



Overview of FEMA
Structure of FEMA Act
Important definitions
Residential status
Capital and Current Account transactions
Rules and Regulations

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Abstract from Lecture delivered by
Mr. Justice S H Kapadia, **Hon'ble Chief Justice of India**
on **20th February 2010** at **ITAT Conference**

- Start:

*“But friends, let me tell you about whatever I have learnt; in fact I became a judge precisely because I was very **keen to have a learning process**. I always realized that this is a position where if a judge sits with an open mind and with clarity of thought, he will understand and he will learn in the process and I can tell you from experience that each day, in whatever jurisdiction you sit, it's a learning process and there I may say that be judges or members of the Tribunal, we are all enjoying a reflected glory of the advocates who have contributed to a large extent in the development of tax law.”*

End:

*“I always believe that **instead of going into theories and principles**, etc., it is better that we **share experience** in such **workshops and seminars**. And last thing I would like to say is, please **do not put an end to the efforts here. It is a continuing process.**”*

Foreign Exchange Management Act, 1999

- Preamble to FEMA 1999:
*“An Act to consolidate and amend the law relating to foreign exchange with the **objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India**”.*
- Extends to the whole of India (including J&K)
- Extra-territorial jurisdiction (applies to overseas Offices)
- FEMA came into force w.e.f. June 1, 2000 with over **330+ amendments** since then
- **FEMA has 49 sections**
- FEMA is **regulated through the Rules (6) & the Regulations (25), AD (Dir Series) Circulars; Master Directions; FAQs; Compounding Orders**

Foreign Exchange Management Act, 1999

| | |
|------------|---|
| Sec.1-2 | Short title, Definitions |
| Sec. 3-9: | Regulation and management of FOREIGN EXCHANGE : |
| 3 | Dealing in foreign exchange |
| 4 | Holding of foreign exchange, foreign security or any immovable property situated outside India by a person resident in India |
| 5 | Current account transactions |
| 6** | Capital account transactions |
| 7 | Export of goods and services |
| 8 | Realisation and repatriation of foreign exchange |
| 9 | Exemption from realisation and repatriation |
| Sec.10-12 | Authorised person |
| Sec. 13-15 | Contravention and penalties , power to compound contravention |
| Sec. 16-35 | Adjudication and appeal |
| Sec. 36-38 | Directorate of Enforcement |
| Sec. 39-45 | Miscellaneous |
| 46, 47 | Power to make Rules; Power to make Regulations @ |
| 48, 49 | Rules/Regulations laid before Parliament*; Repeal & Savings |

****Control on non-debt capital flows as equity will be exercised by the Government (yet to be notified).**

@ Central Government makes Rules; RBI makes Regulations

*For a total period of thirty days in one or more successive sessions.

*Both Houses must either agree or disagree.

What is the mandate of the RBI/ADs?

- § **Regulations:** RBI is empowered to Notify regulations to give effect the FEMA – this constitutes delegated legislation

- § A.P. (Dir. Series) Circular: Contains procedural instruction issued by the RBI issued under Section 10(4) and Section 11 of FEMA to Authorized Dealers / Banks ('ADs').

- **Authorized Dealer** : RBI's gatekeepers
 - **Permitted** to deal in foreign exchange under FEMA
 - FEMA requires all **capital account** and **current account** transactions to be **routed through the Authorized Dealers (ADs)**
 - ADs are regulated by RBI and must **comply with all RBI rules, regulations and instruction** including Master Directions.
 - ADs are **interface between RBI and the various stake holders.**

FEMA 1999

Section 10(5): **An authorised person** shall, before undertaking any transaction in foreign exchange on behalf of any person, require that **person to make such declaration** and to give such information as will reasonably satisfy him that the **transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder**, and where the said person **refuses to comply** with any such requirement or makes only **unsatisfactory compliance** therewith, the authorised person shall **refuse in writing** to undertake the transaction and shall, if he has reason to believe that any such **contravention or evasion** as aforesaid is contemplated by the person, **report the matter to the Reserve Bank.**

Dealing in foreign exchange, etc. Sec 3

Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, **no person shall-**

- a. **Deal in or transfer any foreign exchange or foreign security to any person **not being an authorized person**;**
- b. **Make any payment to or for the credit of any person resident outside India in any manner**;
- c. **Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner**;

Explanation- For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person;

- 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**.

