

Thane Chapter of the Institute of Company Secretaries of India

Inbound and Outbound Investment – FEMA & Income tax Implications in India

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Outline

- ❑ **FEMA Overview**
- ❑ **Capital & Current Account Transactions**
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 - **Lending & Borrowing**
 - **Acquisition of Immovable Property in India**
- ❑ **Outbound Investment**
 - **Overseas Direct Investment**
 - **Overseas Remittances**
 - **Acquisition of Immovable Property outside India**

FEMA Overview

- **FEMA 1999**
 - Replaced the draconian Foreign Exchange Regulation Act 1973
 - Appointed date 1 June 2000
- **Aims of FEMA**
 - Facilitate external trade and payments
 - Promotion of foreign exchange markets
- **FEMA Rules / Regulations**
 - Rules notified by the Central Government and
 - Regulations notified by the RBI
 - **Consultation betn. Government and RBI**
- **RBI website (www.rbi.org.in)**
 - A P (Dir Series) - issued from time to time
 - Master Directions - updated now periodically
 - FAQs
- Every Transaction either Current (generally permissible unless prohibited) or Capital Account - (only if and as permitted)

- **Other Statutes:** Many other statutes impact / enshrined in FEMA, e.g.
 - FDI Policy
 - Foreign Trade Policy
 - Sectoral Regulation
- NBFC, Insurance, SEBI, etc.
 - Companies Act
- Several powers / responsibilities delegated to the **AD / Banker by RBI - their role / concurrence critical but primary responsibility is of constituents and their role is compliance & monitoring**

In view of complexities and voluminous content – Always refer, research, debate and then conclude...every time

CAPITAL AND CURRENT ACCOUNT TRANSACTIONS

Capital Account Transactions

- Defined to mean [Section 2(e) of FEMA]
 - a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or
 - assets or liabilities in India of persons resident outside India
 - includes transactions specified in section 6(3)
 - Covers transfer of securities, borrowing, lending, deposits, import/export of currency, transfer of immovable property other than a lease upto 5 years and giving of guarantees.

E.g. import of equipment on credit basis

Current Account Transactions

- Defined to mean [Section 2(j) of FEMA]
 - a transaction other than a capital account transaction and includes
 - payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business;
 - payments due as interest on loans and net income from investments;
 - remittances for living expenses of parents, spouse and children living abroad; and
 - Expenses in connection with foreign travel, education and medical care of parents, spouse and children

E.g. import of equipment on cash basis

INBOUND INVESTMENT



Inbound Investment – Key Developments

- **Abolishing of the FIPB in June 2017**

- The work of granting government approval for foreign investment entrusted to the concerned Administrative Ministries/Departments

- **Revised DIPP role**

- DIPP has the responsibility of overseeing the applications filed on the FIFP portal and to forward to the concern Administrative Ministries
- SOPs developed for the same
- FIFP Portal and its FAQ for online filing (fifp.gov.in)

- **Online reporting of Forms to RBI**

- Foreign Investment Reporting and Management System (FIRMS)
- Foreign Liabilities and Assets Information Reporting (FLAIR) System

- **Late Submission Fees v. Compounding**

- **FEMA Inbound**

- The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Reg. 2000 (FEMA 20) dt. 3 May 2000 substituted by FEMA 20(R) dt. 7 Nov. 2017
- The FEMA 1999 amended by the **Finance Act 2015** inter alia to realign powers between Central Government (CG) and RBI.
- Debt and Non-Debt Instruments notified by CG under S. 6(7) of FEMA 1999 - Dt. 16 Oct 2019
- The CG Notification dt. 17 Oct 2019 supersedes FEMA 20(R) - The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('NDI Rules')
- Two new RBI Reg. notified dt. 17 Oct 2019 - (i) Debt-Instruments Reg. 2019 (FEMA 396) and (ii) Mode of payment and Reporting of NDI Reg. 2019 (FEMA 395)
- NDI (Amendment) Rules 2019 dt. 5 Dec 2019 - incorporates PN 4 of 2019 & anomaly removals and few from date of original NDI Rules

Inbound Investment

RBI may by regulation prohibit, restrict or regulate-

- Establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business – Section 6(6) of FEMA
 - ✓ Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016
- Transfer or issue of any security by a person resident outside India – Section 6(3)(b) of FEMA
 - ✓ Foreign Exchange Management (non-debt Instruments) Rules, 2019 (including investment in immovable property in India)
 - ✓ Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019

**LIAISON
/ BRANCH / PROJECT
OFFICE**

Liaison/Branch office - Permitted Activities

Liaison office

- Representing in India the parent company/group companies
- Promoting export import from/to India
- Promoting technical/financial collaborations between parent/group companies and companies in India
- Acting as a communication channel between the parent company and Indian companies

Liaison Office means a place of business to act as channel of communication between head office and entities in India

Branch office

- Export/Import of goods
- Rendering professional or consultancy services (other than a practice of legal profession)
- Carrying out research work in which the parent company is engaged
- Promoting technical or financial collaborations between Indian companies and parent or overseas group company
- Representing the parent company in India and acting as buying/selling agent in India
- Rendering services in Information Technology and development of software in India
- Rendering technical support to the products supplied by parent/group companies
- Foreign airline/shipping company.

Branch Office as per Section 2(14) of the Companies Act, 2013, any establishment described as such by the company

Liaison/Branch office - Setting up procedure and timeline

- Prior approval of Reserve Bank of India (RBI) required
- However in some cases, in consultation with Government
 - ✓ Applicant is a citizen of or is registered/incorporated in Pakistan
 - ✓ Applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a BO/LO/PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands
 - ✓ Principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting. However, prior approval of RBI shall not be required in cases where Government approval or license/permission by the concerned Ministry/Regulator has already been granted (other than FDI approval)
 - ✓ Applicant is a NGO, NPO, Body/ Agency/ Department of a foreign government. However, if such entity is engaged, partly or wholly, in any of the activities covered under FCRA, they shall obtain a certificate of registration under the said Act and shall not seek permission under FEMA

Liaison/Branch office - Setting up procedure and timeline

- In other cases, RBI will approve the application
- Non-resident entity applying for a BO/LO in India should have a financially sound track record

Profit making Track Record in Home Country

- For BO — During the immediately preceding 5 FYs
- For LO- During the immediately preceding 3 Fys

Net Worth

- For BO — not less than USD 100,000
- For LO — not less than USD 50,000

In case of not financially sound and a subsidiary of another company, LOC from its parent/ group company is required, subject to condition that parent/ group company satisfies prescribed criteria for net worth and profit

Liaison/Branch office - Setting up procedure and timeline

- General permission for establishing BO in SEZs to undertake manufacturing and service activities subject to the conditions that:
 - ✓ such BOs are functioning in those sectors where 100% FDI is permitted
 - ✓ such BOs comply with Chapter XXII of the Companies Act, 2013 (Section 379 to 393 and
 - ✓ such BOs function on a stand-alone basis
- In the event of winding-up of business and for remittance of winding-up proceeds, the branch shall approach an AD bank with the documents as mentioned under "Closure of Liaison / Branch Office".

