

Overview of FEMA & Acquisition of Immovable Property in India by NRs

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Transition from Foreign Exchange Regulation Act, 1973 to Foreign Exchange Management Act, 1999

- Post liberalization (i.e. New Industrial policy of 1991) there was need to remove shackles of regulatory and legal provisions.
- Need to consolidate and amend the law relating to foreign exchange with the objectives of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.
- Need to take various steps to make 'New Industrial Policy'- workable and meaningful.
- Industrial licensing was made pragmatic and objective-oriented.
- It was decided to review provisions of Foreign Exchange Regulation Act, 1973 (FERA).

Transition from Foreign Exchange Regulation Act, 1973 to Foreign Exchange Management Act, 1999

- Intention was to bring provisions of FERA in line with emerging trends of liberalization so as to remove obstacles in the inward flow of foreign exchange and foreign investment.
- Accordingly, on June 1, 2000, the Foreign Exchange Management Act, 1999 (FEMA) brought in force to replace the then existing FERA.
- It is an act to manage the foreign exchange of India as opposed to FERA which was enacted to regulate/control the foreign exchange.

Structure of FEMA

- Applies to the whole of India and all branches, offices and agencies outside India which are owned or controlled by a person resident in India.
- FEMA has 49 sections of which 9 (section 1 to 9) are substantive and the rest are procedural/ administrative
- Sec 37A – power to seize value equivalent Indian assets for overseas assets viz., foreign exchange, foreign security, immovable property outside India held in contravention of Sec 4
- Section 46 of FEMA grants power to Central Government to make rules to carry out the provision of FEMA
- Section 47 of FEMA grants power to RBI to make regulations to implement its provisions and the rules made there under
- RBI is entrusted with the administration and implementation of FEMA

Structure of FEMA

- FEM ACT
 - NOTIFICATIONS
 - RULES
 - MASTER DIRECTIONS
 - A.P. DIR CIRCULARS
-
- FAQs will not prevail over Act, Notifications etc. in case of conflict

Substantive Provisions

Section	Description
1	Application and Commencement of FEMA
2	Definitions
3 to 9	Provisions relating to Regulations and Management of Foreign Exchange
10 to 12	Provisions relating to Authorized Person
13 to 15	Provisions relating to Contraventions and Penalties
16 to 38	Provisions relating to Adjudication, Appeal and Directorate of Enforcement
39 to 49	Miscellaneous Provisions

Notifications under FEMA

- RBI had initially issued 25 notifications, covering capital account transaction prescribed in Sec 6(3) & certain miscellaneous provisions
- 15 related to capital account transactions, 1 on Export of goods and services and 9 for other regulations
- Since original notifications have undergone many changes, RBI has started revising the notifications and till date has issued 16 revised notifications [3(R), 5(R), 6(R), 7(R), 9(R), 10(R), 11(R), 12(R), 13(R), 14(R), 15(R), 18(R), 20(R), 21(R), 22(R) and 23(R)] carrying suffix (R) for easy identification along with the year in which they are published.
- https://www.rbi.org.in/Scripts/BS_viewfemanewnotification.aspx

Master Directions

- RBI has come up with Master Directions covering foreign exchange transactions.
- Master Directions consolidate instructions rules and regulations on the related subject.
- Master Directions are updated as and when there is change in rules/regulations or change in policy.
- Erstwhile Master Circulars thus have been withdrawn with issue of Master Directions.
- Till date, 19 Master Directions have been issued by RBI.
- https://www.rbi.org.in/scripts/FS_Notification.aspx?fn=5&fnn=2764

A.P. (Dir Series) Circulars

- Authorised Persons Directions issued by RBI u/s. 10(4) and 11(1) of FEMA to Authorized Persons (AP)
- These directions are called – **A.P. (Dir Series) Circulars**
- APs are Authorized Dealers, Money Changers and banks who are authorized to deal in Foreign Exchange
- These Circulars are operational instructions to AP by RBI
- Legal validity of these Circulars have been upheld in the case of Prof. Krishnaraj Goswami v. RBI, [2007 (6) Bom. CR 565]
- Court upheld the power of RBI to issue such Circulars based on powers conferred to RBI u/s. 10(4) & 11(1) & negated the contention that RBI has no jurisdiction to issue such Circulars

Some of the important definitions

- Foreign Exchange [Sec 2(n)] –

foreign exchange means foreign currency and includes –

- i. deposits, credits and balances payable in any foreign currency,*
- ii. Drafts, traveller's cheques, letter of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency.*
- iii. Draft, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.*

Some of the important definitions

- Repatriate to India [Sec 2(y)] –

Repatriate to India means bringing into India the realised foreign exchange and –

i. the selling of such foreign exchange to an authorised person in India in exchange for rupees, or

ii. the holding of realized amount in an account with an authorized person in India to the extent notified by the reserve Bank

and includes use of the realised amount for discharge of a debt or a liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly.

Some of the important definitions

- *'Repatriation outside India' means buying or drawing of foreign exchange from an authorized dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorized dealer from which it can be converted in foreign currency. [Regulation 2(e) of Notification No. 21R]*
- *Transfer [Sec 2(ze)] - includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien*

Introduction – Concept of Capital & Current account transaction

- Concept of Cap A/c & Cur A/c was absent in FERA
- The drawal of foreign exchange was regulated without differentiating between Cap or Cur A/c
- It was absent even after introduction of New Industrial Policy of 1992
- It was introduced in FEMA, 1999 which replaced FERA, 1973

Introduction

- Capital and current a/c are Economic concept
- They originate from 'balance of payment'
- BoP comprises of both capital as well as current a/c transactions

FEMA Structure dealing with Capital Account Transaction

Section 6(1) – Capital Account Transaction - Subject to the provisions of sub-section (2), any person *may sell or draw* foreign exchange *to or from an authorised person* for a capital account transaction.