Explanation - For the purpose of this clause, "**financial transaction**" **means** making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

Definitions

- “**Foreign Exchange**” means foreign currency and **includes**,-
- ❖ **deposits**, credits and balances payable in any foreign currency,
 - ❖ **drafts**, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
 - ❖ **drafts, travelers cheques, letters of credit** or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency
- “**Foreign Security**” means any security, in the form of **shares, stocks, bonds, debentures** or any other instrument denominated or expressed in foreign currency and includes **securities expressed in foreign currency**, but where redemption or **any form of return such as** interest or dividends is payable in Indian currency
- “**Security**” means **shares, stocks, bonds and debentures, Government securities** as defined in the Public Debt Act, 1944 (18 of 1944), **savings certificates** to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, **deposit receipts** in respect of deposits of securities and units **of the Unit Trust of India** established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or **of any mutual fund** and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act

Definitions

- “**Currency**” includes all **currency notes**, postal notes, postal orders, money orders, **cheques, drafts**, travelers cheques, **letters of credit**, bills of exchange and promissory notes, **credit cards** or such other similar instruments, as may be notified by the Reserve Bank
- “**Currency Notes**” means and includes cash in the form of **coins** and **bank notes**.
- “**Foreign Currency**” means any currency other than Indian currency.
- “**Service**” means **service of any description** which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service
- “**Transfer**” includes sale, purchase, exchange, mortgage, **pledge, gift, loan** or any other form of transfer of right, title, possession or lien [Section 2(ze) of FEMA]. Thus, the definition is very wide. It covers not only transfers of ownership but also simple transfer of possession or even lien.

Definitions

- “**Person**” includes-
 - ❖ individual,
 - ❖ a Hindu undivided family,
 - ❖ a company,
 - ❖ a firm,
 - ❖ an association of persons or a body of individuals, whether incorporated or not,
 - ❖ every artificial juridical person, not falling within any of the preceding sub-clauses, and
 - ❖ any agency, office or branch owned or controlled by such person.

Definition of Person resident in India under FEMA...1/2

1

A person residing in India
for > 182 days
during the preceding financial year



A person who has **gone out of India or who stays outside India**, in either case

- ❖ taking up employment outside India, or
- ❖ carrying on outside India a business or vocation outside India, or
- ❖ any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period



A person who has **come to or stays in India**, in either case, otherwise than

- ❖ taking up employment in India, or
- ❖ carrying on in India a business or vocation in India, or
- ❖ any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period

To be treated as a person resident in India, a person has **not only to satisfy the condition of the period of stay (being more than 182 days during the preceding financial year) but has to also comply with the condition of the purpose/ intention of stay.**

Student going abroad for studies is treated as Non-Resident Indian (NRI) and is eligible for all the facilities available to NRI under FEMA, 1999 – Circular 45 dated 08 December 2003.

If NRI returns to stay in India for an '**uncertain period**' he will become a person resident in India and his NRE account should be redesignated as Resident's account (Case law Basant Kumar Sharma vs. Government of India dated February 7, 2013)

The **type of visa granted** should clearly indicate the **intention to stay in India** for an uncertain period to determine his residential status in terms of section 2(v) FEMA, 1999.

Definition of Person resident in India Under FEMA...2/2

2

Any person or **body corporate registered or incorporated in India**

3

An **office, branch or agency in India** owned or controlled by a person resident outside India

4

An **office, branch or agency outside India** owned or controlled by a person resident in India

“Person resident outside India”

means a person who is not resident in India.

Residential Status under FEMA

Under FEMA, to be treated as a person resident in India, a person has not only to **satisfy the condition of the period of stay** (being more than 182 days during the preceding financial year) but has to **also comply with the condition of the purpose/ intention of stay**.

Press Release of Government of India, Ministry of Finance dated **February 1, 2009 - Government's advice on acquiring land by persons residing outside India** - *“A foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business / vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as he would be a ‘person resident in India’ as per section 2(v) of FEMA, 1999. 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”*.

Residential Status

If one goes out of India or who stays outside India for circumstances/reasons mentioned in 'A' above, he **becomes NR under FEMA immediately**. The **period of stay** in India in current financial year or preceding financial year has **no bearing** on such a status. He would be outside the ambit of FEMA as far as overseas transactions are concerned.

Under **Income-tax Act**, **presence/ stay in India** is important for determination of residential status. It merely **considers number of days of stay in India**. Under FEMA, circumstances/reasons mentioned in 'A' / 'B' above are important.

Under **Income-tax Act**, one is either a resident or a non-resident for the **entire previous/financial year**. One cannot be resident for a part of the year, and non-resident for rest of the year. **Under FEMA**, status is determined in the date **when one applies the provisions of FEMA**.

Residential Status

Change of Resident Status of Account holder

(a) From Resident to Non-resident:

When a person resident in India leaves India for a country (other than Nepal or Bhutan) for taking up employment, or for carrying on business or vocation outside India or for any other purpose indicating his intention to stay outside India for an uncertain period, his existing account should be designated as a Non-Resident (Ordinary) account.

(b) From Non-resident to Resident:

NRO accounts may be designated as resident rupee accounts on the return of the account holder to India for taking up employment, or for carrying on business or vocation or for any other purpose indicating his intention to stay in India for an uncertain period. Where the account holder is only on a temporary visit to India, the account should continue to be treated as non-resident during such visit.