Liaison/Branch office - Setting up procedure and timeline

- Application to be made to Central Office of RBI at New Delhi (through AD Bank) in form FNC along with -
 - English version of certificate of incorporation/registration and Memorandum and Articles of Association attested by the Indian Embassy/Notary public in the country of registration
 - Audited balance sheet of the applicant for 3/5 years. In case home country laws/regulations do not insist on auditing of accounts, Net worth duly certified Public Accountant or any Registered Accounts Practitioner
 - Bankers' Report from the applicant's banker in the host country / country of registration showing the number of years the applicant has had banking relations with that bank
 - Power of Attorney in favour of signatory of Form FNC in case the Head of the overseas entity is not signing the Form FNC

Approval generally granted in 3-4 weeks by RBI and 8-9 weeks where
consultation of the Govt.

Liaison/Branch office - Setting up procedure and timeline

- AD bank shall after exercising due diligence and KYC compliance grant approval for establishing BO/LO/PO in India. Only after getting UIN from RBI Delhi, AD bank shall issue approval for establishing BO/LO.
- Validity period of an LO is generally for 3 years, except in the case of NBFCs and entities engaged in construction and development sectors, for whom the validity period is 2 years only.
- Post approval, Intimation to AD Bank the date on which the BO/LO/PO has been set up.
- Registration with State Police in case of Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong, Macau or Pakistan desirous of opening BO/LO/PO in India.

Liaison/Branch office - Setting up procedure and timeline

- Annual Activity Certificate (AAC) as at the end of March 31 each year along with the required documents to be submitted
- The LO/BO needs to submit the AAC to the designated AD bank as well as Director General of Income Tax (International Taxation), New Delhi (Form 49C) whereas the PO needs to submit the AAC only to the AD bank within 60 days from the end of Financial Year
- Validity of the approval may be extended by AD bank for a period of 3 years in case of LO (other than NBFCs and construction/development sectors), provided AACs have been submitted for the previous years and the account of the LO maintained with the AD bank is being operated in accordance with the terms and conditions stipulated in the approval letter

Project Office

- Means a place of business to represent the interests of the foreign company executing a project in India but excludes a liaison office
- No approval for setting up a project office if
 - project is funded directly by inward remittance from abroad or
 - project is funded by bilateral/multilateral International Financing Agency or
 - project is cleared by appropriate authority
 - Indian entity awarding contract has been granted Term Loan by a Public FI or bank in India for the project

Other Compliances by LO/BO/PO

- Registration with ROC once it establishes a place of business in India under the Companies Act, 2013
- To obtain PAN/TAN/GSTN
- Registration with state Police Authorities
- Registration with FRRO for expats working in India
- Withholding tax Return/GST Return
- Annual Statutory Audit/AAC
- Income tax Return/Tax Audit/Transfer Pricing Audit/GST Audit
- Form 49C to be filed with Income tax Authorities (Section 285 of the Income tax Act r.w.r 114DA)
- Filing of annual audited accounts with ROC

Closure of LO/BO/PO

Requests for closure of the BO / LO/ PO and allowing the remittance of winding up proceeds of BO / LO/ PO may be submitted to AD bank may be submitted along with the following documents:

- Copy of the RBI's/AD bank's approval for establishing the BO/ LO/ PO.
- Auditor's certificate :
 - ✓ indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant and indicating the manner of disposal of assets;
 - ✓ confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for; and

Closure of LO/BO/PO

- ✓ confirming that no income accruing from sources outside India (including proceeds of exports) has remained unrepatriated to India
- ✓ Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the BO / LO/ PO and there is no legal impediment to the remittance
- ✓ A report from the ROC regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the BO /LO in India, wherever applicable
- ✓ AD bank has to ensure that the BO / LO/ PO had filed their respective AACs
- ✓ Any other document/s, specified by RBI/AD bank while granting approval
- ✓ In respect of offices of banks and insurance companies, permission will be allowed after obtaining copies of permission of closure from the sectoral regulators along with the documents mentioned above

Transfer of Assets of LO/BO/PO

- Proposals for transfer of assets may be considered by AD bank only from BOs/LOs/POs who are adhering to the operational guidelines such as submission of AACs (up to the current financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation); have obtained PAN from IT Authorities and have got registered with ROC under the Companies Act 2013, if necessary
- Transfer of assets by way of sale to the JV/WoS be allowed by AD bank only when the non-resident entity intends to close their BO/LO/PO operations in India
- A certificate is to be submitted from the Statutory Auditor furnishing details of assets to be transferred indicating their date of acquisition, original price, depreciation till date, present book value or written down value (WDV) value and sale consideration to be obtained

Transfer of Assets of LO/BO/PO

- Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. The sale consideration should not be more than the book value in each case.
- Assets should have been acquired by the BO/LO/PO from inward remittances and no intangible assets such as good will, pre-operative expenses should be included. No revenue expenses such as lease hold improvements incurred by the BO/LO can be capitalised and transferred to JV/WOS.
- Ensure payment of all applicable taxes while permitting transfer of assets
- Donation by BO/LO/PO of old furniture, vehicles, computers and other office items etc. to NGOs or other not-for-profit organisations may be permitted by AD bank after satisfying about bonafides of transaction

Why liaison office ?

- Simplest structure
- Preferred first step before commencing full fledged operations
- Relatively easier and cheaper to set up, maintain and close down
- No income tax burden – since liaison office is engaged in supply of information and preparatory / auxiliary work, it is not considered as a Permanent Establishment (PE) under most Tax Treaties

It has been held on facts that
Since the liaison office was performing part of the main
Business activities it was a considered to be PE (Hitachi)

Restrictions – Liaison office

- Not permitted to carry out directly or indirectly any commercial / trading / industrial activity
- Not permitted to earn any income
- Should maintain itself out of inward remittances received from abroad through normal banking channels

Restrictions/Disadvantages – Branch office

- Undertake only those activities, which have been permitted by the RBI
- The foreign company is exposed to all liabilities incurred by the branch office
- A branch office is taxed @ 43.68% on its profits in India

Subsidiary/Joint Venture

- Foreign Direct Investment upto 100% is allowed under the automatic route in most of the activities/sectors except certain activities which require approval of the Government
- Corporate Income Tax at 34.94%/29.12%/25.17%/17.16%
- Dividend is taxable in the hands of shareholders (in case of foreign shareholder, treaty based concessional rate of tax)
- Dividends, fees for technical services, royalty freely repatriable

FOREIGN DIRECT INVESTMENT

Notification dated 16 Oct 2019 under Section 6(7) of FEMA

Debt Instruments

- i. Government Bonds
- ii. Corporate Bonds
- iii. All tranches of securitization structure which are not equity tranche
- iv. Borrowings by Indian firms through loans
- v. Depository receipts whose underlying securities are debt securities

Non-Debt Instruments

- i. All investments in equity in incorporated entities (public, private, listed, unlisted)
- ii. Capital participation in LLPs
- iii. Instruments of investment as in FDI policy
- iv. Investment in units of AIFs, REITs and InVITs
- v. Investment in mutual funds and ETFs which invest more than 50% in equity
- vi. Juniormost layer (e.g. equity tranche) of securitization structure
- vii. Acquisition, sale or dealing directly in immovable property
- viii. Contribution to trusts
- ix. Depository receipts issued against equity instruments