- Section 6(2)(a) - The RBI may, in consultation with the Central Government specify any class or classes of capital account transactions, **involving debt instruments**, which are permissible, the limit up to which FE shall be admissible for such transactions, and any conditions which may be placed. (This is introduced by Finance Act 2015 with effect from date yet to be notified).
- Section 6(2A) - CG may, in consultation with the RBI specify any class or classes of capital account transactions, **not involving debt instruments**, which are permissible, the limit up to which FE shall be admissible for such transactions, and any conditions which may be placed. (This is introduced by Finance Act 2015 with effect from date yet to be notified).

Capital Account Transaction

- **Once notified, all Capital Account transactions, except involving debt instruments will be regulated by the CG, which are currently being regulated by the RBI.**
- From Section 6(1) it is clear that a person can only sell or draw foreign exchange from an authorised person only for capital account transactions. Dealing in foreign exchange other than through Authorized Person is not permitted.
- Section 3(a) also prohibits- dealing in or transferring of any foreign exchange to any person other than by authorised person.

Definition – Capital Account Transaction

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.*

Capital Account Transaction

Section 6(3) – Lists the Capital Account Transactions that are prohibited, restricted or regulated by RBI (capital account transactions as also referred to in definition of Capital Account Transaction in Section 2(e)]

- a) Transfer or issue of any security by a person resident in India
- b) Transfer or issue of any security by a person resident outside India.
- c) Transfer or issue of any security or foreign security by any branch, office or agency in India to a person resident outside India.
- d) Any borrowing or lending in foreign exchange in whatever form or by whatever name called

Capital Account Transaction

- e) Any borrowing or lending in Indian rupees in whatever form or by whatever name called between person resident in India and a person resident outside India.
- f) Deposits between persons resident in India and persons resident outside India
- g) Export, import or holding of currency or currency notes.
- h) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident outside India
- i) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.

Capital Account Transaction

- j) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred –
- By a person resident in India and owed to a person resident outside India; or
 - By a person resident outside India.

Apart from above transactions, RBI has made FEM (Capital Account Transactions) Regulations, 2000. Schedules I and II of this regulation specify the classes of capital account transactions of resident and non-residents for which foreign exchange may drawn or sold to an authorised person.

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section of FEMA
1	Permissible Capital Account Transactions	No. 1	Sec 6(2) read with Sec 47 (2)
2	Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India	No. 2	Sec 6(3)(c) read with Sec 47(2)
3	Any borrowing or lending in foreign exchange in whatever form or by whatever name called	No. 3(R) dated 17.12.2018	Sec 6(3)(d) read with Sec 47(2)
4	Deposits between persons resident in India and persons resident outside India	No. 5(R) dated 01.04.2016	6(3)(f) read with Sec 47(2)

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section of FEMA
5	Export, import or holding of currency or currency notes	No. 6(R) dated 29.12.2015	Sec 6(3)(g) read with Sec 47(2)
6	Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India	No. 7(R) dated 21.01.2016	Sec 6(3)(h) read with Sec 47(2)
7	Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred - (i) by a person resident in India and owed to a person resident outside India (ii) by a person resident outside India	No. 8	Sec 6(3)(j) read with Sec 47(2)
8	Insurance	No. 12(R) dated 29.12.2015	Sec 47(2)

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section
9	Remittance of Assets	No. 13 (R) dated 01.04.2016	Sec 47
10	Transfer or issue of any Foreign Security	No. 120 dated 07.04.2004	Sec 6(3)(a) read with Sec 47
11	Transfer or issue of any security by a person resident outside India	No. 20 (R) dated 07.11.2017	Sec 6(3)(b) read with Sec 47
12	Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India	No. 21 (R) dated 26.03.2018	Sec 6(3)(i) read with Sec 47(2)
13	Establishment in India of Branch or Office or other place of business	No. 22 (R) dated 31.03.2016	Sec 6(6)

Capital Account Transaction – FEMA Notification No. 1

Schedule I [Regulation 3(1)(A)]: Classes of capital account transactions of persons resident in India

- a) Investment by a person resident in India in foreign securities
- b) Foreign currency loans raised in India and abroad by a person resident in India
- c) Transfer of immovable property outside India by a person resident in India
- d) Guarantees issued by a person resident in India in favour of a person resident outside India
- e) Export, import and holding of currency/currency notes
- f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India

Capital Account Transaction – FEMA Notification No. 1 Contd...

- g) Maintenance of foreign currency accounts in India and outside India by a person resident in India
- h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- i) Loans and overdrafts by a person resident in India to a person resident outside India.
- j) Remittance outside India of capital assets of a person resident in India.
- k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

Capital Account Transaction – FEMA Notification No. 1 Contd...

Schedule II [Regulation 3(1)(B)]: Classes of capital account transactions of persons resident outside India.

- a) Investment in India by a person resident outside India, that is to say,
 - i. Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; &
 - ii. Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- b) Acquisition and transfer of immovable property in India by a person resident outside India.
- c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.

Capital Account Transaction – FEMA Notification No. 1 Contd...

- d) Import and export of currency/currency notes into/from India by a person resident outside India.
- e) Deposits between a person resident in India and a person resident outside India.
- f) Foreign currency accounts in India of a person resident outside India.
- g) Remittance outside India of capital assets in India of a person resident outside India.

Cap A/c Transaction and Contingent liability

Guarantee by Person Resident Outside India:

- The definition of Cap A/c Transaction does not include contingent liability of a person resident outside India. However, Sec 6(3)(j) & Schedule II (c) to Notification 1 includes in the list of capital account transaction guarantee given by a person resident outside India to any person resident in India.
- Further in terms of amended Regulation 3A of Notification 8 (Guarantees), Indian companies require prior approval of RBI for 'domestic rupee denominated **structured obligations**' (wef 26.09.2011) leading to credit enhancement in the form of guarantee by JV partners, Intl banks etc.

Guarantee by NR contd...

