



THE CHAMBER OF
TAX CONSULTANTS

FEMA Study Circle – Webinar on
Acquisition of Immovable Property in India by Non-Residents &
Outside India by Residents
&
Overview of Liberalised Remittance Scheme (LRS)

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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 6 : Brief Overview of Liberalised Remittance Scheme (LRS)**

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 shall include all types of immovable properties – whether residential, commercial, industrial or agricultural property. It will also include under construction property.
- **General Restrictions on acquisition of immovable property Under FEMA:**
 - 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

- **Authority under FEMA Act, 1999**
 - RBI derives its power under S. 6(2) to frame regulations & GOI derives its power under S. 46(2) and in accordance with s. 6(2A) to frame rules under the Foreign Exchange Management Act, 1999 to regulate capital account transactions including 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

Immovable Property in India – Thrust is predominantly on Residential Status

- Under FEMA, the thrust is on residential status of a person determined under Section 2(v) of the FEMA Act, 1999 and not on citizenship of a person. The regulations are therefore based on the residential status.
- However the above statement is subject to following restrictions-
 - **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) irrespective of their residential status (Rule 31).
 - **Exclusions for certain citizens of Pakistan, Bangladesh & Afghanistan**
Excludes OCIs and Citizen of Pakistan, Bangladesh and Afghanistan who belong to minority community in the respective country and are residing in India on Long Term Visa).
 - However, they are allowed to 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

Change in Residential Status – General Exemptions under 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.

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 the Requirements as per GOI Advisory:**
 - Residing in India for >182 days during the 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

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

- In a case when NRIs/ OCIs returns back to India, RBI ignores condition 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 his/ her 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.**”*

- Relaxation from the condition of 182 days stay under Para 4.9 is applicable only to NRIs/ OCIs who are returning to India for taking up an employment. However, as per Para 6.10 of the same Master Direction reproduced below, RBI would ignore the condition of 182 days stay for an Indian returning for any purpose also based on his/ her intentions.

6.10 NRO accounts may be designated as resident accounts on the return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period. Likewise, when a resident Indian becomes a person resident outside India, his existing resident account should be designated as NRO account.

Person Resident in India

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

- Does this mean that foreign nationals, other than NRIs/OCIs coming to India with proper residential visas are required to meet arithmetic condition of 182 days stay in India during the preceding financial year to be considered as a person resident in India? (Refer GOI Press Release dt. February 1, 2009). Or that the condition of 182 days is to be observed only for acquisition of immovable property in India?
- What type of banking account, ordinary resident account or NRO account, should be opened by a foreign national who has come for an employment in India with proper visa but has not completed 182 days stay during the preceding financial year ? The answer will depend on the residential status of the foreign national.
- Once a person goes outside India to take up employment outside India, he/ she becomes a non-resident. On account of the education of their children, their spouses keep on moving between India & abroad and makes it difficult to determine the purpose or circumstances as would indicate his/her intention to stay outside India for an uncertain period as per s. 2(v)(i)(A)(c). What will be the residential status of such spouses?
- As per Regulation 4(6) of Notification No.10(R), a person resident in India who has gone abroad for studies may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India. All credits from India into the account shall be made in accordance with the Act, Rules and Regulations made thereunder. It provides further that on his return to India, after completion of studies, such an account will deemed to have been opened under the Liberalised Remittance Scheme. Does that meant that such a student continues to be a person resident in India? **How does one reconcile this with AP Dir. Cir. No. 45 dated 8.12.2003?**