All other Instruments which are not notified as Debt or Non-Debt Instruments shall be deemed as Debt-Instruments

NDI Rules, 2019 - Chapters

Chapter	Rule & Particulars
Chapter I	Rule 1 - Preliminary - Rule 2 -Definitions
Chapter II	Rule 3, 4 and 5 - General conditions applicable to all Investors
Chapter III	Rule 6, 7, 8 and 9 - Investment by Person Resident Outside India (PROI)
Chapter IV	Rules 10 – 11 - Investment by FPI
Chapter V	Rules 12 – 13 - Investment by NRI / OCI
Chapter VI	Rules 14 – 15 - Investment by other NR investors
Chapter VII	Rules 16 – 17 - Investment by FVCI
Chapter VIII	Rules 18 to 23 - General Provisions: Issue of convertible notes by Start-up, merger or demerger or amalgamation of Indian Companies, Reporting requirements, downstream investments, pricing guidelines, remittances of sale proceeds
Chapter IX	Rules 24 to 33 - Acquisition and transfer of immovable property in India

NDI Rules 2019 stipulate at several places consultation of RBI with the Central Government

NDI Rules, 2019- PROI Schedules

Schedules	Investments by PROI
I	Purchase or sale of equity instruments of an Indian Company by a PROI
II	Purchase or sale of equity instruments by Foreign Portfolio Investors (FPI)
III	Investment by NRI / OCI on repatriation basis
IV	Investment by NRI / OCI on non-repatriation basis
V	Investment by other non- resident investors
VI	Investment in an Indian LLP
VII	Investment by SEBI Registered Foreign Venture Capital Investors
VIII	Investment in an Investment Vehicle viz. AIF, REIT, InvIts
IX	Investment in Depository Receipts by PROI
X	Issue of Indian Depository Receipts

NDI Rules, 2019 – Key Definitions

- FDI means investment through equity instruments by a person resident outside India (a) in an unlisted Indian company; or (b) in 10% or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company
- Foreign Investment means any investment made by a person resident outside India on a repatriable basis in equity instruments of an Indian company or to the capital of a LLP
- Equity instruments means equity shares, convertible debentures, preference shares and share warrants issued by an Indian company

FPI - Investment in Equity Capital less than 10% in listed Indian Company

NDI Rules, 2019 – Key Definitions

- Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid
- Convertible debentures means fully, compulsorily and mandatorily convertible debentures.
- Preference shares means fully, compulsorily and mandatorily convertible preference shares
- Share Warrants are those issued by an Indian company in accordance with SEBI regulations
- Equity instruments can contain an optionality clause subject to a minimum lock-in period of 1 year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price
- Partly paid shares that have been issued to a person resident outside India shall be fully called-up within 12 months of such issue or as may be specified by the RBI from time to time. 25% of the total consideration amount (including share premium, if any) shall be received upfront.
- In case of share warrants, at least 25% of the consideration shall be received upfront and the balance amount within 18 months of the issuance of share warrants

The grandfathering for NC/ OC / PC - Preference shares issued up to 30 April 2007 and OC/ PC - Debenture issued up to 7 June 2007 in FEMA 20 / FEMA 20R not incorporated in NDI Rules 2019

NDI Rules, 2019 – Key Definitions

Definitions	Particulars
Investment Vehicle	Means REITs, Invts, AIFs <i>Note: NDI Rules, 2019 included MF which invest more than 50% in equity but NDI Amendment Rules dt. 5 Dec 2019 deleted this entry retrospectively</i>
Indian Company	means a company incorporated in India
Indian Entity	shall mean an Indian company or a LLP
Investing Company	means an Indian company holding only investments in other Indian company/ies directly or indirectly, other than for trading of such holdings or securities
Listed Indian company	means an Indian company which has any of its equity instruments listed on a recognised stock exchange in India and the expression “unlisted Indian company” shall be construed accordingly <i>Note: NDI Rules 2019 included the condition of listed debt instrument but NDI Amendment Rules deleted this with retrospective effect</i>

NDI Rules, 2019 – Key Definitions

Definitions	Particulars
Sectoral Cap	<p>Sectoral Cap means the maximum investment including both foreign investment on a repatriation basis by PROI in equity and debt <i>(words omitted by NDI Amendment Rules retrospectively)</i> instruments of a company or the capital of a LLP, as the case may be, and indirect foreign investment, unless provided otherwise.</p> <p>This shall be the composite limit for the Indian investee entity. Explanation:</p> <p>(i) FCCBs and DRs having underlying of instruments being in the nature of debt shall not be included in the sectoral cap</p> <p>(ii) any equity holding by a PROI resulting from conversion of any debt instrument under any arrangement shall be reckoned under the sectoral cap</p>

NDI Rules, 2019 – Rules 6 & 7

Rule	Particulars
Rule 6 – Investments by PROI in an Indian Company	<ul style="list-style-type: none"> • PROI can subscribe, purchase or sale of equity instruments of an Indian company subject to the terms and conditions of Schedule 1 • PROI to be other than citizens of / entities incorporated in Pakistan and Bangladesh and even under Approval Route, their investments can be for sectors other than defence, space, atomic energy and sectors or activities prohibited for foreign investments • Issue or transfer of participating interest or rights in oil field by Indian Company is FDI and to comply with Schedule 1
Rule 7 – Rights / Bonus Issue of an Indian Company	<ul style="list-style-type: none"> • Permissible subject to same terms of original issues (NR basis if by PROI for shares acquired when Resident) • Rights issue by listed Indian Company - price as determined by the Indian company • Rights issue unlisted Indian Company - shall not be at a price which is less than the price offered to PRI • Additional rights and renunciation of rights by PRII in favor PROI permitted <p><i>Note: FEMA 396 -Rule Issue of Bonus NCRPS / NCDs: Permitted from General Reserves under scheme of arrangement approved by NCLT subject to sectoral conditions and other compliance (earlier this provision was part of FEMA 20(R))</i></p>

NDI Rules, 2019 – Rule 8

Rule	Particulars
Rule 8 - ESOP & Sweat Equity Shares to PROI (other than citizens of Pakistan / Bangladesh)	<ul style="list-style-type: none">• Issue of share under ESOP and Sweat Equity scheme permitted to be issued by an Indian Company to PROI who are<ul style="list-style-type: none">- Its employees/ directors- Employees/ directors of its holding company / joint venture/ wholly owned overseas subsidiary or subsidiaries• The Scheme to be drawn up as per SEBI Guidelines / Companies Act [Share and Debenture Rules 2014)• If sector is under Approval Route then prior approval of GoI• To be held on Non-Repatriation basis by PROI exercising option which was issued when he or she was PRII

NDI Rules, 2019 – Rule 9 (Transfer of Equity Instruments)

