCIs within the meaning of NRI.

Person of Indian Origin (PIO)

Person of Indian Origin (PIO)

- Person of Indian Origin 'PIO' is not defined under the FEMA Act.
- Only **Notification- 5 (R)- Deposits** - Section 2 (x) defines the term PIO as under-
- PIO is a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:
 - **Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or**
 - **Who belonged to a territory that became part of India after the 15th day of August, 1947; or**
 - **Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or**
 - **Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c)**

Explanation: For this regulation, PIO includes an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

- PIO concept is replaced by the concept of OCI for all other notifications including acquisition / transfer of Immovable Property in India.
- **Therefore, OCI card for foreign citizens of Indian origin to purchase Immovable Property in India. POI, who does not hold OCI can continue to hold the immovable property which was acquired in accordance with law.**

Overseas Citizen of India (OCI)

Overseas Citizen of India (OCI)

- **Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 – Rule 2 (ak),**
- “Overseas Citizen of India” “OCI” means an individual resident outside India who is registered as an **Overseas Citizen of India Cardholder** under section 7A of the Citizenship Act, 1955 (57 of 1955). The following categories of foreign nationals are eligible for registration as OCI Cardholder:
 - *Who was a citizen of India at the time of, or at any time after commencement of the Constitution i.e. 26.01.1950; or*
 - *who was eligible to become a citizen of India on 26.01.1950; or*
 - *who belonged to a territory that became part of India after 15.08.1947; or*
 - *who is a child or a grandchild or a great grandchild of such a citizen; or*
 - *who is a minor child of such persons mentioned above; or*
 - *who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or*
 - *spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.*
- For online OCI Services/ Registration visit <https://ociservices.gov.in>
- No person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder.

SECTION-3
ACQUISITION OF IMMOVABLE PROPERTY IN
INDIA

Investment in Real Estate by NRIs/OCIs

(Other than FDI) (under Chapter IX- Foreign Exchange Management (Non-Debt Instruments) Rules, 2019)

Transaction Type	Rule	By NRIs/ OCIs
<u>Acquisition</u>		
Agricultural Land, Farm House or Plantation Property	24(a)	No except Inheritance from PROI/PRII. Repatriation not allowed.
Other Property	24(a) 24(b) 24(c)	Purchase Gift from NRIs, OCI & PRII who are relatives as defined under the Companies Act, 2013 Inheritance of property which was originally acquired in accordance with FEMA*
<u>Transfer</u>		
Agricultural Land, Farm house or Plantation Property	24(e)	Sale or Gift to PRII only. Cannot be transferred to NRIs/OCIs/ Foreign Nationals
Other Property	24(d)	Any person including NRIs, OCIs & PRII
<u>Mode of Payment</u>	24(a)	<ul style="list-style-type: none"> •Inward remittance through normal banking channels •Out of funds held in NRE/FCNR/NRO Accounts maintained in India •No payment can be made either from any resident account or by traveller's cheque or by foreign currency notes or any other mode other than specifically permitted.

Investment in Real Estate by NRIs/OCIs

(Other than FDI) (under Chapter IX- Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

Transaction Type	Rule	NRIs/OCIs	Rule	Others
<u>Repatriation (net of taxes)</u>	29	<ul style="list-style-type: none"> Residential Property acquired in FC - Full repatriation for maximum 2 house properties. Remittance for additional properties under US \$ 1M Scheme Other Properties acquired in FC – Full repatriation Properties covered under s. 6(4) – Remittance under US \$ 1 Million Scheme 	26 & 27	<p>Branch</p> <ul style="list-style-type: none"> In accordance with applicable law Incidental for undertaking permitted activities Investment out of remittances from abroad
<u>Repatriation of application money for booking of flat/ payment made to the builder when flat is not allotted or booking / contract is cancelled</u>	29	NRIs/OCIs are allowed to credit refund of application /earnest money / purchase consideration on account of non-allotment/ cancellation of bookings for purchase of residential/commercial property, together with interest, if any (net of taxes) to NRE/FCNR account, if originally paid out of NRE/FCNR account / Remittance from outside India - Notification No. 5(R)		<ul style="list-style-type: none"> Form IPI should be filed with RBI within 90 days <p>Diplomatic offices of Foreign Government</p> <ul style="list-style-type: none"> Remittances from abroad Approval from Ministry of External Affairs
<u>Remittance in the event of failure in repayment of ECB:</u>	29	AD bank may permit overseas lender or the security trustee to sell immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate sale proceeds towards outstanding dues in respect of the said loan and not any other loan		<p>Repatriation</p> <ul style="list-style-type: none"> Allowed