Residential Status under Income-tax Act

| “RESIDENT IN INDIA” | “NON RESIDENT IN INDIA” |
|--|---|
| Basic conditions | |
| An individual is said to be resident in India in any previous year, if he satisfies any one of A or B: | An individual is said to be non-resident in India in any previous year, if he satisfies both of A and B: |
| A. is in India in that year for a period or periods amounting in all to 182 days or more, | A. is in India in that year for a period or periods amounting in all to less than 182 days, |
| or | and |
| B. having within the four years preceding that year been in India for a period or periods amounting in all to 365 days or more, is in India for a period or periods amounting in all to 60 days** or more in that year. | B. having within the four years preceding that year been in India for a period or periods amounting in all to less than 365 days, is in India for a period or periods amounting in all to less than 60 days** in that year. |
| ** Words "60 days" to read as "182 days" - being a citizen of India , who leaves India in any previous year for the purposes of Employment (note 2 below) outside India | ** Words "60 days" to read as "182 days" - being a citizen of India , who leaves India in any previous year for the purposes of Employment outside India - |
| ** Words "60 days" to read as "182 days" - being a citizen of India , or a person of Indian origin within the meaning of <i>Explanation</i> to clause (e) of section 115C, who, being outside India, comes on a visit to India (note 1 below) in any previous year | ** Words "60 days" to read as "182 days" - being a citizen of India , or a person of Indian origin within the meaning of <i>Explanation</i> to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year |

Residential Status under Income-tax Act

If RESIDENT IN INDIA, then find out whether:

Additional conditions (not relevant for NR)

"RESIDENT AND NOT ORDINARILY RESIDENT" IN INDIA ('RNOR')

Non-resident in India in 9 out of the 10 previous years preceding that year,

or

has during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to, 729 days or less

Alternatively

"RESIDENT AND ORDINARILY RESIDENT" IN INDIA ('ROR')

Resident in India in at least 2 out of the 10 previous years preceding that year,

and

has during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to, 730 days or more

An individual becomes ROR if he satisfies at least one basic condition and both the additional conditions.

Residential Status

Note 1: [2003] 131 TAXMAN 477 (CAL.) - **Vijay Mallya** - The 'visitor' as understood in a common parlance is a person who goes or comes to see (person or place) as **act of friendship or on ceremony of for curiosity**. Having accepted this definition of visitor it is very difficult to treat you as visitor to India and to apply *Explanation (b)* to section 6(1)(c) in your case. You **came to India for the purpose of your business for looking after your companies to attend meeting of Board of Directors to pursue or hobby of horse racing and breeding and other serious and profit motivated occupations**. In view of this, you **cannot be treated as a visitor...** Your **indirect contention of having work permit visa and having an appointment offer in financial year 1989-90 is not going to alter the situation**. Primarily because the job undertaken is an **arrangement** in the nature of **disguise** and is to **hoodwink** the provisions of Income-tax Act. However, you may furnish details and proof of service rendered in view of appointment letter furnished by you.

Note 2: [2011] 198 TAXMAN 1 (Ker.) - **O. Abdul Razak** - In our view, **going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like**. Going abroad for the purpose of employment therefore means going abroad to take up employment or any a vocation as referred to in the Circular No. 346, dated 3061982, which takes in **self employment like business or profession**.

Regulation 2 of FEMA 20(R)

w.e.f. 7th November, 2017:

(xxxv) **'Non-Resident Indian (NRI)'** means an individual resident outside India who is citizen of India;

(xxxvi) **'Overseas Citizen of India (OCI)'** means an individual resident outside India who is registered as an Overseas Citizen of India **Cardholder** under Section 7(A) of the Citizenship Act, 1955;

(xxxvii) **'Resident Indian citizen'** means an individual who is a person resident in India and is citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955;

Under erstwhile FEMA 20:

Non Resident Indian (NRI) means an individual resident outside India who is citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7(A) of the Citizenship Act, 1955.

Definition of NRIs

| REGULATIONS | DEFINITION |
|---|---|
| FEM (Deposit) Regulations: Prohibition/restriction/regulation of deposits between persons resident in India and persons resident outside India | NRI means a person resident outside India who is a citizen of India. |
| FEM (Transfer or Issue of Security by a Person Resident Outside India) Regulations 'FEMA 20 (R)' | |
| FEM (Borrowing and Lending In Rupees) Regulations | |
| FEM (Remittance of Assets) Regulations: Remittance outside India by a person whether resident in India or not, of assets in India | |

Definition of PIOs

| REGULATIONS | DEFINITION |
|--|---|
| FEM (Deposit) Regulations | PIO means 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: |
| FEM (Remittance of Assets) Regulations | a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or c) 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 d) 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) |
| FEM (Borrowing and Lending In Rupees) Regulations | Explanation: for the purpose of this sub-regulation, the expression 'Person of Indian Origin' includes an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955. |
| | |
| FEM (Acquisition and Transfer of Immovable Property In India) Regulations | PIO means an individual (not being a citizen of <u>Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan</u>), who (a) at any time, held Indian passport or (b) who or either of whose parents or whose grandparents was a citizen of India (c) the person is a spouse of an Indian citizen (Spouse is excluded) |

Overseas Citizenship of India (OCI)