Person Resident in India

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

- Mr. Rakesh, an Indian national, takes up employment with a Company in USA. Mr. Rakesh will be a Non Resident from the day of his first departure for taking up employment in USA.
- Mrs. Rakesh also moves to USA to settle down with her husband. She is NR on her departure to USA for settlement.
- On retirement of Mr. Rakesh, Both Mr.& Mrs. Rakesh return to India for permanent settlement. They become Residents immediately upon return to India – Refer Master Direction on deposits - Para 4.9/Para 6.10.
- 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.
- Mr. Vijay joins a company in New York as a partner and shifts his residence to USA. He becomes Non Resident.
- Mr. Dilip, Manager in CCI is deputed to New York office. He is a Non-Resident during his posting to New York.
- Mr. B an American national is employed with Bank of America, Mumbai and obtained resident permit. Mr. B will be a resident. (Will he be required to fulfill condition of 182 days stay during the preceding financial year.?)
- Mr. Achyut 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 the RBI, Mr. Achyut will become non resident if his stay abroad is more than 182 days during the preceding financial year. Can he be considered NR in the first year?
- Mr. Carlos, an American citizen, comes to India as a tourist and stayed for more than 182 days during the preceding financial year due to lockdown. He will continue to be a Non-Resident.
- Mr. Carlos takes admission for one year course in Mumbai University. He is still a Non-Resident. .
- Mr. Carlos marries his co-student, an Indian girl and settles down in India permanently. **He becomes a resident.** (Will he be required to fulfill condition of 182 days stay during the preceding financial year.?)
- Mr. Anand, an NRI/OCI comes to India for marriage of his two children and intends to leave India soon thereafter. His total stay in India continues to be for more than eighteen months and more than six months in each of the two preceding years respectively. Mr. Anand has not taken up employment / started any business in India. He continues to be a non-resident, The onus is on him to establish that he did 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 NRI 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.

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.

Person Resident in India

Case Study

- Naren was born and brought up in Amritsar. He is an agriculturist. He has got 100 acre of agricultural land and 5 farm houses. He is also owning a huge residential bungalow and several commercial shops in India. Few of the shops are rented and he is fetching good rent from them.
- Naren has further negotiated a deal to buy 10 acres of an agricultural land in Gujarat and after entering into MOU, he has paid a token sum of Rs. 5 Lakh to the seller.
- Naren has decided to migrate and spend his balance life with his son Smeet who is living in Canada. He has obtained necessary visa and he is leaving for Canada on 15 June, 2021.
- He has following questions for which he has approached you for the advice:
 - Whether he is required to do any thing about his property in India before leaving for Canada? Can he hold all the properties and continue to earn rent?
 - Can he do contract farming in the agricultural land owned by him?
 - Can he remit money from India and how much?
 - He wants to give power of attorney to his nephew to complete the registration of 10 acres of agricultural land to complete the registration in the month of July 2021. Any issue about it?

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 of 2 house properties. Remittance for 3rd and subsequent house properties can be made under US \$ 1M Scheme Other Properties acquired in FC – Full repatriation Properties covered under s. 6(4) – Remittance allowed under US \$ 1 M 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/ Transfer and Remittance of sale proceeds of Immovable Property

Case Study

- **Smeeth** is living in Canada for past few years and now he is a citizen of Canada and runs a food chain. In May 2019, Smeeth got married to a local Canadian citizen named **Sandra**. The couple have a son named **Smeethdeep** aged 1 year.
- In the year 2010, Smeeth had purchased 3 residential houses in India for a consideration of USD 100,000 each and bought 3 shops at a consideration of USD 100000 each. For residential houses, he took housing loan in India and paid the instalments through inward remittance from Canada. For buying shops, he remitted money from Canada. He wants to sell all these properties and he is fetching USD 200000 for each of the properties and remit money back to Canada.
- Nayandeeep who is an NRI and father of Smeeth, intends to gift his agricultural land to his son Smeeth and a residential house to his grandson Smeethdeep.
- In addition, Nayandeeep has made his “Will” and bequeathed all his properties in India which includes another piece of agricultural land and farm houses to his son Smeeth.
- Smeeth intends to buy a new house in India jointly with his wife Sandra.