Rule	Seller	Buyer	Permissible Mode	Pricing & Reporting Guidelines	Government Approval
9(1)	PROI (not NRI, OCI & OCBs)	PROI	Sale / Gift - It covers transfer pursuant to liquidation, merger, demerger and amalgamation of entities or companies outside India	No (yes if seller holds on NR basis and buyer acquires on Rep basis with attendant conditions)	Yes for sectors under Approval Route
9(2)	PROI	PRII	Sale / Gift - sale is subject to pricing guidelines & reporting	Yes for sale (except when PROI holds on Non-Rep basis)	No
9(3)	PRII	PROI	Sale - adherence to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions	Yes	Yes for sectors under Approval Route
9(4)	PRII / NRIs & OCIs on Non-Rep basis	PROI	Gift - with prior RBI approval - 5% of the paid-up capital of Indian Company / each series of debentures and aggregate ceiling of USD 50K per financial year qua donor	Yes	Yes though not expressly mentioned
9(5)	PROI holding equity instruments of an Indian Company with optionality clause can exit without any assured return subject to minimum lock-in period of one year				

NDI Rules, 2019 – Rule 9 (Transfer of Equity Instruments)

Rule	Seller	Buyer	Mode
9(6) - sale on deferred consideration	Between PRII and PROI		<p>Sale on deferred consideration subject to following</p> <ul style="list-style-type: none">•Deferred consideration not to exceed 25% of the total consideration•Deferment period not to exceed 18 months from date of transfer agreement•Can be settled through Escrow arrangement•Can be indemnified by the seller for a period not exceeding 18 months from the date of the payment of the total consideration if total consideration has been paid by the buyer to the seller•Total consideration to be compliant with applicable pricing guidelines

NDI Rules, 2019 – Rule 9 (Transfer of Equity Instruments)

Rule	Seller	Buyer	Mode
9(7) - Escrow		PRII and PROI	<ul style="list-style-type: none">Escrow account to be in accordance with FEMA Deposit regulations and it can be funded by inward remittance of AD- Bank Guarantee
9(8)		Pledge of Equity Instruments	<ul style="list-style-type: none">Pledge for ECB subject to conditionsPledge of equity instruments for borrowing in India (Banks / NBFC) by such Indian company and in favor of overseas bank for PROI promoter / overseas group company

NDI Rules, 2019 – Rule 18 (Indian Start-ups)

Meaning	<ul style="list-style-type: none">• A 'startup company' means a private company incorporated under the Companies Act, 2013 and identified under G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry
Investment by FVCI	<ul style="list-style-type: none">• FVCIs can invest in equity / equity instruments / debt instruments issued by startup irrespective of the sectors in which the startup is engaged
FDI through Convertible note	<ul style="list-style-type: none">• 'Convertible Note' is an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.• PROI (other than citizens/ entities of Pakistan or Bangladesh) permitted to invest in convertible notes issued by startup of INR 25 Lakh or more in a single tranche.• Prior Government approval required if sectors is under Approval Route
Form CN	<ul style="list-style-type: none">• For Indian Start-ups issuing CNs to PROIs to report to RBI within 30 days from the issue• For transfer of CN between PROI and PRI and to be reported by PRI within 30 days from date of transfer

NDI Rule 20 – FEMA Reporting

Form	When to file?	Due date?
FC-GPR	Indian company issuing capital instruments to a PROI Also in case of conversion of ECB into equity along with Form ECB-2 (Part V: Annex III)	30 days from the date of issue of capital instruments.
FLA Return	Indian company which has received FDI or an LLP which has received investment by way of capital contribution	By 15 July of the corresponding year
FC-TRS	For transfer of capital instruments	60 days of transfer or receipt / remittance of funds (whichever is earlier)
ESOP	Indian company issuing employees' stock option to PROI	30 days from the date of issue of ESOPs.
DRR	For issue/ transfer of depository receipts issued in accordance with the Depository Receipt Scheme, 2014	30 days of close of the issue
LLP (I)	LLP receiving amount of consideration for capital contribution and acquisition of profit shares	30 days from the date of consideration
LLP (II)	Disinvestment/ transfer of capital contribution or profit share of LLP between a resident and a non-resident	60 days from the date of receipt of funds
LEC(FII)	Purchase/ transfer of capital instruments by FPIs on the stock exchanges in India	NA
LEC(NRI)	Purchase/ transfer of capital instruments by Non-Resident Indians or Overseas Citizens of India stock exchanges in India	NA
DI	Indian entity or an investment Vehicle making downstream investment in another Indian entity	30 days from the date of allotment of capital instruments
CN	Indian startup company issuing Convertible Notes to a person resident outside India	30 days of such issue
InVi	Investment vehicle which has issued its units to a person resident outside India	30 days from the date of issue of units

NDI Rules, 2019 – Rule 21(Pricing Guidelines for ISSUE & Transfer)

- Pricing guidelines do not apply if transfer by way of sale is governed by SEBI guidelines or price is specified by SEBI
- Issue price of equity instruments to PROI – price should not be lower than:
 - For Listed Company - SEBI Guidelines including for Delisting
 - For Unlisted Company - Internationally accepted pricing methodology (IAPM) for valuation on arm's-length basis & Valuation by Merchant Banker / CAs / Cost Accountants

Note: CCPS and CCD - price conversion formula to be determined upfront. Also, price should not less than FV on issuance date. This was restated in NDI Rules 2019 vide NDI (amendment) Rules 2019 dated 5 Dec 2019 with retrospective effect

- Transfer of equity instruments – price for transfer between PRII to PROI
 - PRII to PROI - price not to be less than SEBI guidelines (issue or preferential allotment or delisting) for Listed Company and IAPM for unlisted company as above
 - PROI to PRII - price not to exceed SEBI guidelines for listed company and IAPM for unlisted company as above
 - Valuation by Merchant Banker / CAs / Cost Accountants

Note: PROI cannot be guaranteed assured exit price and the exit to be at prevalent price Note: Pricing is not applicable for investment by PROI on non-repatriation

For Issue of Shares by Unlisted Indian Company - Dichotomy in the requirement of Pricing norms as per FEMA and Income tax Act

NDI Rules, 2019 – Rule 21(Pricing Guidelines for ISSUE & Transfer)

- **Others cases**

- Swap of shares - valuation only by SEBI Registered Merchant Banker / Investment Banker registered with Host Country
- Subscription to MoA / AoA - face value (shall used instead of May)
- Share warrants - pricing / conversion formula to be determined upfront

- **Rule 22 - Remittances of sales proceeds**

- All transaction through banking channel
- Payment of applicable taxes /duties / levies in India
- AD Bank to verify that the security was held on repatriation basis (RBI registration letter for equity instruments issued to PROI or AD-Bank approval of FC-TRS for equity instruments acquired by PROI)
- Sales is as per pricing guidelines or with prior RBI approval in other cases

NDI Rules, 2019 – Rule 23 (Downstream Investment)

- **Concept of ownership**

- Ownership of Indian Company - beneficial holding of more than 50% of the equity instruments
- Ownership of Indian LLP - more than 50% in capital and having majority profit share
- Indian Company / LLP owned by Resident Indian Citizens - ownership is vested in Resident Indian Citizens or Indian companies / Indian Entities which are ultimate owned and controlled by them
- Indian Company / LLP owned by PROI - Ownership is with PROI)