Eligibility

- A **foreign national, who was eligible to become a citizen of India on 26.01.1950** or was a citizen of India on or at any time after 26.01.1950 or belonged to a territory that became part of India after 15.08.1947
- Children (including minor) and grand children of above person
- Citizens of Pakistan or Bangladesh are not eligible
- **Spouse** of the eligible person can apply for OCI if he/she is eligible in his/her own capacity
- PIO Cardholder can also apply for OCI provided he/she is otherwise eligible for grant of OCI like any other applicant

Benefits to an OCI

- **Multiple entry multi-purpose lifelong visa for visiting India.**
- **Exemption from registration with local police authority for any length of stay in India.**
- Parity with Non resident Indians (NRIs) in respect of economic, financial and educational fields **except** in relation to **acquisition of agricultural or plantation properties.**
- No parity shall be allowed in the sphere of political rights.
- **Parity with NRIs** in respect of pursuing the following **professions in India**, in pursuance of the provisions contained in the relevant Acts:
 - Doctors, dentists, nurses & pharmacists;
 - Advocates;
 - Architects;
 - Chartered accountants
- Parity with NRIs to appear for the All India Pre-medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.

Validity

- An OCI is **entitled to lifelong visa with free travel to India.**

Source: FAQs on Overseas Citizenship of India @ mha.nic.in

Close Relative / Relative of an individual defined in Section 6 of Companies Act, 1956 / 2013

| | |
|---|---------------------------------------|
| Members of a Hindu undivided family | Husband and wife |
| Father (including step-father*) | Mother (including step-mother) |
| Son (including step-son) | Son's wife |
| Daughter (including step-daughter*) | Father's father* |
| Father's mother* | Mother's mother* |
| Mother's father* | Son's son* |
| Son's son's wife* | Son's daughter* |
| Son's daughter's husband* | Daughter's husband |
| Daughter's son* | Daughter's son's wife* |
| Daughter's daughter* | Daughter's daughter's husband* |
| Brother (including step-brothers) | Brother's wife* |
| Sister (including step-sister) | Sister's husband* |

* Deleted/inserted in section 2(77) in Companies Act, 2013

This definition is different from what is defined as RELATIVE under the Income Tax Act, 1961:

Sec 2(41): Definition of Relative

Sec 13: Trust for charitable & religious purposes

Sec 40A(2): Expenses/payments not deductible

Sec 56(2): Gifts

Sec 64(1): Clubbing of Income

Sec 80DD: Medical treatment of a dependant who is a person with disability

Sec 92A: Associated enterprise under transfer pricing

Current Account Transactions - Sec 5

- Foreign exchange transactions are classified as current account transactions, and capital account transactions.
- **Current account transactions: 'all that is not forbidden is permitted'. Capital account transactions: 'all that is not permitted is forbidden'.**
- **Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction:**
Provided that the **Central Government may**, in public interest and in consultation with the Reserve Bank, **impose such reasonable restrictions** for current account transactions as may be prescribed.
- **Drawal of foreign exchange** includes use of International Credit Cards (ICC), International Debit Cards (IDC), ATM cards, etc.
- **Any transaction which is not a capital account transaction and includes:**
 - Payment due in connection with **current business, trade, services, short term borrowings & credit facilities in normal course of business**
 - Payment of **interest** on loans
 - **Income/Dividend on investment**
 - Remittance of **living expenses** to parents/spouse/children
 - Expenses in connection with **foreign travel, education, medical etc.**
 - No ceiling for **Export Commission**. However, **for export benefits** like Duty Drawback, DEPB, etc., agency commission is permissible up to **12.50%**.

FEM (Current Account Transactions) Rules, 2000

Schedule I

Foreign exchange withdrawal is prohibited

Examples

- Lottery winnings
- Racing/riding etc.
- Purchase of lottery tickets, banned /prescribed magazines, football pools, sweepstakes etc.
- Commission towards equity investment in JVs/ WoS abroad of Indian companies
- Call Back Services of telephones etc.

Schedule II

Ministry/Department of Central Government approval required

Examples

- Cultural Tours (Ministry of Human Resources Development)
- Hiring charges of transponders (Ministry of I&B) etc.

Schedule III

RBI approval Required only if exceeds threshold limit

Examples

Individuals within LRS limit of US\$ 250,000

- Private visits abroad
 - Gifts, Donations
 - Going abroad for employment
 - Maintenance of close relatives abroad
 - Business travel
 - Medical treatment abroad
- Other than Individuals**
- Consultancy services
 - Reimbursement of pre-incorporation expenses
 - Donations etc.