Acquisition/ Transfer and Remittance of sale proceeds of Immovable Property

Case Study

Nature of Property	Cost	Sale Proceeds	Tax	Remittance
Shop1	1,00,000	2,00,000	20,000	1,80,000
Shop	1,00,000	2,00,000	20,000	1,80,000
Shop	1,00,000	2,00,000	20,000	1,80,000
Resi House 1	1,00,000	2,00,000	20,000	1,80,000
Resi House 2	1,00,000	2,00,000	20,000	1,80,000
Resi House 3	1,00,000	2,00,000	20,000	NIL- However, remittances allowed under US 1 M Scheme
Purchase of House with NR Wife	One house allowed jointly with Husband as they are married for more than 2 years provided the marriage is registered.			

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:**
- **Against 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 an 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.
- **Against 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 loan by the company from overseas lender subject to the 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 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 can provide housing loan to NRI/OCI Cardholder subject to such terms and conditions prescribed by the RBI from time to time.
 2. RBI has not specified any specific terms and conditions. Banks/ NBFCs are however considering such proposal as per their prudential norms.
- 3. For Rupee loan for personal needs: (Notification 3R- Regulation 7A)**
 1. As per Regulation 7A of the Notification No. FEMA 3(R), AD in India is permitted to grant loan to 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 the RBI.

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 can be repatriated only 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 through FIRMs Platform
- Investment in partnership engaged in retail trading/stocks trading/tobacco/gambling is 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 listed on the stock exchange or otherwise
 - Units of an Investment Vehicle listed 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 or funds held in 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 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.
 - However, FDI in construction development is allowed subject to several performance linked conditions
 - Hence FDI in LLP which is engaged in construction/ development activities is not allowed under the automatic route.- Refer 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 data-bbox="112 325 1381 564"><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> <ul data-bbox="112 614 1854 1220" style="list-style-type: none">▪ Other Conditions▪ 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,	100%	Automatic

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 it does not result into repatriation, lock-in period/ GOI approval not applicable.
- **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 further construction/ development work and investor is allowed to sale the same.
- The Indian investee company shall be responsible for obtaining all the 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,
- **"Transfer"**: Definition is aligned with definition under other relevant laws (e.g. Income-tax Act, 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: Can Companies having FDI in Real Estate Sector 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 the following activities in the Real Estate 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 / entity incorporated in Pakistan or Bangladesh)

▪ Investment in Units of the IVs.

▪ Sale/ Transfer :

- In any manner or redeem the units as per the regulations framed by SEBI or directions issued by RBI.
- 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

- **Purchase / holding of Immovable Property abroad by Resident Indian Citizens:**
 - Property which was acquired on or before 8th July, 1947 and held with the permission of RBI
 - Purchase out of funds held in RFC account / Funds held abroad which earned 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 \$ 2 was 50,000 during a financial year.
 - Members of a family can pool their remittances - the property should be in joint names of remitters
- **Acquisition 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 ???

SECTION-5
LIBERALISED REMITTANCE SCHEME
(LRS)

Liberalized Remittance Scheme ('LRS')- Background

- Prior to introduction of LRS, drawl of foreign exchange was governed by :-
 - For Current Account Transactions, Current Account Transaction (CAT) Rules, 2000 divided under three schedules as follows:-
 - Schedule I - Completed prohibited transactions
 - Schedule II - Allowed only with the prior approval of the concerned Ministry of the Central Government
 - Schedule III - Permissible transactions. It also prescribed limits for certain transactions beyond which procedures / approvals are prescribed.
 - **No restriction or limit** on other Current Account Transaction which are not covered by any of the three schedules
 - For Capital account Transactions:-
 - All Capital Account transactions restricted under Notification No. 1
 - Allowed only as specified under subsequent Notifications issued by the RBI/ Rules framed by the Central Government

Liberalized Remittance Scheme ('LRS')- Background

- LRS introduced as a measure of partial capital account convertibility to allow specified capital account transactions up to the prescribed limits. The original objective was to allow Resident Individuals to remit funds within LRS limit for any Current Account Transaction; or for any Capital Account Transaction; or a combination of both.
- Funds up to the limit allowed for purchase of **any asset** outside India without approval of RBI. This was done as a measure of partial capital account convertibility
- Drawal of Foreign exchange under LRS was to be allowed in addition to the limits prescribed under Schedule III
- Drastic change in position brought in from May 2007. LRS allowed only for any 'permissible' current or capital account transaction or a combination of both. No guidance on permissible transactions was provided until 2015.
- Remittance to non-cooperative countries listed by FATF not allowed under LRS