- Master Direction on ECB, TC & Structured Obligations dt 26.03.2019:
- Para 19- Domestic rupee borrowing between two Residents based on guarantee of NR doesn't have any FEMA implications until the guarantee is invoked.
- Upon invocation of Guarantee & payment by NR, such NR can enforce recovery and also repatriate such sum, if remitted from abroad or paid out of NRE/FCNR a/c.- General Permission

Gift Transactions

- Gift of sum of money by resident to a non-resident or non-resident to resident is a Current A/c Transaction.
- Gift of foreign security is a Capital A/c Transaction having following implications:

Donor	Donee	Remarks
NR	R	Permissible Reg 22(1)(i) of 120
R	R	Not covered by general permission
R	NR	Not covered by general permission

- ~~Inheritance of foreign security:~~

Donor	Donee	Remarks
NR	R	Permissible Reg 22(1)(iii) of 120
R	R	Permissible Reg 22(1)(iii) of 120
R	NR	Not covered by general permission

Gift Transactions

- Gift and inheritance of Immovable Property Situated outside India:

Donor	Donee	Remarks
NR	R	Not covered by general permission
R	R	Regulation 5(1)(a) for Sec 6(4) cases and 5(2) of Not. 7(R)
R	NR	Not covered by general permission

Settling Property in Trust

- Resident becoming beneficiary in an overseas trust.
- Resident settling properties in a trust having NRI beneficiaries.
 - The assets settled should be FEMA compliant and trustees should be resident Indian as per FEMA.
 - **FEMA Master Direction No. 13 – Remittance of Assets- Para 3.2(iii)** - *in case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/ parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account;*

Whether following transactions are in nature of Capital Account Transaction?

- Trade Payables more than six months in respect of goods?
- Trade Payables more than six months for services?

As per Master Direction on Import of Goods and Services:

- Import dues should be paid within six months from the date of shipment. If not paid extension must be obtained.
- Deferred Payment Arrangements (suppliers and buyers credit) up to five years, are treated as Trade Credit and guidelines relating to same must be followed.

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- Whether Trade Payables outstanding more than six months and up to three or five years be treated as ECB?

RBI Compounding Orders

Delayed payment of import dues/fees for more than six months were treated as ECB.

➤ **Outstanding Fees:**

- TWI India Pvt. Ltd. (CA Order No. 3945/2016 dated-31.08.2016)

➤ **Outstanding dues against import of goods:**

- AMC Diamonds (CA Order No. 3934/2016 – dated 13.07.2016)
- Intercat Equipment (CA Order No. 3861/2015 - dated 02.06.2016)

Whether following transactions are in nature of Capital Account Transaction?

- Factoring of Export Invoices
 - Say, at Interest rate of 5%
 - Factoring Commission of 1.8%
 - Delayed Payment Interest @ 4%
- Effect of terms & conditions - if factoring is -
 - “With recourse” basis, or
 - “Non-recourse” basis
- Refer AP (Dir Series) Circular No.5 of July 16, 2015 on permitting factoring on ‘Non Recourse’ basis.

6(4) and 6(5) – Whether out of purview of FEMA?

- 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 may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India

Capital Account Transaction under Section 6(4)

- RBI has vide its *A.P. (DIR Series) Circular No. 90 dated January 9, 2014 clarified that the following transactions shall be covered under section 6(4) of FEMA, 1999:*
 - a) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
 - b) Income earned through employment or business or vocation outside India taken up or commenced, or from investments made, or from gift or inheritance received while such a person was resident outside India;
 - c) Foreign exchange including any income arising there from, and conversion or replacement or accrual to the same, held outside India acquired by way of inheritance from a person resident outside India;

Capital Account Transaction under Section 6(4)

- d) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of RBI.

Whether assets other than currency, security and immovable property are covered by provisions of 6(4) and 6(5)?

Definition – Current Account Transaction

Section 2(j) -

Current Account transaction is transaction other than a capital account transaction and generally includes:

- i. Payments due in connection with foreign trade, Short term banking and credit facilities.
- ii. Payment due as interest on loan and income from investment.
- iii. Remittances for living expenses of parent, spouse and children residing abroad.
- iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Current Account Transaction

- Current account transaction is a transaction other than a capital account transaction
- Current account transactions are governed by Foreign Exchange Management (Current Account Transaction) Rules, 2000 ("Current Account Transactions Rules").
- India is signatory to WTO Agreement and in terms of Article VIII; it states that “.....no member shall, without the approval of the Fund (IMF), impose restrictions on the making of payments and transfers for current international transaction.”

Current Account Transaction

- Current account transactions are divided into 3 schedules in Current Account Transactions Rules:-
 - Schedule I – Prohibited Transactions
 - Schedule II – Transactions requiring prior approval of Government of India
 - Schedule III – Transactions requiring prior approval of RBI
- Drawal of foreign exchange is prohibited for –
 - Transactions specified in Schedule I; or
 - Travel to Nepal and / or Bhutan; or
 - Transaction with person resident in Nepal or Bhutan (this prohibition may be relaxed by special approval).

Current Account Transaction

Schedule I (Rule 3): Transactions which are prohibited

- Remittance out of lottery winnings (*)
- Remittance of income from racing/riding etc., or any other hobby
- Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- Payment of commission on exports made towards equity investment in JV/WOS abroad of Indian companies.
- Payment of commission on exports under Rupee State Credit route except commission up to 10% of invoice value of exports of tea and tobacco.
- Payment related to 'Call Back Services' of telephones
- Remittance of interest income of funds held in Non-resident Special Rupee Scheme A/c.