Capital Account Transactions...1/2

Any transaction:

- which **alters the assets or liabilities outside India** of persons resident in **India**
- or**
- which **alters assets or liabilities in India** of persons resident outside **India**
- Including transactions referred to in **section 6(3) of FEMA**

Capital Account Transactions...2/2

Section 6(3)

RBI in consultation with Central Govt. may by regulations, prohibit, restrict or regulate:

| | |
|--|--|
| Transfer or issue of any | <ul style="list-style-type: none"> ❖ foreign security by a person resident in India ❖ security by a person resident outside India ❖ security or foreign security by any branch, office or agency in India of a person resident outside India |
| Any borrowing or lending in foreign exchange | |
| Any borrowing or lending in rupees between a person resident in India and a person resident outside India | |
| Deposits between person resident in Indian and person resident outside India | |
| Export, import or holding of currency or currency notes | |
| Acquisition and transfer of immovable property other than a lease not exceeding five years | <ul style="list-style-type: none"> ❖ outside India by a person resident in India ❖ in India by a person resident outside India |
| Giving a guarantee or surety in respect of any debt, obligation or other liability incurred | <ul style="list-style-type: none"> ❖ by a person resident in India and owed to a person resident outside India ❖ by a person resident outside India |

Schedule I to FEMA 1

[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.
- (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.

Schedule II to FEMA 1

[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; and
 - (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.**
- (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.

Liberalised Remittance Scheme (LRS)

The **permissible capital account transactions** by an individual under LRS are:

- (i) **opening of foreign currency account abroad** with a bank;
- (ii) purchase of **property abroad**;
- (iii) making investments abroad- **acquisition and holding shares of both listed and unlisted overseas company or debt instruments**; acquisition of **qualification shares** of an overseas company for holding the post of Director; acquisition of shares of a foreign company **towards professional services** rendered or in lieu of Director's remuneration; investment in **units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes**;
- (iv) setting up **Wholly Owned Subsidiaries and Joint Ventures** (with effect from August 05, 2013) outside India for bonafide business subject to the terms & conditions stipulated in Notification No FEMA.263/ RB-2013 dated March 5, 2013;
- (v) **extending loans including loans in Indian Rupees to Non-resident Indians (NRIs)** who are relatives as defined in Companies Act, 1956.

Rules under FEMA (6)

| | |
|----|--|
| 1. | FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 |
| 2. | FEM (Authentication of Documents) Rules, 2000 |
| 3. | FEM (Adjudication Proceedings and Appeals) Rules, 2000 |
| 4. | FEM (Current Account Transactions) Rules, 2000 |
| 5. | FEM (Compounding proceedings) Rules, 2000 |
| 6. | Appellate Tribunal for Foreign Exchange (Recruitment, Salary & Allowances & Other Conditions of Service of Chairperson & Members) Rules, 2000 |

Regulations under FEMA (25)

| | |
|----|---|
| 1. | FEMA 1/2000 - FEM (Permissible Capital Account Transactions) Regulations, 2000 Permissible Capital Account Transactions + Liberalised Remittance Scheme |
| 2. | FEMA 2/2000 - FEM (Issue of Security in India by a branch, office or Agency of a person resident outside India) Regulations, 2000 Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India |
| 3. | FEMA 3/2000 - FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000 Any borrowing or lending in foreign exchange in whatever form or by whatever name called |
| 4. | FEMA 4/2000 - FEM (Borrowing and Lending in Rupees) Regulations, 2000 Any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India |
| 5. | FEMA <u>5(R)/2016</u> - FEM (Deposit) Regulations, 2016 Deposits between persons resident in India and persons resident outside India |
| 6. | FEMA <u>6(R)/2015</u> - FEM (Export & Import of Currency) Regulations, 2015 Export, import or holding of currency or currency notes |
| 7. | FEMA <u>7(R)/2015</u> - FEM (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India |

Regulations under FEMA (25)

| | |
|-----|--|
| 8. | FEMA 8/2000 - FEM (Guarantees) Regulations, 2000 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 and (ii) by a person resident outside India |
| 9. | FEMA 9(R)/2015 - FEM (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 Realisation , Repatriation and Surrender of Foreign Exchange |
| 10. | FEMA 10(R)/2015 - FEM (Foreign currency accounts by a person resident in India) Regulations, 2015 Foreign Currency Accounts by a Person Resident in India |
| 11. | FEMA 10A/2014 - FEM (Crystallization of Inoperative Foreign Currency Deposits) Regulations, 2014 Inoperative foreign currency deposits - inoperative for a period of 3 years |
| 12. | FEMA 11(R)/2015 - FEM (Possession and retention of foreign currency) Regulation, 2015 Possession and retention of Foreign Currency |
| 13. | FEMA 12(R)/2015 - FEM (Insurance) Regulations, 2015 Holding by a person resident in India of a general or life insurance policy issued by an insurer outside India |
| 14. | FEMA 13(R)/2016 - FEM (Remittance of Assets) Regulations, 2016 Remittance outside India by a person whether resident in India or not, of assets in India |
| 15. | FEMA 14(R)/2016 - FEM (Manner of Receipt & Payment) Regulations, 2016 Manner of Receipt and Payment |
| 16. | FEMA 20(R)/2017 - FEM (Transfer or Issue of Security by a Person resident Outside India) Regulations, 2017 – FDI Regulations Transfer or issue of any security by a person resident outside India Read with - Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India (DIPP) Circular on Consolidated FDI Policy (last updated on August 28, 2017) |