- **Concept of control**

- Control for Indian company: Control shall mean the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreements.
- Control of Indian LLPs is right to appoint majority of the designated partners who have control over all policies of LLP (in specific exclusion of others)
- Indian Company / LLP controlled by Resident Indian Citizens - control is vested in Resident Indian Citizens or Indian companies / Indian Entities which are ultimate owned and controlled by them
- Company / LLP owned by PROI - control is with PROI

IOCC – Indian Owned and Controlled Company & IOCL = similar situation for LLPs
FOCC – Foreign Owned or Controlled Company & FOCL – similar situation for LLPs

NDI Rules, 2019 – Rule 23 (Downstream Investment)

- Downstream Investment' means an investment made by an Indian entity which has received foreign investment or by an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity.
- Indirect Foreign Investment' means downstream investment received by an Indian entity from:
 - another Indian entity (IE) which has received foreign investment and which is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India; or
 - an investment vehicle whose sponsor or manager or investment manager is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India.
- Total Foreign Investment' is the sum of foreign investment and indirect foreign investment which will be reckoned on a fully diluted basis
- Indian entity which has received Indirect foreign investment to comply with entry route, sectoral caps, pricing guidelines and other attendant conditions. No PRII other than Indian entity can receive Indirect Foreign Investment
- Downstream investment by LLP which is FOCL is allowed only in an Indian company where foreign investment up to 100% is permitted under Automatic Route and where there are no FDI linked performance related conditions
- Exceptions (from 31 July 2012) - Downstream investments by Banking company as part of CDR/ loan restructuring / trading books / loan defaults and which are not strategic investments (as defined)

NDI Rules, 2019 – Rule 23 (Downstream Investment)

- **Computation Methodology**

- Apply at every stage of investments
- All types of foreign investment included except by NRIs / OCIs on NR basis under schedule 4
- Portfolio investment - 31 March of previous year
- FOCC - Downstream FDI - (a) if foreign ownership is less than 100% then downstream investment is full investment made by the FOCC / FOCL
- (b) if downstream investment is in a WOS, then it is the foreign investment in the FOCC/ FOCL
- Indirect foreign investment permitted in and by LLP permitted in sectors where foreign investment is allowed 100% under Automatic Route and there are no FDI linked performance conditions

- **Conditions for downstream investments**

- Approval of Board / Shareholders
- Investment from funds received outside India and / or internal accruals
- Leveraging funds from domestic market is not permitted
- Reporting to RBI and DIPP / FIFP portal
- Reporting by Statutory Auditor of the Indian Investor Company at the first level

- **Transfer of equity instruments by FOCC of downstream Investee Indian Entity**

- Sale to PROI - reporting in Form FC-TRS **but no pricing guidelines**
- Sale to PRII **subject to pricing guidelines**
- Sale to another FOCC - **no reporting and no pricing guidelines**

- Similar provisions apply to LLPs

Investment Routes for FDI

❑ Automatic route

- ❑ Investment should fall within the sectoral FDI limits
- ❑ Inward remittance through normal banking channel
- ❑ Reporting to Reserve Bank of India (RBI) within 30 days from date of receipt of FDI and allotment of shares

❑ Government Approval route

- ❑ Investment beyond sectoral FDI limits
- ❑ Application to be made to concerned administrative Ministry/Department for specific permission
- ❑ Generally granted in 5-6 weeks

Note: Sectoral caps part of Schedule I as compared to Regulation 16 of FEMA 20R

Sectoral Caps

- **Sectoral Policy**

- An Indian company to issue equity instrument to PROI subject to entry-routes, sectoral caps and attendant conditions
- Sectoral caps and government approval indicated against each sector in the schedule
- All other sectors / activities under Automatic Route
- SOPs issued by DIPP specifies process and Ministries for Government Approval Route
- Minimum capitalization to include premium received by the company (credit for same also in transfer / sales price)
- Approval route for investing companies not registered with RBI as NBFC and CIC
- Indian company with no operations and no downstream investment - automatic route only if activities undertaken are under automatic route and with no FDI linked performance conditions and government approval to be obtained if activities proposed to be commenced fall under approval route

Sectoral Caps – Illustrative List

Automatic Route with / without conditions

1. Agriculture (Floriculture / Horticulture/ other items) & Animal Husbandry - 100%
2. Plantation - 100%
3. Mining / Coal & Lignite / Titanium - 100%
4. Petroleum & Natural Gas (100% for exploration and 49% for refining by PSUs)
5. Manufacturing - 100% #
10. Construction Development: Townships, Housing, Built-up infrastructure
11. Industrial Park
12. Satellites - Establishment and Operations
15. Trading - Four parts - C&C + WT / E- commerce / SBRT / Duty Free Shops #
17. Railway infrastructure

Partly Automatic Route & Partly under Government Route with / without conditions

6. Defence - 49% Auto Route and beyond that up to 100% under Approval route
7. Broadcasting - 100% under Auto Route or 49% under Government Route as per activity
8. Print Media - 100% under Automatic Route or 26%/ 49% under Approval Route as per activity
9. Civil Aviation - 100% under Auto Route except Air Transport Services @ beyond 49% under Approval Route for PROI other than NRIs / OCIs)
14. Telecom - 49% Auto Route and beyond that up to 100% under Approval route
16. Pharma - Auto Route is Greenfield upto 100% and Brownfield upto 74% Auto and beyond under Approval Route
17. Financial Services - 20%/ 49% / 74% / 100% Auto as well as Approval route

Prior Approval Route: (13.) Private Security Agencies - 49% & # (15) Trading (i) MBRT - 51% & (ii) Under Manufacturing - 100% Retail Trading of Food products manufactured and / or produced in India including through E-commerce

Schedule I

- **Schedule I**

- PROI to purchase shares in listed company on stock of exchange of India if
 - PROI has acquired control as SEBI SAST regulations and continues to hold control
 - Consideration can be paid out of dividends by Indian Investee Company (as per mechanism stipulated)
- Issue of equity instrument against pre-incorporation / pre-operative expenses (including rent)
 - 5% of authorized capital or USD 500,000 whichever is lower.
 - Indian company is a WOS of NR Entity and is engaged in a sector where 100% FDI permitted under Automatic Route with no FDI linked performance conditions
 - Statutory Auditor Certificate
 - Reporting within 30 days of issue of equity instruments but not later than 1 year from the date of incorporation or such time permitted by RBI
 - *Missing Explanation from FEMA 20(R) to NDI Rules 2019 - Pre-incorporation/ pre-operative expenses shall include amounts remitted to Investee Company's account, to the investor's account in India if it exists, to any consultant, attorney or to any other material/ service provider for expenditure relating to incorporation or necessary for commencement of operations*

Schedule I

- **Schedule I**

- Issue of equity instruments against inward remittance through banking channels / as specified under FEMA 395
- Issue of equity instruments also permitted against
 - Swap of equity instruments
 - import of capital goods / machinery /equipment (excluding second hand machinery)
 - NRE / FCNR (B) - NRIs / OCIs
 - any funds payable by Indian company to a PROI, the remittance of which is permitted under FEMA by RBI / Gol or post obtaining all approvals for payments and completion of actions for delay such as compounding

- Time limits for issue of equity instruments
 - Within 60 days from receipt of consideration else refund within 15 days from completion of such 60 days
- Foreign Currency Account
 - The consideration for equity instrument can be deposited in a foreign currency account with AD Bank :
 - There must be impending foreign currency expenditure
 - The account needs to be closed immediately after the requirements are completed or within six months of opening whichever is earlier

Prohibited FDI

- Business of chit funds ((except for investment made by NRIs and OCIs on a non-repatriation basis)
- Nidhi company
- Agricultural or plantation activities
- Real estate business, or construction of farm houses (other than development of townships, construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships)
- Trading in Transferable Development Rights
- Gambling and Betting including casinos etc.