Joint acquisition of property by spouse, not being NRI/OCI

(Rule 25 Chapter IX- Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

- One immovable property by spouse, who is not NRI/ OCI, jointly with spouse, who is NRI/ OCI (other than agricultural land/farm house/ plantation property) subject to the following conditions -
 - Consideration for transfer, is made out of Inward Remittance/ FCNR/NRE/NRO Accounts
 - No payment is allowed either by traveler's cheque or by foreign currency notes
 - The marriage has been registered and subsisted for a continuous period of not less than two years
 - Non-resident spouse is not otherwise prohibited from such acquisition.
- No approval is required for transfer of such property to an Indian resident, provided the resident is otherwise eligible to purchase property in India.
- Transaction should be through normal banking channels in permissible modes.
- Repatriation of sale proceeds by non OCI spouse will require prior RBI approval.

Acquisition of property by Long-Term Visa holder

(Rule 28 Chapter IX- Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

- **Eligible persons** - Citizen of Afghanistan, Bangladesh or Pakistan;
- **Belonging to minority communities:** Hindus, Sikhs, Buddhists, Jains, Parsis and Christians
- Residing in India and have been granted Long Term Visa (LTV) by the Central Government.
- **Conditions:**
 - The property is not located in and around restricted/ protected areas so notified
 - The purchaser submits a declaration to the District Revenue Authority of the district, specifying the source of funds and that he/ she is residing in India on LTV;
 - The registration document mentions nationality of the purchaser and the fact that he/she is on LTV;
 - The property can be attached/ confiscated in the event of indulgence in any anti-India activities;
 - A copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division);
 - Such person shall be eligible to sell the property only after acquiring Indian citizenship or with the prior approval of DCP/FRO/FRRO concerned.

Other Aspects

- **Renting of residential / commercial property purchased out of foreign exchange / rupee funds**
- NRI/PIO can rent both residential/ commercial property without prior approval of the RBI.
- Rent can be credited to his NRO / NRE Account/ Directly remitted abroad subject to deduction/ payment of appropriate taxes

Other Aspects

- **Creation of Charge on Immovable Property in India:**
- **For availing ECB by Eligible Borrowers : [FEMA (Non- Debt Instrument) Rules, 2019 - Rule 30]:**
 - AD Bank may permit a person resident in India to create charge on his immovable property in India in favor of overseas lender or security trustee for ECB (Refer Master Direction on ECB- Regulation 10).
 - In case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit sale proceeds to the overseas lender.
- **For availing loan abroad by an Overseas Company: [FEMA (Non- Debt Instrument) Rules, 2019 - Rule 30]:**
- AD Bank in India may create a mortgage on IP in India owned by NRI /OCI, being director of a company outside India for a loan by the company from overseas lender, subject to following conditions:-
 - Funds shall be used for core business purposes overseas.
 - In case of invocation of charge, Indian bank may sell the IP and pay to overseas lender (Regulation 10(iii)).