Regulations under FEMA (25)

| | |
|-----|---|
| 17. | FEMA 21/2000 - FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India |
| 18. | FEMA 22(R)/2016 - FEM (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any Other Place of Business) Regulations, 2016 Establishment in India of a Branch Office or a Liaison Office or a Project Office or any Other Place of Business |
| 19. | FEMA 23(R)/2015 - FEM (Export of Goods and Services) Regulations, 2015 Export of Goods and Services |
| 20. | FEMA 25/2000 - FEM (Foreign Exchange Derivative Contracts) Regulations, 2000 Foreign Exchange Derivative Contracts |
| 21. | FEMA 120/2004 - FEM (Transfer or Issue of any Foreign Security) Regulations, 2004 – ODI Regulations Transfer or issue of any Foreign Security |
| 22. | FEMA 348/2015-Foreign Exchange Management (Regularization of assets held abroad by a person resident in India) Regulations, 2015 Regularization of assets held abroad by a person resident in India - The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 |
| 23. | FEMA 71/2002 - FEM (Offshore Banking Unit) Regulations, 2002 Branch of a bank in India located in the Special Economic Zone |
| 24. | FEMA 101/2003 - FEM (Withdrawal of General Permission to Overseas Corporate Bodies (OCBs)) Regulations, 2003 Withdrawal of General Permission to OCBs |
| 25. | FEMA 339/2015 – FEM (International Financial Services Centre) Regulations, 2015 Financial institutions set up in International Financial Services Centres |

Comprehensive Master Directions

§ **Master Directions:** Until December 2015, the regulatory framework and instructions were compiled in the form of Master Circulars issued on 01 July every year. From 01 January 2016 onwards, Master Directions are being issued. These are regularly updated and simultaneously placed online on the RBI website after any change in rules, regulation or policy. Consequently, Master Circulars stand withdrawn.

§ Instructions to ADs have been compiled in the Master Directions.

§ List of underlying circulars/ notifications which form the basis of this Master Direction furnished in the Appendix to the Master Direction.

Master Directions issued on 04 January 2016 - Consolidated relevant A.P (DIR Series) Circulars issued so far

All master regulations will be **fully updated and placed online.**

Reserve Bank will issue Master Directions **on all regulatory matters.**

The **Master Directions to be issued will consolidate instructions on rules and regulations framed by the Reserve Bank under various Acts** including banking issues and foreign exchange transactions.

The process of issuing Master Directions involves issuing one Master Direction for each subject matter covering all instructions on that subject. **Any change** in the rules, regulation or policy will be communicated during the year **by way of circulars.** The **Master Directions will be updated suitably** and simultaneously whenever there is a change in the rules/regulations or there is a change in the policy.

All the changes will get reflected in the Master Directions available on the RBI website **along with the dates on which changes are made.**

Explanations of rules and regulations will be issued by way of **Frequently Asked Questions (FAQs)** after issue of the Master Directions **in easy to understand language wherever necessary.**

The existing set of **Master Circulars** issued on various subjects will **stand withdrawn** with the issue of the Master Direction **on the subject.**

Master Directions

Foreign Investment in India updated **12.01.2018** - **FED Master Direction No.11/2017-18**