Liberalized Remittance Scheme ('LRS')

- LRS introduced on February 4, 2004, with a initial limit of USD 25,000 per financial year
- LRS brought in as a measure of partial capital account convertibility by allowing specified capital account transactions up to the LRS limit
- Facility available to all Resident Individuals including minors
- Limit has increased over the years but reduced in between August 2013 till May, 2015 due to forex reserve position

							Amount in US \$
Date	Feb 4, 2004	Dec 20, 2006	May 8, 2007	Sept 26,2007	Aug14,2013	June 3,2014	May 26,2015
LRS Limit	25,000	50,000	1,00,000	2,00,000	75,000	125,000	2,50,000

- All the facilities for release of foreign exchange under Para 1 of Schedule III as amended from time to time for current account transactions are subsumed under the overall limit of USD 250,000. No separate limits for gifts, donations, etc.

Liberalized Remittance Scheme ('LRS')

Permitted Transactions under LRS	
Current Account Transactions	Capital Account Transactions
<ul style="list-style-type: none"> 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 specialized 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 	<ul style="list-style-type: none"> i. Opening of foreign currency account abroad with a bank. ii. purchase of property abroad. iii. making investments abroad. iv. Acquisition and holding of shares of listed / unlisted companies abroad. v. Debt Instruments vi. Acquisition of ESOPs, ESOPs linked ADR/GDR vii. Acquisition of qualification shares viii. Investment in Mutual Funds, VCFs, unrated debt securities and promissory notes ix. Setting up Wholly owned subsidiaries and Joint Ventures abroad; (Under Notification No. 120 within LRS Ceiling. x. Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

* Individuals may avail of exchange facility for an amount in excess of the overall limit of US \$ 2,50,000 prescribed under the LRS, if it is so required by the country of emigration, medical institute offering treatment or the university respectively.

Liberalized Remittance Scheme ('LRS')

- Income and sums remitted abroad need not be brought back into India and can be reinvested overseas.
- Resident individuals cannot invest in foreign companies having downstream subsidiaries
- Remittance for margins or margin calls to overseas exchanges/ overseas counterparty are not allowed under the Scheme.
- **Loan to Non-residents:**
 - Interest free loan to their NRI / PIO close relatives defined under Companies Act, 2013 is allowed within overall LRS ceiling
 - Payment by way of credit to their NRO account only in India.
 - The loan amount shall not be remitted outside India
 - Loan amount to be used for personal requirements of the borrower
 - Loan should be for a minimum period of one year
 - Loan amount should not be used for any restricted purposes.
- **Gift to Non-residents:**
 - The gift is within the overall limit of USD 250,000 per financial year as permitted under the LRS for a resident individual.
 - Rupee gift to a NRI/PIO who is a relative of the resident individual ['relative' as defined in Section 2(77) of the Companies Act, 2013] . Amount may be treated as an eligible credit to NRO account of the NRI/PIO/OCI
 - Payment of gift shall be by way of crossed cheque /electronic transfer and should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) account of the NRI / PIO relative

Liberalized Remittance Scheme ('LRS')

▪ **Clubbing/ Consolidation of Remittance**

- Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.
- However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account/investment/purchase of property, if they are not the co-owners/co-partners of the overseas bank account/ investment/property.
- Further, a resident cannot gift to another resident, in foreign currency, for the credit of the latter's foreign currency account held abroad under LRS.