(NOT PERMISSIBLE EVEN FROM RFC and EEFC ACCOUNT)

- * - In terms of FDI Policy even technology collaboration (franchise, trademark, brand name, management contract is prohibited for lottery business and gambling and betting)

Current Account Transaction

Schedule II (Rule 4) Transactions requiring prior approval of Government:

Purpose of remittance	Ministry/Department of Govt. of India
<ul style="list-style-type: none"> ▪ Cultural tours 	Ministry of Human resources Development
<ul style="list-style-type: none"> ▪ Advertisement in foreign print media for purpose other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public sector undertaking 	Ministry of Finance
<ul style="list-style-type: none"> ▪ Remittance of freight of vessel chartered by a PSU 	Ministry of Surface Transport
<ul style="list-style-type: none"> ▪ Payment of import [through ocean transport] by a Govt. department or a PSU on CIF basis 	Ministry of Surface Transport

Current Account Transaction

Purpose of remittance	Ministry/Department of Govt. of India
<ul style="list-style-type: none"> ▪ Multimodal transport operators making remittance to their agents abroad 	Registration Certificate from the Director General of Shipping
<ul style="list-style-type: none"> ▪ Remittance of hiring charges of transporters by TV channels, internet service providers 	Ministry of Information and Broadcasting, Ministry of Communication and Information technology
<ul style="list-style-type: none"> ▪ Remittance of container detention charges exceeding rate prescribed by Director General of Shipping 	Ministry of Surface Transport
<ul style="list-style-type: none"> ▪ Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies if the amount involved exceeds USD 1,00,000 	Ministry of Human Resources Development (Department of Youth Affairs and Sports)
<ul style="list-style-type: none"> ▪ Remittance for membership of P&I club (Association of Marine Insurance provider) 	Ministry of Finance

Current Account Transaction

Schedule III (Rule 5): Prior Approval of RBI

Facilities for Individuals - Individuals can make remittance within limit of USD 2,50,000 for following facilities. However, any additional remittance in excess of said limit shall require RBI approval.

- i. Private visits to any country (except Nepal and Bhutan)
- ii. Gift or donation
- iii. Going abroad for employment
- iv. Emigration
- v. Maintenance of close relatives abroad
- vi. Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check up.
- vii. Expenses in connection with medical treatment abroad
- viii. Studies abroad
- ix. Any other current account transaction.

Current Account Transaction

- For items mentioned at (iv), (vii) and (viii), individual may remit amount in excess of USD 2,50,000 if it is so required by a country of emigration, medical institute offering treatment or the university.
- A person who is resident but not permanently resident and is:
 - A citizen of a foreign state other than Pakistan; or
 - Is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions.

*[for purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a **resident but not permanently resident**]*

Current Account Transaction

- An entity in India may remit PF or pension in respect of its employees who are resident in India but not permanently resident in India (Regulation 5 of Notification 13R)

Current Account Transaction

Facilities for persons other than individuals – Following remittances by persons other than individuals shall require prior approval of RBI

- Donations exceeding 1% of their foreign exchange earnings during the three financial years or USD 5,00,000 whichever is less.
- Commission per transaction to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or 5% of inward remittance whichever is more.
- Remittances exceeding USD 10 million **per project** for any consultancy services in respect of infrastructure projects and USD 1 million **per project** for other consultancy services procured from outside India.
 - Whether the above referred limits of USD 1 and 10 million are qua project or qua foreign consultant?
 - Compounding Order No. 3950/2016 dated 09.09.2016 in case of Jaguar Buildcon Pvt. Ltd. – remittance exceeding USD 1 million to various consultants for single project a contravention.

Current Account Transaction

- Infrastructure shall mean as defined in Explanation to para 1(iv)(A)(a) of Schedule I of FEMA 3.
- **'Infrastructure Sector'** has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide Notification F. No. 13/06/2009-INF dated March 27, 2012 as amended / updated from time to time.

Thus infrastructure sector and sub-sectors for the purpose of ECB include
(Para 1(iv)(A)(a) of Schedule I of FEMA 3):

- a. Energy
- b. Communication
- c. Transport
- d. Water and Sanitation
- e. Mining, exploration and refining
- f. Social and commercial infrastructure (includes Hospitals/Hotels)

Current Account Transaction :

Pre-incorporation Exps

- Remittances exceeding 5% of investment brought into India or USD 1,00,000 whichever is higher for **reimbursement of pre-incorporation expenses** by entity in India.

Current Account Transaction

- Unincorporated Joint Ventures - Co-operation Agreements/Strategic Alliances
- It's a contractual relationship/arrangement like a cooperation agreement or a strategic alliance wherein the parties agree to collaborate as independent contractors rather than shareholders in a company or partners in a legal partnership.
- Co-operation agreements / strategic alliances can be employed for the following types of business activities:
 - Technology transfer agreements
 - Joint product development
 - Purchasing agreements
 - Distribution agreements
 - Marketing and promotional collaboration
 - Intellectual advice In such a JV the rights, duties and obligations of the parties as between themselves.

Current Account Transaction

- Royalties and Lump Sum Fees
 - Earlier there were monetary caps on remittances (both lumpsum fees and royalties) made for technology collaborations and license or use of trademark / brand name.
 - Now there are no restrictions and the payments towards the lumpsum fees or royalties for technology collaborations and license or use of trademark / brand name can be made under the automatic route, without any monetary cap

The limits were there in Schedule II which read as under:

Remittances under technical collaboration agreements where payments of royalty exceeds 5% on local sales and 8% on exports and lump sum payments exceeds USD 2 million.

This has been removed w.e.f. 16/12/2009

Current Account Transaction

- Advance against exports of goods can be received by an exporter ***from a buyer or third party named in export declaration.***
- Interest can be paid on advance payment (rate of interest shall not exceed LIBOR plus 100 basis points).
- Shipment of goods needs to be made within one year from the date of receipt of Advance.
- In case of advance against export of services, there is no specific inward remittance purpose code and hence poses practical difficulties.

Current Account Transaction

- Whether Deposit given by NRI for acquiring immovable property on rental is a Current Account Transaction?