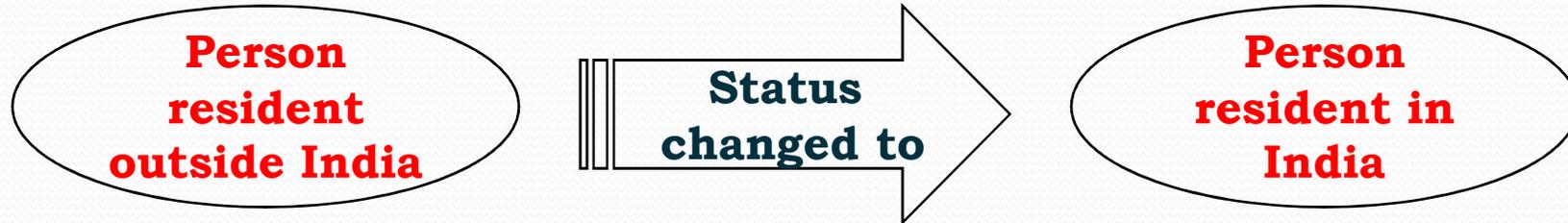
- **Direct Investment Abroad** by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) – updated as on **04.01.2018** - **FED Master Direction No.15/2015-16**
- **External Commercial Borrowings, Trade Credit**, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers – updated as on **16.03.2018** - **FED Master Direction No.5/2015-16**
- **Borrowing and Lending transactions in Indian Rupee** between Persons Resident in India and Non-Resident Indians/ Persons of Indian Origin – updated as on **01.01.2016** - **FED Master Direction No. 6/2015-16**
- Acquisition and Transfer of **Immovable Property** under Foreign Exchange Management Act, 1999 – updated as on **04.02.2016** - **FED Master Direction No. 12/2015-16**
- Establishment of **Liaison/ Branch/ Project Offices in India** by Foreign Entities – updated as on **17.05.2016** - **FED Master Direction No. 10/2015-16**
- **Compounding of Contraventions** under FEMA, 1999 – updated as on **22.12.2017** - **FED Master Direction No.4/2015-16**
- **Reporting** under Foreign Exchange Management Act, 1999 – updated as on **16.03.2018** – **FED Master Direction No.18/2015-16**
- **Deposits and Accounts** – updated as on **23.06.2016** - **FED Master Direction No. 14/2015-16**
- **Remittance of Assets** – updated as on **28.04.2016** - **FED Master Direction No. 13/2015-16**
- **Insurance** – updated as on **17.11.2016** - **FED Master Direction No. 9/2015-16**
- **Other Remittance Facilities** – updated as on **11.02.2016** - **FED Master Direction No. 8/2015-16**
- **Liberalised Remittance Scheme (LRS)** – updated as on **02.08.2017** - **FED Master Direction No. 7/2015-16**
- **Money Changing** Activities – updated as on **08.12.2017** - **FED Master Direction No. 3/2015-16**
- **Miscellaneous** – updated as on **28.07.2017** - **FED Master Direction No.19/2015-16**
- Opening and Maintenance of Rupee/Foreign Currency **Vostro Accounts** of Non-resident Exchange Houses – updated as on **19.05.2017** - **FED Master Direction No. 2/2015-16**
- **Master Circular - Guarantees and Co-acceptances** dated **01.07.2015** - **DBR. No. Dir. BC.11/ 13.03.00/ 2015-16**
- **Risk Management and Inter-Bank Dealings** updated as on **21.03.2017** - **FMRD Master Direction No. 1/2016-17**
- **Export of Goods and Services** – updated as on **12.01.2018** - **FED Master Direction No.16/2015-16**
- **Export of Goods and Services – Project Exports** dated **14.01.2016** – **A.P. (DIR Series) Circular No.39** dated 14 January 2016
- **Import of Goods and Services** – updated as on **02.02.2018** - **FED Master Direction No.17/2016-17**

Frequently Asked questions (FAQs) by RBI

- **Foreign Investments in India - 13.02.2017**
- **Overseas Direct Investments - 01.09.2017**
- **External Commercial Borrowings (ECB) - 16.01.201**
- **Liberalised Remittance Scheme (LRS) for Residents - 11.08.2016**
- **Liaison / Branch / Project Offices** of foreign entities in India - **26.12.2016**
- **Money Changing Activities - 29.09.2017**
- **Foreign Currency Accounts by Resident Individuals - 01.08.2016**
- **Remittance of Assets - 02.09.2016**
- **Accounts in India by Non-residents - 01.08.2016**
- **Purchase of Immovable Property - 02.09.2016**
- **Miscellaneous Forex Facilities - 01.08.2017**
- **Annual Return** on Foreign Liabilities and Assets (**FLA return**) under FEMA 1999 - **18.06.2014**
- **Compounding of Contraventions** under FEMA, 1999 - **29.01.2018**
- **Hedging** of Price Risk in Commodities - **04.07.2014**
- **Exchange Earner's Foreign Currency (EEFC) Account - 05.07.2016**
- Issuance of **Rupee denominated bonds overseas - 9.10.2017**
- Remittances [**Money Transfer Service Scheme (MTSS)** and Rupee Drawing Arrangement (RDA)] - **18.01.2017**
- **Asian Clearing Union - 06.04.2017**
- Swap Window for attracting FCNR (B) Dollar funds - **18.09.2013**

Change of residential status...1/2

Section 6(4) of FEMA



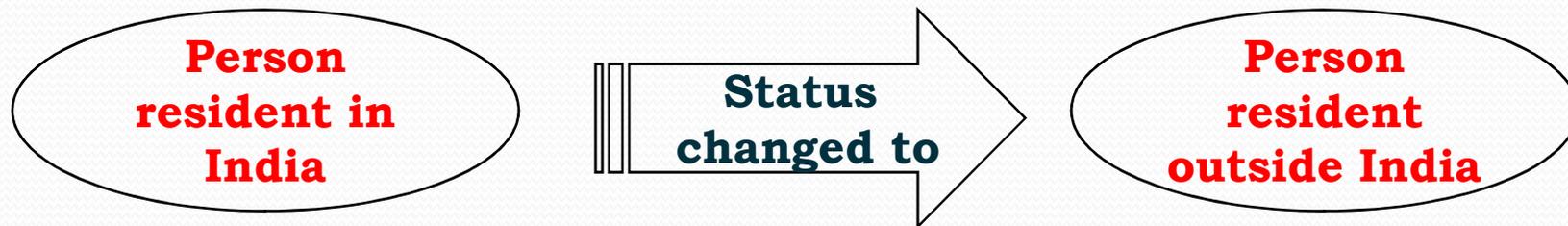
A **person resident in India** may hold, own, transfer or invest in foreign currency, foreign security or any immovable property **situated outside India** if:

- 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) of FEMA



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**

Change of residential status....2/2

- **Any fresh investments in India** in shares or expansion of the activities of the companies in which investment is made would be **subject to the prevailing sectoral FDI cap and conditionalities**.
- Further, **sale proceeds of the assets** would have to be deposited in the **NRO Account** and disposal thereof would be as per the applicable guidelines.
- **Section 6(4) of FEMA, 1999** covers the following transactions:
 - (i) Foreign currency accounts opened and maintained by such a person **when he was resident outside India**;
 - (ii) **Income earned** through employment or business or vocation outside India taken up or commenced **while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India**;
 - (iii) **Foreign exchange** including any income arising there from, and conversion or replacement or accrual to the same, held outside India **by a person resident in India acquired by way of inheritance from a person resident outside India**.
 - (iv) A person resident in India may **freely utilise 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 Reserve Bank**, provided the cost of such investments and/or any subsequent payments received there for are met exclusively out of funds forming part of **eligible assets** held by them and the transaction is not in contravention to extant FEMA provisions.

Always Ask What...?

- What are the **details of the foreign/Indian investor**?
- What is the **nature of the target entity**?
- What **sector** is the target entity in?
- What are the **principal and ancillary activities**?
- What is the **route** that is proposed to be adopted?
- **Nature and timing of investment**?
- Is the **aggregate foreign shareholding** in the target entity?
- Is the **nature of the instrument**? Equity shares, convertible debentures, preference shares, derivatives? Listed or unlisted company?
- Is there a **minimum capitalization** requirement?
- Are the **lock in requirements** or other restrictions on exit / repatriation?
- **Pricing/Valuation guidelines** are applicable?
- **Regulatory approvals** are needed?
- **Post-facto filings** are applicable?
- For primary, **time period for allotment – Companies Act 2013**?
- **Structure in India and Overseas – round tripping issues**?
- **Tax issues** – both in India and Overseas; Section 56(2)(vii), POEM, Thin Capitalisation, GAAR, LoB, BEPS

Prohibited Sectors1/2

Under Schedule 1/ Regulation 15 of FEMA 20(R) - (FDI)

FDI is prohibited in:

- (a) **Lottery Business**, including Government/private lottery, online lotteries,
- (b) **Gambling and Betting** including casinos
- (c) Chit funds
- (d) Nidhi company
- (e) Trading in Transferable Development Rights (TDRs)
- (f) Real Estate Business** or Construction of Farm Houses
- (g) **Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes*****
- (h) Activities/sectors not open to private sector investment e.g. (I) **Atomic Energy** and (II) *Railway operations (other than permitted activities mentioned in entry 18 of Annex B of FDI Policy).*

** “Real estate business” shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014. Further, for FDI, earning of rent/income on lease of the property, not amounting to transfer, will not amount to real estate business.

***Wholesale cash and carry, retail trading etc. shall be governed by FDI policy

- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities

Prohibited Sectors2/2

Under FEMA 1 Foreign investment in any form is prohibited in a company or a partnership firm or a proprietary concern or any entity, whether incorporated or not (such as, Trusts) which is engaged or proposes to engage in the following activities:

- (a) Business of chit fund, or
- (b) Nidhi company, or
- (c) Agricultural or plantation activities, or
- (d) Real estate business**, or construction of farm houses, or
- (e) Trading in Transferable Development Rights (TDRs).

- ***“Real estate business” shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.*

FEMA 1999

Section 13(1A) If any person is found to have **acquired any foreign exchange, foreign security or immovable property, situated outside India**, of the aggregate value exceeding the threshold prescribed under the proviso to subsection (1) of section 37A, he shall be liable to a **penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, of the foreign exchange, foreign security or immovable property.**

Section 37A. (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, **seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:**

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is **less than the value** as may be prescribed (**Rs. 1 crore** as per notification dated 16.09.2015)

Routing of funds raised abroad to India

It has come to our notice that **some Indian companies are accessing overseas market for debt funds through overseas holding / associate / subsidiary / group companies.** It has also been reported that **such borrowings are raised at rates exceeding the ceiling applicable in terms of extant FEMA regulations and that the funds so raised are routed to the Indian companies which accounts for sole/major operations of the group. Different modalities/structures** are resorted to for channeling such funds for Indian operations including investment in rupee bonds floated by the Indian company.

On a review of the matter in light of the existing regulatory framework, it is **clarified** as under:

- i. **Indian companies or their AD** Category – I banks are **not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for such borrowings by their overseas holding / associate / subsidiary / group companies** except for the purposes explicitly permitted in the relevant Regulations.
- ii. Further, funds raised abroad by overseas holding / associate / subsidiary / group companies of Indian companies with support of the Indian companies or their AD Category – I banks as mentioned at (i) above **cannot be used in India unless it conforms to the general or specific permission** granted under the relevant Regulations.
- iii. Indian companies or their AD Category – I banks using or establishing structures which contravene the above shall render themselves liable for **penal action** as prescribed under FEMA, 1999.

Disclaimer

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Thank You

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