Prohibited FDI

- Lottery Business including Government /private lottery, online lotteries, etc.
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities / sectors not open to private sector investment e.g. Atomic Energy and Railway Transport
- 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]
- A person who is a citizen of Pakistan or an entity incorporated in Pakistan cannot invest in defence, space, atomic energy

Investment in LLP

- FDI [from a non resident other than a citizen/incorporated of/in Pakistan or Bangladesh, FPI, FVCI] is permitted in an LLP operating in sectors/ activities where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions with effect from May 20, 2011.
- Investment by way of 'profit share' will fall under the category of reinvestment of earnings.
- Investment in an LLP is subject to the conditions prescribed in the Limited Liability Partnership Act, 2008.
- Investment in an LLP either by way of capital contribution or by way of acquisition/ transfer of profit shares, should not be less than the fair price worked out as per any valuation norm which is internationally accepted/ adopted as per market practice and a valuation certificate to that effect should be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

**Reporting on the login page of the FIRMS application using
<https://firms.rbi.org.in> on the internet**

Investment in LLP

- Payment by an investor towards capital contribution of an LLP should be made by way of an inward remittance through banking channels or out of funds held in NRE or FCNR(B)
- In case of transfer of capital contribution/ profit share of an LLP from a Resident to a Non-Resident, the transfer should be for a consideration not less than the fair price of capital contribution/ profit share of an LLP.
- In case of transfer of capital contribution/ profit share of an LLP from a person resident outside India to a person resident in India, the transfer should be for a consideration which is not more than the fair price of the capital contribution/ profit share of an LLP.

Conversion of a company/LLP having foreign investment, engaged in a sector where foreign investment up to 100% is allowed, into LLP/company is permitted under the automatic route and there are no FDI linked performance conditions

Investment in Partnership Firm/Proprietary concern

- ❑ NRI/PIO are allowed to contribute to the capital on non-repatriation basis out of inward remittance or NRE/FCNR/NRO account maintained in India
- ❑ Firm or Proprietary concern should not be engaged in any agricultural/plantation or real estate business or print media sector
- ❑ Profit of such Firm or Proprietary concern is freely repatriable
- ❑ Investment on repatriable basis or Investment by NR (other than NRI/PIO) – Approval required from RBI/Government

Acquisition/Transfer of Immovable Property in India by NRIs/OCIs

- NRI/OCI can acquire by way of purchase any immovable property (other than agricultural land/ plantation property/ farm house) in India
- NRI/OCI may transfer any immovable property in India to a person resident in India
- NRI/OCI resident outside India may acquire any immovable property (other than agricultural land/ plantation property/ farm house) in India by way of gift from a person resident in India or NRI/OCI resident outside India [relatives only as per Section 2(77) of the Companies Act, 2013];
- NRI/OCI may acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force or FEMA regulations, at the time of acquisition of the property

Non Resident Spouse of NRI/OCI may acquire one immovable property (other than agricultural land/farm house/planation property) jointly with her/his NRI/OCI spouse

Acquisition/Transfer of Immovable Property in India by NRIs/PIOs

Payment for Acquisition of Immovable Property

- NRI/OCI can make payment for acquisition of immovable property (other than agricultural land/ plantation property/ farm house) out of funds received in India through normal banking channels by way of inward remittance from any place outside India or by debit to his NRE/ FCNR (B)/ NRO account;
- Such payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned above.

Repatriation of sale proceeds of immovable property

- A person acquiring property in accordance with section 6(5) of FEMA (inherited/acquired while resident in India) or his successor cannot repatriate outside India the sale proceeds of such immovable property without the prior permission of the RBI. However, if such a person is an NRI/ PIO, he can make a remittance upto USD 1 million

Acquisition/Transfer of Immovable Property in India by NRIs/PIOs

Repatriation of sale proceeds of immovable

property - In the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by a NRI/ PIO, the AD may allow repatriation of the sale proceeds outside India, subject to:

- immovable property was acquired by the seller in accordance with provisions of foreign exchange law in force at the time of acquisition ;
- amount to be repatriated does not exceed amount paid for acquisition of the immovable property received through normal banking channels or out of funds held in FCNR(B) account or NRE account.
- In case an immovable property in India has been purchased by an NRI/ PIO out of housing loans availed in India and the repayments for such loans are made out of remittances received from abroad through banking channels or by debit to the NRE/ FCNR(B) a/c of NRI/PIO, such repayments may be treated as equivalent to foreign exchange received.
- in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties

Acquisition/Transfer of Immovable Property in India by NRIs/PIOs

- As per Government of India Press Release dated February 1, 2009 in order to be considered 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 course of preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him should 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
- Payment of taxes – Any transaction involving acquisition of immovable property under these regulations shall be subject to applicable tax laws in India
- **Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong, Democratic People's Republic of Korea (other than OCI) cannot, without prior permission of the RBI, acquire or transfer immovable property in India, other than on lease, not exceeding 5 years**

Persons Resident in India borrowing in INR from NRIs/PIOs

Borrowing in INR by persons other than companies in India:

A person resident in India, not being a company incorporated in India, may borrow in INR from NRIs/PIOs after satisfying the following terms and conditions:

- Borrowing shall be only on a non-repatriation basis
- The amount of loan should be received either by inward remittance from outside India or by debit to NRE/NRO/FCNR(B)/NRNR/NRSR account of the lender in India
- Period of loan shall not exceed 3 years
- Rate of interest on the loan shall not be more than 2% above Bank Rate prevailing on the date of availment of loan
- Payment of interest and repayment of principal shall be made only to the NRO account of the lender

Persons Resident in India borrowing in INR from NRIs/PIOs

Borrowing in INR by companies in India: on repatriation or non-repatriation basis, after satisfying the following terms and conditions:

- i. Borrowing company does not and shall not carry on agricultural/ plantation/real estate business; or Trade in transferable development rights; or Act as Nidhi or Chit fund company
- ii. Borrowing is by issuance of NCDs
 - The issue of NCDs is made by public offer
 - The rate of interest is not more than the PLR +3%
 - Period of loan shall not be less than 3 years
 - If the borrowing is on repatriation basis, percentage of NCDs issued to NRIs/PIOs to total paid up value of all NCDs issued shall not exceed the ceiling prescribed for issue of equity shares/convertible debentures for FDI in India
 - Further, the funds towards borrowing should be received through inward remittance from outside India or by debit to NRE/FCNR (B) account of the investor