Reference can be drawn from A.P. DIR 59 dated April 13, 2016 wherein it is mentioned that *“keeping deposits with an Indian company by persons resident outside India, in accordance with section 160 of the Companies Act, 2013, is a current account (payment) transaction and, as such, does not require any approval from Reserve Bank. All refunds of such deposits, arising in the event of selection of the person as director or getting more than twenty five percent votes, shall be treated similarly”*.

Conversion of Current Account Transaction to Capital Account Transaction

- Paragraph 1(3) and 1(4) of Sch I of FEMA 20R - Issue of Shares against Import of capital goods/machinery/equipment or pre-incorporation expenses:
 - This is permitted under automatic route in case Indian Company is engaged in an automatic route sector.
 - In case of WOS, shares can be issued against pre-incorporation expenses up to limit of 5% of its authorised capital or USD 5,00,000 whichever is lower, provided Indian WOS is engaged in sector where 100% Foreign investment is allowed under automatic route and there are no FDI Linked performance conditions. (Certificate from Statutory Auditor and FIRC for funds remitted by parent to be submitted).

Conversion of Current Account Transaction to Capital Account Transaction

- Para 1(5) of Sch I of FEMA 20R - Shares can be issued against **any funds payable**, remittance of which does not require prior approval of RBI of government.
- Examples of **any other funds payable** - payments for use or acquisition of intellectual property rights, for import of goods, payment of dividends, interest payments, consultancy fees, etc. – Refer A.P. DIR 52 dated February 11, 2016.

Change in nature of Capital Account Transaction

- Conversion of ECB to Equity Shares:
 - The activity of borrowing company should be under automatic route or approval as required must be obtained.
 - It must comply with FDI guidelines.
- In case of Overseas Direct Investment, conversion of loan to equity is under automatic route whereas for conversion of equity to loan prior approval is required.

Analysis of Sec 3 of FEMA

- Sec 3- Dealings in Foreign Exchange:
- Section 3 does not distinguish between Current or Capital Account Transactions. Both are covered.
- Save as otherwise provided in the Act- No person shall
- **3(a) Deal in** or transfer any foreign exchange or foreign security to any person not being an authorised person
- Analysis of Sec 3(a):
 - Meaning of the term 'Deal in' - To Buy and Sell
 - Transfer [Sec 2(ze)] – includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Analysis of Sec 3 of FEMA

- Any dealing otherwise than through AD is contravention i.e. One of the parties to a forex transaction should be AD
- Any transfer otherwise than through AD is also contravention – should this apply only to Resident?
- It must be noted that contravention under clause (a) of Section 3 cannot be compounded by RBI but such matters are examined by Directorate of Enforcement.

Analysis of Sec 3 of FEMA

- **3(b)**-no person shall-
- Make any payment to, or for the credit of any person resident outside India (NR) **in any manner.**
- **To the credit of NR**
- **For the credit of NR (on behalf of NR)**
- Intention is to prohibit fulfilment of foreign exchange **obligation of a NR** by third party. Such third party could be R or NR.
- Can therefore it be said that resident's obligation if fulfilled by NR it doesn't lead to contravention of 3(b)?

Sec 3(b) Case Laws

- **For the credit of NR -**
- A.V. Francis Alukka vs. Assistant Director, Directorate of Enforcement, Cochin [2015] 56 taxmann.com 31 (Kerala)
 - Petitioner made payment towards customs duty payable by the non-resident while importing car in India.
 - The adjudicatory authority with reference to FEMA Notification No. 16 held that payment for customs duty was not covered by the said notification and hence imposed penalty.

Sec 3(b) Case Laws

- **For the credit of NR -**
- [2017] 81 taxmann.com 175 (ATFFE - New Delhi), Jaipur IPL Cricket (P.) Ltd. v. Special Director, Enforcement Directorate, Mumbai

Where 'E' of UK was successful bidder for Jaipur IPL franchise, i.e., Rajasthan Royals, in tender invited by BCCI and performance deposit was transferred from UK by person other than investor without approval from RBI, remittances were in contravention of section 3(b) and penalty was to be imposed on Rajasthan Royals

SEC 3(b) read with FEMA Notification No. 14R

- As per **Regulation 6(2) of FEMA Notification No. 14R** any person resident in India can make payment in rupees:
 - **(For the credit of NR)** Towards meeting expenses on account of boarding, lodging and services related thereto and travel to and from and within India of a person resident outside India who is on a visit to India.
 - **(To the credit of NR)** To a person resident outside India by means of crossed cheque or a draft as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for time being in force.

Analysis of Sec 3 of FEMA

- 3(c)
 - Receive otherwise through an A.P. any payment by order or on behalf of any NR in any manner
 - Expln to above- where a resident receives any payment **without corresponding inward remittance** than such payment would be regarded as having been received otherwise than through authorised person

In case of FDI, amount of FDI proceeds were received from third party intermediary viz. Transfer wise instead of Authorised Person – Compounding Order in case of Mahesh Ramakrishnan (Order No. 4536 dated 05.01.2018)

Analysis of Sec 3 of FEMA

- 3(d)
 - enter into any **financial transaction in India** as consideration for or in association with acquisition or creation or transfer of a right to acquire, **any asset outside India** by any person

Residential Status under FEMA

- Under FEMA residential status is of two types:
 - Person resident in India
 - Person resident outside India
- Under FERA, citizenship was considered as deciding factor
- FEMA lays emphasis on 'residing' which denotes permanency

Residential Status under FEMA

- **PERSON RESIDENT IN INDIA [Sec. 2(v)(i) of FEMA]:**

Residing in India for > 182 days during the course of preceding F.Y. but doesn't include

- going out of India or staying outside India
 - for taking up employment
 - for carrying business or vocation
 - for any other purpose in such circumstances as would indicate his intention to stay outside India for uncertain period
- coming to India or staying in India otherwise than
 - for taking up employment
 - for carrying business or vocation
 - for any other purpose in such circumstances as would indicate his intention to stay in India for uncertain period

- **PERSON RESIDENT OUTSIDE INDIA [Sec. 2(w) of FEMA]:** a person who is not resident in India.