Other Aspects

- 1. Creation of Charge on Immovable Property in India- continued-**
- 2. For Housing loan for acquisition of a residential accommodation in India by NRI/ OCI: (Notification 3R- Regulation 7B)**
 1. A registered NBFC in India or a registered housing finance institution in India or any other financial institution as may be specified by the RBI is permitted to provide housing loan to a NRI/OCI Cardholder subject to such terms and conditions as prescribed by the Reserve Bank from time to time.
 2. RBI has not specified any specific terms and conditions. Banks/NBFCs are considering the proposal as per their prudential norms.
- 3. For availing Rupee loan for personal needs: (Notification 3R- Regulation 7A)**
 1. As per Regulation 7A of Notification No. FEMA 3(R), An AD in India is permitted to grant loan to a NRI/OCI Cardholder for meeting borrower's personal requirements/ own business purposes/ acquisition of a residential accommodation in India/ acquisition of motor vehicle in India / or for any purpose as per the loan policy laid down by the Board of Directors of the AD and in compliance with prudential guidelines of Reserve Bank of India.

Investment in Immovable Property through Company /LLP / Partnership by NRIs/ OCIs on Non-Repatriation Basis

FEMA (Non-Debt Instrument)Rules, 2019 - Chapter V - Schedule IV

▪ **Non-repatriable- Meaning:**

- Only Interest/ Dividend / Current Income can be remitted abroad by the partners
- Principal + Capital gains cannot be repatriated except under US D 1 Million Scheme

▪ **Eligible Investors**

- NRIs/ OCIs including a Company, Trust and a Partnership Firm incorporated outside India and owned and controlled by NRIs/OCIs
- PIO not registered as an OCI Cardholder - Not eligible to make investment under Schedule 4
- Foreign Company/Trust/Firms Owned & Controlled by NRIs/OCIs (Rule 23):-
 - Company - > 50% of Share Capital
 - Partnership/LLP-Beneficially owned by NRIs/OCIs
 - Meaning of Control – Right to appoint majority of Directors/ Partners/DPs is with NRIs/OCIs

▪ **Investments under Schedule IV to be treated at par with Domestic Investment – Meaning?**

- No pricing norms/ No need for compliance filing with the RBI
- Investment in partnership engaged in retail trading/stocks trading/tobacco/gambling allowed

▪ **Restricted Sectors:**

- Nidhi Company, Agricultural / plantation activity or real estate business / construction of farm houses / dealing in TDR.

- Note: Earning of rent income on lease of the property, not amounting to transfer / Investments in units of REITs regulated by the SEBI (REITs) Regulations 2014 are excluded from the definition of “real estate business”

Investment in Immovable Property through Company /LLP / Partnership by NRIs/ OCIs on Non-Repatriation Basis

FEMA (Non-Debt Instrument)Rules, 2019 - Chapter V - Schedule IV

- **Investment allowed on Non-Repatriation Basis without any limit in –**
 - Shares, Debentures, Warrants of Indian companies on the stock exchange or otherwise
 - Units of an Investment Vehicle on the Stock Exchange or otherwise
 - Contribution to the Capital of a Partnership Firm, Proprietary Firm or LLP.
 - Convertible notes issued by a startup company in accordance with the Regulations.

- **Mode of Investment – Inward remittance / NRE / FCNR(B) / NRO Accounts in India**

- **Sale proceeds - Net of taxes to be credited only to NRO Account**

- **Principal Amount invested and Capital gains can be repatriated under US \$ 1 Million Scheme**

- **LLP is not allowed to raise ECB**

Foreign Investment in LLP engaged in Real Estate Development

(under Chapter III- Schedule VI - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

- **Whether Foreign Investment in LLP engaged in construction, development allowed?**
 - Foreign Investment (not considered as FDI) in LLP on repatriation basis under **Schedule VI of FEMA (Non Debt Instrument) Rules, 2019** is allowed in sectors or activities where foreign investment up to 100 per cent is permitted under automatic route and there are no FDI linked performance conditions.
 - FDI in construction development is allowed subject to several performance linked conditions
 - Hence FDI in LLP engaged in construction/ development activities is not allowed under the automatic route.- FAQ 5 on ECB

- **Restriction on Real Estate Business:**
 - No such condition is prescribed under Schedule VI, probably because Foreign Investment (This is not considered as FDI) in this sector is not allowed on repatriation basis.
 - However, GOI may prescribe such condition, if investment proposal is so considered under approval route.