Persons Resident in India borrowing in INR from NRIs/PIOs

- **Restriction on use of borrowed funds**: The proceeds shall be utilised only for the own business of the borrower other than what is mentioned at (i) above. Additionally, construction of farm houses will also not be permitted. This restriction on real estate does not include development of townships, construction of residential/ commercial premises, roads or bridges. The proceeds shall not be used for investment or for on-lending in any manner whatsoever.
- **Reporting Requirements**: For borrowing by the company, the borrowing company should file with the nearest office of the RBI, not later than 30 days from the date of:
 - Receipt of remittance for investment in NCDs, full details of the remittances received
 - Issue of NCDs, full details of the investment

Lending by ADs in INR to NRIs

- **Lending for own requirements or own business purposes:** An AD in India may grant INR loans to a NRI against security of shares and other securities or against the security of immovable property (other than agricultural or plantation land or farm house) held by the latter subject to:
 - The utilisation of loans shall meet the provisions given at (i) above. Further, loan proceeds cannot be used for any other activity where foreign investment is not allowed. This shall be applicable even if the loan is utilised in association with other person
 - The loan amount shall not be remitted outside India or credited to NRE/FCNR(B)/NRNR account of the borrower
 - The repayment of loan should be either by inward remittance from outside India or by debit to NRE/NRO/FCNR(B)/NRNR/NRSR account of the borrower and/or out of sale proceeds realised through securities offered for the loans. Further, these loans can also be repaid by any relative (as defined under Companies Act) of the borrower in India through account to account transfer

Lending by ADs in INR to NRIs

- **Lending for acquiring shares under the Employees Stock Option Plan:** An AD in India may grant INR loan to NRI employees of Indian companies for acquiring shares of the companies under the Employees Stock Option (ESOP) Scheme subject to the following terms and conditions:
 - Lending for ESOP Scheme shall be as per the policy approved by the Board of the AD and shall be subjected to capital market exposure norms of the RBI and other prudential norms
 - The loan amount should not exceed 90% of the purchase price of the shares or INR 20 lakhs per NRI employee, whichever is lower
 - The rate of interest and margin on such loans may be decided by the banks, subject to directives issued by the RBI from time to time
 - The amount shall be paid directly to the company and should not be credited to the borrowers' non-resident accounts in India
 - The loan amount shall be repaid by way of inward remittances from outside India or by debit to NRO/NRE/FCNR(B) account of the borrower

Lending by ADs in INR to NRIs

- **Lending in INR by an AD or a housing finance institution to NRI/PIO for housing purpose in India -**
 - The quantum of loans, margin money and the period of repayment shall be at par with those applicable to housing finance provided to a person resident in India;
 - The loan amount shall not be credited to NRE/FCNR(B)/NRNR account of the borrower;
 - The loan shall be fully secured by equitable mortgage of the property proposed to be acquired, and if necessary, also by lien on the borrower's other assets in India;
 - The instalment of loan, interest and other charges, if any, shall be paid by remittances from outside India or out of funds in NRE/ FCNR(B)/ NRNR/ NRO/ NRSR account of the borrower or out of rental income derived from renting out the property acquired or by any relative of the borrower in India by crediting the borrower's loan account through account to account transfer;
 - The rate of interest on the loan shall conform to the directives issued, if any, by the RBI and/ or NHB.

INR loans by Resident to NRI/PIO

- **INR loans by Indian body corporate to its NRI/PIO employees, subject to -**
 - The loan shall be granted only for personal purposes including purchase of housing property in India;
 - The loan shall be granted in accordance with the lender's Staff Welfare Scheme/Staff Housing Loan Scheme and other terms and conditions applicable to its staff resident in India;
 - The lender shall ensure that the loan amount is not used for the purposes mentioned under (i) above;
 - The lender shall credit the loan amount to the borrower's NRO account or shall ensure credit to such account by specific indication on the payment instrument;
 - The repayment of loan shall be made only by way of remittance from outside India or from NRE/NRO/FCNR(B) account of the borrower and by no other source. This condition shall be inbuilt in the loan agreement.

INR loans by Resident to NRI/PIO

- **INR Loans to NRI by Resident Individual, subject to -**
 - The loan is free of interest and the minimum maturity of the loan is 1 year;
 - The loan amount should be within the overall limit under the Liberalised Remittance Scheme per financial year available for a resident individual (USD 250,000), who shall ensure that the applicable limit is not breached
 - There are restrictions specified on use of loan
 - The loan amount shall not be remitted outside India but shall be credited to the NRO account of the borrower
 - Repayment of loan shall be made by way of inward remittances from outside India or by debit to the NRO/NRE/FCNR(B) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted

Change of status of borrower/lender from person resident in India to person resident outside India

- **Change of status of borrower to a person resident outside India:** In case of change of status of a borrower who has taken Rupee loan/overdraft from an AD bank, from a person resident in India to a person resident outside India, the AD bank may allow continuance of loan/overdraft till its original maturity subject to the satisfaction of the lender. So long as the borrower continues to remain a person resident outside India, the repayment shall be out of inward remittance from outside India or from NRE/FCNR(B)/NRNR/NRO/NRSR account of the borrower.
- **Change of the status of the lender to a person resident outside India:** In case a rupee loan was granted by a person resident in India to another person resident in India and the lender subsequently becomes a person resident outside India, the repayment of the loan by the resident borrower should be made by credit to the NRO account of the lender.

Income deemed to accrue or arise in India

- through Business Connection, property, asset or source of income or transfer of capital asset situated in India [Section 9(1)(i)]
- Salary [Section 9(1)(ii)]
- Dividend [Section 9(1)(iv)]
- Interest [Section 9(1)(v)]
- Royalty [Section 9(1)(vi)]
- Fees for Technical Services
[Section 9(1)(vii)]



Property, Asset or Source of Income

- In a case where tangible property is situated in India, the income arising through or from such property is deemed to be income arising in India – CIT v. Currimbhoy Ebrahim & Sons Ltd.(3 ITR 395)(PC)
- Capital gains arising from the transfer of a capital asset situated in India at the time of transfer are deemed to accrue in India, irrespective of the place where the agreement of transfer is made or the consideration for the transfer is payable – CIT v. Assam Tea (167 ITR 215), CIT v. Quantas Airways Ltd.(256 ITR 84)(Del), Trinita Corpn (295 ITR 258)(AAR)
- Indirect transfer of assets outside India having substantial value from assets located in India – Taxable retrospectively (Overruled Vodafone SC judgement)
- Capital gains tax will be attracted when NRI sells any capital assets situated in India and accordingly, section 195 would apply on capital gains – Meena S. Patil v. ACIT (113 TTJ 863)(Bang)/Syed Aslam Hashmi v. ITO (55 SOT 441)(Bang)

Salaries

- Salary earned in India –
 - ✓ Salary payable for services rendered in India; and
 - ✓ The rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the contract of employment
- Relevant test to decide the place of accrual of income is the place where the services are