Residential Status under FEMA

- Person to be resident in India, has to reside in India for more than 182 days during the previous financial year
- Exclusion to this is - if a person stays outside India for employment, for vocation or for any other purpose for uncertain period, then even if he has resided in India for more than 182 days he will become a 'person resident outside India'
- Moreover a person to be treated as person resident in India he has to satisfy not only the condition of period of stay (i.e. 182 days) but has to also comply with the conditions of the 'purpose' of stay i.e. for taking up employment, carrying on business or vocation in India or for any other purpose which would indicate his intention to stay in India for an uncertain period

Residential Status under FEMA- Person Resident but not permanently resident

- Explanation to Schedule III of Current A/c Rules
-, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed 3 years, is considered to be *a person resident but not permanently resident in India.*

Residential Status under FEMA – Indian Students Studying Abroad

- A.P. (DIR Series) Circular No. 45 dated December 8, 2003
 - While taking up studies, students may have to take up job or seek scholarships to supplement their income. As a result their stay gets prolonged than what is intended while leaving India.
 - They are not dependent for a dominant part of their expenses on remittances from their households in India.

Hence, their stay will be for more than 182 days and intention will also be to stay outside India for uncertain period. Thus they **can be treated** as Non Resident Indians (NRI).

Accounts for Indian Students Studying Abroad

- Regulation 5(E)(6) of FEMA Notification No. 10R
 - Indian students studying abroad may open, hold and maintain foreign currency account with bank outside India during their stay outside India.
 - On return to India, after completion of studies, such an account will deemed to have been opened under the Liberalized Remittance Scheme
- Regulation 4B(vi) of Notification No. 3(R)
 - An individual resident in India studying abroad may borrow up to USD 2,50,000 or such higher amount decided by RBI for the purpose of payment of education fees abroad and maintenance.

Acquisition and Transfer of Immovable Property in India

Notification No. 21(R)

What is Immovable Property under FEMA?

- Immovable Property (IP) is not defined in the Act as well as in Notification 21(R).
- Acquisition and Transfer of IP being a Capital Account Transaction, Sec 6(3)(i) prescribes this capital account transaction as under –
 - 6(3)(i) – acquisition or transfer of immovable property in India, *other than a lease not exceeding five years*, by a person resident outside India
 - Further,– Classes of permissible Capital A/c transactions of persons resident outside India in terms of Schedule II to Not. 1 reads as under
 - Acquisition & Transfer of immovable property in India by PROI

Certain activities relating to IP prohibited

- As per Not. 1 (Permissible Capital Account Transactions) 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.

Acquisition of land out of ECB – Permissible

- Companies eligible to receive FDI are falling in the coverage of ‘Eligible Borrower’.
- 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.*
- **However**, construction / development of industrial parks / integrated township / SEZ, purchase / long term leasing of industrial land as part of new project / modernisation of expansion of existing units or any activity under ‘infrastructure sector’ definition are not regarded as Real Estate Activity.

Acquisition of land out of ECB – Permissible

- Thus, buying or selling of land otherwise will be regarded as Real Estate Activity and is not permitted out of ECB proceeds.
- But, if 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.

Method of payment for Investment (Capital Account Transaction)

- Regulation No.5 of Notification No.1
 - Payment for investment shall be made by
 - Remittance from abroad through normal banking channel or
 - By debit to an account of the investor maintained with the *authorised persons* in India in accordance with the regulations made by the RB under the Act

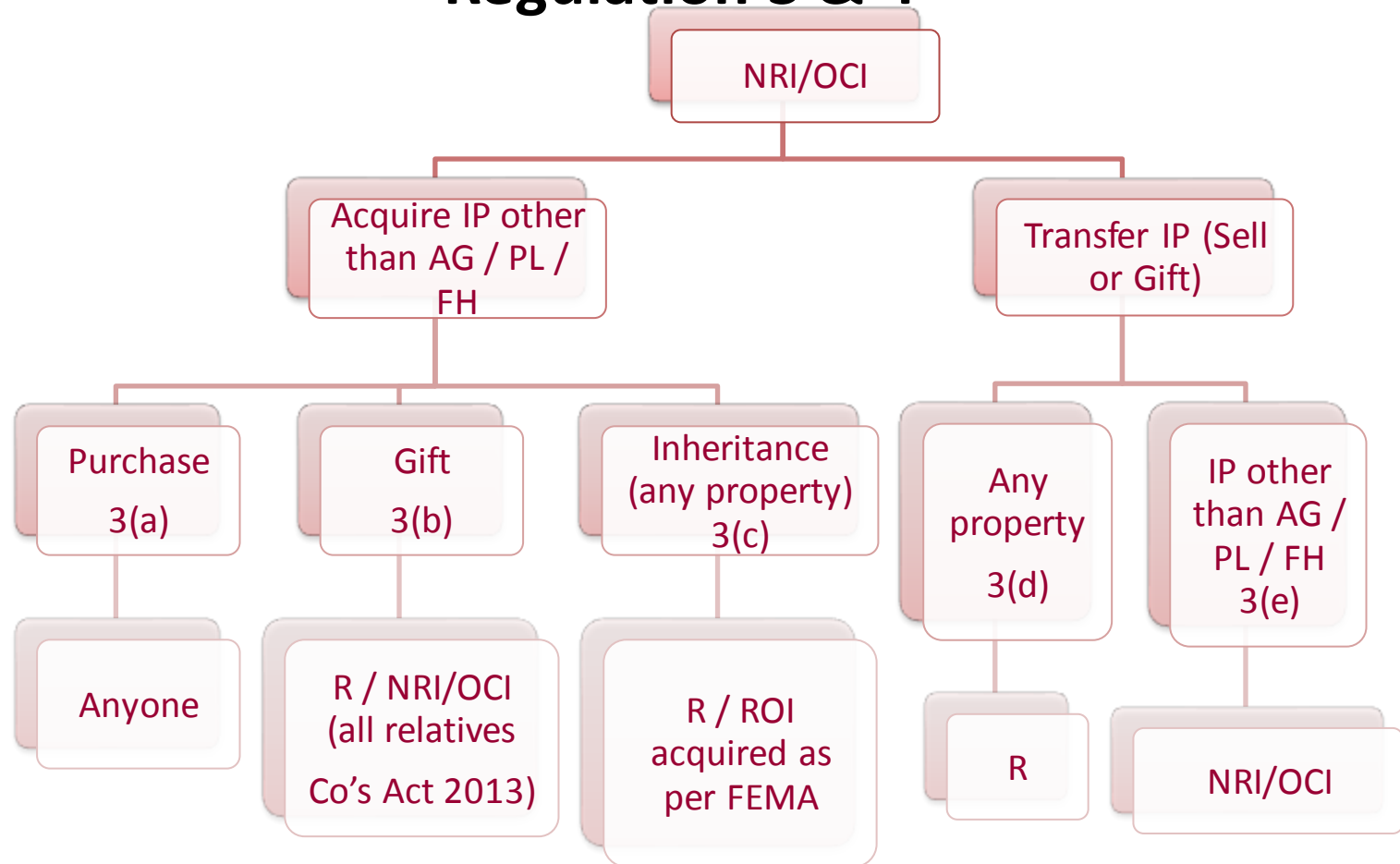
Method of Payment for acquisition of immovable property