▪ **Remittances to International Financial Services Centers (IFSCs)** (AP Dir. Cir No. 11 dated February, 16,2021)

▪ **Conditions:**

- The remittance shall be made only for making investments in IFSCs in securities, other than those issued by entities/companies resident (outside IFSC) in India.
- Resident Individuals allowed to open a non interest bearing Foreign Currency Account (FCA) in IFSCs, for making the above permissible investments under LRS. Funds lying idle in the account for a period upto 15 days from the date of its receipt shall be repatriated to domestic INR account of the investor in India.
- Resident Individuals are not allowed to settle any domestic transactions with other residents through these FCAs held in IFSC.

▪ **Document/ Procedure for Remittance**

- The individual will have to designate a branch of an AD Bank through which all the remittances under the Scheme will be made.- Master Direction Reg. 14
- The resident individual seeking to make the remittance should furnish Form A2 for purchase of foreign exchange under LRS along with LRS Declaration.
- It is mandatory for the resident individual to provide his/her Permanent Account Number (PAN) to make remittance under the Scheme.

Liberalized Remittance Scheme ('LRS')

Issues under LRS

- **Overseas Direct Investment by Individuals**
 - Whether LRS can be used to set up a company abroad?
 - Whether Step- Down subsidiary can be formed by the overseas entity having investment under LRS?
 - Whether investment under LRS is allowed by way of equity and Loan to an overseas entity?
 - Whether an overseas SPV can be formed for acquisition of Immovable Property abroad?

- **Immovable Properties**
 - Can investment in property abroad under LRS be made jointly with close relatives?
 - Whether immovable property acquired under LRS be gifted to a non-resident close relative?
 - Can housing Loan be taken for acquisition of immovable property abroad under LRS?

- **Miscellaneous**
 - Whether there is any reporting requirement under LRS?
 - Whether money remitted abroad under LRS can be used for other permissible capital / current account transactions , other than the original purpose for which the it was remitted?
 - Whether Loan can be given under LRS?
 - Whether money invested in a bank account abroad and interest earned there on is required to be repatriated back to India?

Liberalized Remittance Scheme ('LRS')

ODI by Individuals within the LRS Ceiling

- **Overseas Direct Investment**
 - Resident Individuals allowed to invest in shares - both listed and unlisted under the original LRS Circular dated 4.02.2004
 - Relying on this circular, many individuals have set up entities under the LRS. No such investment were allowed by individuals until 5th August, 2013 under Notification No. 120
 - However, RBI clarified vide FAQs dated 17th September 2010 for first time that LRS cannot be used to setup company abroad – Refer Point (v) in reply to Q. 3 of the FAQ - FAQ is not law
 - Master Circulars of 2011 and 2012 still stated that investment can be made in shares (listed or otherwise)

Liberalized Remittance Scheme ('LRS')

ODI by Individuals within the LRS Ceiling

- **Overseas Direct Investment - Continued....**
 - RBI issued notification to allow JV/WOS outside India under LRS-ODI from 5th August 2013- Notification No. FEMA. 263/RB-2013
 - Investment only in bonafide business activities.
 - Prohibited to invest in a JV / WOS which is engaged in Real estate business; or Banking business; or Financial services activity.
 - Investment only in equity or compulsorily convertible preference shares.
 - Investment only in operating entity. Hence, no step-down subsidiary / SPV is allowed.
 - No guarantees / pledge of shares allowed
 - Charge on domestic or foreign assets is not allowed
 - Write-offs not allowed
 - Investment through banking channels - investment by credit cards, cash deposits prohibited
 - Valuation to be done as per the prescribed norms
 - Invest in countries identified as “non-cooperative countries and territories” by FATF prohibited.
 - Resident individual should not be on Reserve Bank's Exporters Caution List or List of defaulters to the banking system or under investigation by any investigation/enforcement agency or regulatory body
 - Disinvestment allowed only after one year from the date of first remittance
 - Disinvestment proceeds to be repatriated to India immediately and in any case not later than 60 days
 - No write off shall be allowed
 - Disinvestment may be reported by the designated AD to the Reserve Bank in Part IV of Form ODI within 30 days of receipt of proceeds

Thank
you