SECTION-4

**FDI IN REAL ESTATE UNDER FEMA (NON
DEBT INSTRUMENTS) RULES, 2019**

FDI in Real Estate

(under Chapter III- Schedule I - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

Construction Development: Townships, Housing, Built-up Infrastructure	FDI Percentage	Route
<p><u>FDI In Corporate Entities under Schedule I</u> : Construction-development projects (which shall include development of townships, construction of residential/ commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)</p>	100%	Automatic
<ul style="list-style-type: none"> ▪ FDI in Phases: Each phase of the construction development project shall be considered as a separate project. ▪ Issue: The term 'phase' is not defined. How does one interpret this term? ▪ Exit conditions: Investor is permitted to exit on completion of the project or after development of trunk infrastructure. ▪ Issue: What if the trunk infrastructure is pre existing? Does that make exit any simpler? ▪ Trunk Infrastructure : Roads, water supply, street lighting, drainage and sewerage, 		

FDI in Real Estate

(under Chapter III- Schedule I - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

▪ Other Conditions – continued

- **Lock-in period of three years** : To be calculated with reference to each completed tranche of foreign investment .
- **Transfer of stake from NR to NR** : If without repatriation-not subject to any lock-in period/ GOI approval.
- **Compliance with Local Norms/ Laws/ Standards:** The project to conform norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable laws/ regulations.
- **Sale of Developed Plots allowed** - Plots where trunk infrastructure is made available. No need to carry out any other further construction/ development work and the investor is allowed to sale the same.
- The Indian investee company shall be responsible for obtaining all necessary approvals, payment of development, external development and other charges and compliance with all other requirements including applicable rules/ bye-Laws/ regulations.
- Local authority concerned, which approves the building or development plans, shall monitor the compliances.

FDI in Real Estate

(under Chapter III- Schedule I - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

- **Other Conditions – continued**
- **Exemption from Condition of lock-in period:** Lock-in period condition shall not apply to Hotels and Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs or OCIs.
- **Completion of the Project:** To be determined as per local bye-laws/ rules and other regulations.
- Foreign investment up to 100 percent under automatic route is permitted in completed projects for operating and managing townships, malls/ shopping complexes and business centers.
- Transfer of ownership and/ or control of the investee company from PRII to PROI is also permitted,
- Lock-in-period of three years shall be calculated with reference to each tranche of foreign investment - transfer of immovable property or part thereof is not permitted during this period.
- **"Transfer"**: Definition is aligned with definition under other relevant laws (Income-tax, TOPA)

FDI in Real Estate

(under Chapter III- Schedule I - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

▪ Other Conditions – continued

- **Real Estate Business:** is defined to mean dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships.

Explanation: —

(a) Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of “real estate business”.

(b) Earning of rent income on lease of the property, not amounting to transfer, shall not amount to real estate business

- Issue: Activity of Leasing of property is not considered as ‘real estate business’. Whether FDI is allowed in a company which is substantially engaged in leasing of property?
- **Real Estate Broking Services:** Excluded from the definition of “real estate business” and 100% foreign investment is allowed in real estate broking services under automatic route

FDI in Real Estate

(under Chapter III- Schedule I - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

- **Other Conditions – continued**

- Issue: Whether Companies having FDI in Real Estate Sector can raise ECB?.

- **ECB proceeds cannot be used for ‘Real Estate Activities’.**

- Real Estate Activity means any real estate activity involving own or leased property for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate.

- **ECB allowed for following activities in the Sector:**

- Construction / development of industrial parks / integrated township / SEZ, purchase / long term leasing of industrial land as part of new project / modernization or expansion of existing units or any activity under ‘infrastructure sector’ definition are not regarded as Real Estate Activity.

- Purchase of industrial land for expansion / modernization of units is allowed. Even purchase of land for construction development or for any activity under ‘Infrastructure’ definition is permitted out of ECB proceeds.

- **ECB not allowed for following activities:**

- Buying or selling of land, renting of commercial and residential properties will be regarded as Real Estate Activity and ECB is not allowed.