- Proviso to Regulation 3(a) of Not. 21 (R)
 - Funds received in India through banking channels by way of inward remittance from any place outside India or
 - Funds held in any non resident account maintained in accordance with the provisions of the Act, Rules or regulations
 - Use of traveller's cheque or foreign currency notes or other mode not permissible

Definitions under Notification No. 21 (R)

- **NRI-** means a PROI who is a citizen of India
- **OCI-** means a person resident outside India who is registered as OCI Cardholder under section 7A of the Citizenship Act, 1955
- **Repatriation outside India-** means the buying & drawing of foreign exchange from an *AD* in India and remitting it outside India through banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an *AD* from which it can be converted in foreign currency

Acquisition / Transfer of Immovable Property in India by an NRI/OCI- Regulation 3 & 4



NRI – Non Resident Indian
 OCI – Overseas Citizen of India
 R - Resident
 ROI - Resident outside India

Joint Acquisition

Regulation 6 of FEMA 21(R) –

- A person resident outside India not being NRI or OCI who is spouse of NRI or OCI can acquire **one IP** (other than AP, PL or FH) jointly with his/her NRI / OCI spouse.
- Consideration for acquiring property shall be made out of funds received in India through normal banking channels by way of inward remittance or out of funds held in any non-resident account.
- No payment shall be made by traveler's cheque or by foreign currency notes.
- The marriage is registered and has been subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.
- Non-resident spouse otherwise should not be prohibited from acquiring the property.

Acquisition of property by Foreign Nationals

➤ **Foreign Nationals of 11 countries –**

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong and Democratic Republic of Korea –

- ✓ Irrespective of their residential status cannot acquire or transfer any IP in India without prior RBI approval. (citizen shall include natural persons and legal entities)
- ✓ However, above provisions shall not apply to an OCI (Proviso to Reg 9)

➤ **Foreign Nationals of other countries –**

Resident in India –

- ✓ Can acquire IP in India

Resident outside India –

- ✓ Cannot acquire IP in India except for lease not exceeding 5 years.

Foreign Nationals as Resident under FEMA- (Press Release of Govt Feb 2009- annexed to Master Direction)

- Requirements:
- Residing in India for >182 days in P.F.Y. For taking up employment, business or uncertain period
- So, period of stay, purpose of stay & the nature of Visa to clearly & unambiguously establish intention to stay for an uncertain period in India.
- Foreign nationals on Travel visa and visa for certain period are illegally acquiring IP

Foreign Nationals as Resident of India- Press Release

- 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.

Person who is Resident but Not Permanently Resident in India

- Reference to this term is found in Schedule III to Current Account Rules in connection with remittance of 'net salary'
- Explanation provides as under-
 - *For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which doesn't exceed three years, is a resident but not permanently resident*

Onus of proving Residency

- Onus is on foreign national / citizen to prove his residential status
- Guidance from Balance of Payment manual - 'Center of (vital) Interest'-
- Para 66 to 75 of above manual deal with Individual's Center of Interest

Acquisition by Long Term Visa (LTV) Holders

- Citizen of Afghanistan, Bangladesh and Pakistan belonging to minority communities mainly Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and have been granted LTV by Central Government can purchase –
 - ✓ One residential property for self occupation and
 - ✓ One immovable property for carrying out self employment

Conditions:

- ✓ The property should not be located in and around restricted/protected areas.
- ✓ Submission of declaration to the Revenue Authority of the district
- ✓ The registration documents of the property should mention the nationality and the fact that such person is on a LTV.

Acquisition by Long Term Visa (LTV) Holders

- ✓ Attachment/ confiscation in the case of anti-India activities.
- ✓ Submission of property documents 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).
- ✓ Sale only after obtaining Indian citizenship. Prior Sale will require approval of DCP/ FRO/ FRRO concerned.

Acquisition of IP by Branch Office (BO) or any other place of business in India

- Person resident outside India having BO or other place of business for carrying any activity in India, excluding a Liaison Office may –
 - ✓ Acquire IP necessary for or incidental in carrying on business activity.
 - i. All laws, rules, regulations to be complied.
 - ii. Such person has to file Form IPI with RBI within 90 days from date of such acquisition.
 - ✓ Transfer IP acquired by way of mortgage to an AD as security for any borrowing.
 - ✓ Restriction of 11 nations would continue to apply here too

Repatriation of Sale Proceeds

Repatriation of sales proceeds:

Regulation 8(a) of FEMA 21R – Specific or General Permission of RBI is required to be obtained to repatriate sale proceeds of immovable property outside India by persons referred to in Section 6(5) or his successor who had acquired such property when he was resident in India or inherited from a person resident in India.

- Section 6(5) refers to person resident outside India and includes NRI or PIO also but by sub regulation (b) of Reg 8
- NRIs and OCIs can avail remittance can repatriate subject to following conditions

Repatriation of Sales Proceeds

Repatriation by NRIs/OCIs:

- The immovable property was acquired in accordance with FEMA provisions
- Amount of acquisition was paid in foreign exchange received through banking channels or out of funds held in foreign currency non-resident account or NRE account.
- In case of residential property, repatriation is restricted to not more than 2 properties.

Repatriation under 1 Mn Scheme (Not 13) is in addition to above

- For repatriation of proceeds of properties exceeding two, the same can be credited to the NRO account and can be remitted out of NRO account upto USD 1 million per financial year

Refund in case of non-allotment of flat/plot/cancellation of bookings

Refund in case of non-allotment of flat / plot / cancellation of bookings / contracts

From the old Master Circular-

- Para no. 6: Refund together with interest (net of income tax) can be credited to NRE / FCNR (B) account provided:
 - the original payment was made out of NRE/FCNR (B) account or remittance from outside India through normal banking channels; and
 - the authorised dealer is satisfied about the bona fides of the transaction.

Creation of Charge on Immovable Property for securing Loan

For availing ECB–

- AD Bank may permit a person resident in India to create a charge on his IP in India in favor overseas lender or security trustee for ECB (regulation 10(ii)).

For availment of loan by overseas company –

- AD Bank in India may create a mortgage on IP in India owned by NRI or OCI, being director of a company outside India for a loan to be availed by the company from overseas lender.
 - 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)).

Availing loan against security of immovable property

- Rupee loan against security of IP (other than AP, PL & FH) subject to following conditions: (Reg 7(B) of Not 4)
 - Shall be utilized for borrower's personal requirements or for business purposes
 - Shall not be utilized for activities in which investment by NRI is prohibited (chit fund, nidhi company and AP, PL, FH or real estate business and trading in TDR)
 - Shall not be credited to NRE / FCNR / NRNR account of the borrower
 - Shall not be remitted outside India
 - Repayment out of foreign remittance or NRO / NRSR / NRNR / NRE / FCNR account or sale of shares or securities or immovable property

Availing loan for purchase of immovable property

- Housing loan to NRI or PIO/ROI for acquisition of a residential accommodation in India subject to following conditions:
 - Quantum of loans, margin money and repayment period shall be same as for housing loans to Resident.
 - Shall not be credit to NRE / FCNR / NRNR account
 - Fully secured by equitable mortgage of property proposed to be acquired and if required, by lien on the borrower's other asset in India
 - EMI and other charges to be paid by way of remittance or out of funds in NRE / FCNR / NRNR / NRO / NRSR account in India or rental income or by any 'relative' (as defined under sec. 6 of the Companies Act) in India by crediting the borrower's loan account through the bank account of such relative.
 - Rate of interest shall conform to RBI or NHB directives.

Transfer of IP by Person Resident Outside India

- Person resident outside India may transfer IP –[Reg 10(iv)]
 - If IP was acquired as per extant FEMA laws.
 - To person resident in India provided the transaction takes place through banking channels in India.
 - Resident is not otherwise prohibited from such acquisition.

Misc. Provisions

- Any transaction involving acquisition of or transfer of immovable property under these regulations shall be undertaken:
 - a) through banking channels in India
 - b) subject to payment of applicable taxes and other duties/levies in /India.

Regulation 12

- Any existing holding of immovable property in India by a person resident outside India made in accordance with the policy at the time of such acquisition would not require any modifications to conform to these regulations.

Acceptance of Deposits by Resident property owner from NR for leave & license or Rental agreement

- Which Notification governs acceptance of such Deposit?
- Such deposit is not in the form of 'debt' so not covered by Notification No.3 (Borrowing in foreign currency) or Notification No. 4 (Borrowings in Rupees)
- Deposit Defn- Not-5- includes deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person

Deposit... contd...

- Reg 3 of Not- 5 – save as otherwise provided... no person resident in India shall accept any deposit from.....
- Reg 6- Acceptance of deposits by persons other than AD doesn't cover – such deposit
- Or is it not in the nature of capital account transaction at all?

Case law dealing with Deposit for Indian property owned by NRI & acceptance of deposit by his resident brother

- Where appellant received interest free security deposit on behalf of his non-resident brother for letting out a flat for 36 months, since there was no transfer of money outside India nor money came inside India from outside and, moreover non-resident was not required to take permission from RBI as flat was leased out for less than five years, appellant could not be held guilty of violating provisions of section 9(1)(b) and 9(1)(d) of *FERA* in respect of amount received - [2018] 100 taxmann.com 26 (FEMA-AT)

Sec 9(1)(b) & (d) of FERA

- Sec 9(1) : No person in, or resident in, India shall
- (b) receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India. (Similar to sec 3(c) of FEMA)
- (d) make any payment to, or for the credit of, any person by order or on behalf of any person resident outside India. (Similar to sec 3(b) of FEMA).

Deposit cont.

- Eg. NRI enters a leave and license agreement for a period of 3 years.
- The deposit for same is given by a resident on behalf of NRI.
- Is there a contravention of sec 3(b) of FEMA?
- Intention of Sec 3(b) is to prohibit fulfilment of foreign exchange **obligation of a NR** by third party. Such third party could be R or NR.

THANK YOU

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FIRST DESERVE

AND

THEN DESIRE!!