Investment through an Investment Vehicle in Real Estate

(under Chapter III- Schedule VIII - Foreign Exchange Management (Non-debt Instruments) Rules, 2019)

▪ Investment Vehicle (IV):

- Indian Investment Vehicle - Company, Trust, Partnership, etc. registered under Indian Laws
- Required to be Registered with the concerned Regulatory Authority in India, e.g. SEBI, IRDI, RBI, etc.

▪ Eligible Investors:

- A person resident outside India, including NRIs/OCIs (except Citizens of Pakistan or Bangladesh or an entity other than an entity incorporated in Pakistan or Bangladesh)
- Investment in Units of the IVs.

▪ Sale/ Transfer :

- In any manner or redeem the units as per regulations framed by the Securities and Exchange Board of India or directions issued by the Reserve Bank.
- Units can also be issued against swap of capital instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such Investment Vehicle.

▪ AIF with Foreign Investment :

- Investment made by Investment vehicle into an Indian entity is to be reckoned as indirect foreign investment if the Sponsor or the Manager or the Investment Manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India.
- If sponsors or managers or investment managers are organized in a form other than Companies or LLPs, SEBI shall determine whether the sponsor or manager or investment manager is foreign owned and controlled.
- AIF Category III which has received any foreign investment shall make portfolio investment only in those securities or instruments in which a FPI is allowed to invest under the Act, rules or regulations

SECTION-5

**ACQUISITION OF IMMOVABLE
PROPERTY OUTSIDE INDIA**

Immovable Property Outside India by Individuals

▪ Acquisition of Immovable Property abroad by Resident Indian Citizens:

- Property acquired on or before 8th July, 1947 and held with the permission of RBI
- Out of funds held in RFC account / Funds held abroad acquired as a NR - without any ceiling.
- Jointly with a Non-resident relative provided there is no outflow of funds from India
- Under Liberalised Remittance Scheme (LRS) – Investment within limit of US \$ 250,000 during a financial year.
- Members of a family can pool their remittances - the property should be in joint names of remitters
- **By way of Gift or Inheritance:**
- From a person referred to in S. 6(4) of FEMA – From a person being resident in India and who is close relative (Relative means - Spouse, brother or sister, lineal ascendant or descendant)
 - Property acquired by him while he was a non-resident

▪ Acquisition by Resident Foreign Citizens:

- Foreign citizens who are Indian residents- free from any restrictions regarding immovable property transactions outside India.- Reg. 4

▪ Acquisition of Immovable Property on Lease

- Property on lease up to 5 years is permitted. (It is not a capital account transaction.)

▪ Issues:

- Whether property exceeding LRS limit can be acquired in installments?
- Whether borrowing abroad allowed for purchase of immovable property abroad?.

Immovable Property Outside India by Companies

- **Acquisition of Property by Branch Office of Indian Company: (Notification No. FEMA 7(R) read with LRS)**
- Overseas branches of an Indian company can acquire Immovable property for its business including residence of its staff within the limits for initial & recurring expenses as follows-
 - Up to 15 percent of average annual sales/ turnover of the Indian party during last two financial years or up to 25 percent of the net worth, whichever is higher for initial set up
 - Up to 10 percent of the average annual sales/ income or turnover during last two financial years towards recurring expenses
- **Investment by “Indian Party” in Foreign Company engaged in Construction/ Development (FEMA Notification No. 120):**
 - In Foreign entities doing development of townships, construction of residential/commercial premises, roads or bridges –
 - Investment allowed Up to 400% of the Net worth of Indian Party
 - Mode of Funding - Regulation 4 & 6 of Notification No. 120 - From RFC Account /Funds held outside India by persons not permanently resident in India/ Drawal of Foreign Exchange from AD Bank

Investment in foreign entities involved in Real Estate Business is prohibited – Notification No. 120- Regulation 5(2). Whether ODI in an entity which is engaged only in leasing of a property abroad permissible ???

Thank
you