Salary will be taxable in India on the basis of services rendered in India irrespective of Residential status of employees (except to the extent of short-stay exemption)

**CIT v. Eli Lilly & Co. (312 ITR 225)(SC)
CIT v. Avtar Singh Wadhwan (247 ITR 260)(Bom)
Capt. A. L. Fernandes v. ITO (81 ITD 203) (TM)
ITO v. Lohitakshan Nambiar (2010-TII-201-ITAT-BANG-NRI)(Bang)**

Dividend

- Dividend income paid to a non-resident by Indian company is deemed to accrue in India only on payment and not on declaration.
- This is in contradistinction to section 8 which refers to a dividend declared, distributed or paid by a company.
- Dividend income in the hands of shareholder is taxable

Pfizer Corporation v. CIT
(259 ITR 391)(Bom)

Background: Interest, Royalties & Fees for Technical Service

- The Finance Act, 1976 had inserted three new clauses in Section 9(1) specifying comprehensive source rule (effective from AY 1977-78):
 - ✓ Interest
 - ✓ Royalty (arising out of agreement made on or after 1 April 1976)
 - ✓ Fees for technical services

Extra-territorial operation

Validity upheld in Electronics Corporation of India Ltd. v. CIT (183 ITR 44)(SC)
GVK Industries Ltd. v. ITO (4 SCC 36)(SC)

Interest

- Payable by-

(a) the Government; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the interest is payable in respect of any debts incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

J.K. Synthetics Ltd. v. Asst. CIT 185 ITR 540 (Del)
CIT v. Vijay Ship Breaking Corporation. (261 ITR 113)(Guj)

DTAA v. Income tax Act

- Taxability of Non-Resident is to be examined under the Income-tax Act, 1961 vis-à-vis under the Double Taxation Avoidance Agreement (“DTAA”)
- Form 15CB and 15CA are required for making remittance to non-residents
- Remittance to non-resident The Non-Resident can choose between the two, whichever is more beneficial [Section 90(2)]
- Tax Residency Certificate and Form 10F is must in order to avail Treaty benefits [Section 90(4)]

CBDT Circular No. 333 dated 2.4.1982
Azadi Bachao Andolan (263 ITR 706)(SC)
P. V. A. L. Kulandagan Chettiar (267 ITR
654)(SC)

LOANS - External Commercial Borrowings

- ECBs are commercial loans raised by eligible resident entities from recognized nonresident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.
- The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB (herein after referred to as the ECB Framework) comprises the following two options.

LOANS - External Commercial Borrowings

Sr. No	Parameters	FCY denominated ECB	INR denominated ECB
i	Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.
iii	Eligible borrowers	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: i. Port Trusts; ii. Units in SEZ; iii. SIDBI; and iv. EXIM Bank of India.	a) All entities eligible to raise FCY ECB; and b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/ cooperatives and Non-Government Organisations.

LOANS - External Commercial Borrowings

Recognised lenders

The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB. However,

- Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders
- Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad and
- Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed

Foreign Equity Holder: It means (a) direct foreign equity holder with minimum 25% direct equity holding in the borrowing entity, (b) indirect equity holder with minimum indirect equity holding of 51%, or (c) group company with common overseas parent.

LOANS - External Commercial Borrowings

Minimum Average Maturity Period (MAMP) - MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

Sr.No	Category	MAMP
(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years
(c)	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
(d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years
(e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose	10 years

for the categories mentioned at (b) to (e) –

(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks

(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.

LOANS - External Commercial Borrowings

Other costs	Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2% over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.
End-uses (Negative list)	The negative list, for which the ECB proceeds cannot be utilised, would include the following: a) Real estate activities. b) Investment in capital market. c) Equity investment. d) Working capital or General corporate or Repayment of Rupee loans purposes, except in case of ECB from foreign equity holder with MAMP for 5 years or from other recognized lenders or for on-lending by NBFCs for 10 years MAMP. e) On-lending to entities for the above activities, except in case of ECB raised by NBFCs

LOANS - External Commercial Borrowings

Documentation - Reporting Requirements: Borrowings under ECB Framework are subject to reporting requirements in respect of the following:

- Loan Registration Number (LRN): Any draw-down in respect of an ECB as well as payment of any fees / charges for raising an ECB should happen only after obtaining the LRN from RBI.
- To obtain the LRN, borrowers are required to submit duly certified Form 83, which also contains terms and conditions of the ECB, in duplicate to the designated AD bank who will then forward one copy to the Director, Balance of Payments Statistics Division, Department of Statistics and Information Management (DSIM), RBI.
- Copies of loan agreement for raising ECB are not required to be submitted to the RBI.
- Changes in terms and conditions of ECB should be reported to the DSIM through revised Form 83 at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form 83 the changes should be specifically mentioned in the communication.

LOANS - External Commercial Borrowings

Reporting of actual transactions:

- The borrowers are required to report actual ECB transactions through ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates.
- Changes, if any, in ECB parameters should also be incorporated in ECB 2 Return. Format of ECB 2 Return is available at Annex III of Part V of Master Directions – Reporting under Foreign Exchange Management Act.
- Late submission fee for delay in reporting in Form ECB2/ECB beyond 30 days upto Up to 3 years from due date of submission/date of drawdown (From INR 5,000 upto INR 1 lac per year)

LOANS - External Commercial Borrowings

Trade Credit:

- Trade Credit refers to the credits extended by the overseas supplier, bank and financial institution for maturity up to 5 years for imports into India. Depending on the source of finance, such trade credits include suppliers' credit or buyers' credit. Suppliers' credit relates to the credit for imports into India extended by the overseas supplier, while buyers' credit refers to loans for payment of imports into India arranged by the importer from overseas bank or financial institution
- Automatic route - Up to USD 150 million or equivalent per import transaction for oil/gas refining & marketing, airline and shipping companies. For others, up to USD 50 million or equivalent per import transaction
- Maturity period reckoned from the date of shipment, shall be up to 3 years for import of capital goods. **For non-capital goods, this period shall be up to 1 year or the operating cycle whichever is less.** For shipyards / shipbuilders, the period of trade credit for import of non-capital goods can be up to 3 years

OUTBOUND INVESTMENT



Overseas Direct Investment

- Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognized as important avenues for promoting global business by Indian entrepreneurs
- JVs are perceived as a medium of economic and business co-operation between India and other countries. Transfer of technology and skill, sharing of results of R&D, access to wider global market, promotion of brand image, generation of employment and utilization of raw materials available in India and in the host country are other significant benefits arising out of such overseas investments (or financial commitment).
- **Foreign Exchange Management (Overseas Investment) Rules, 2022** has been notified on 22 August 2022 in supersession of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015

Overseas Direct Investment

- **Prohibition on investment outside India**

Save as otherwise provided in the Act or these rules or the regulations made or directions issued under the Act, no person resident in India shall make or transfer any investment or financial commitment outside India

- **Overseas Investment**

Save as otherwise provided in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, any investment made outside India by a person resident in India shall be made in a foreign entity engaged in a bona fide business activity, directly or through step down subsidiary or the special-purpose vehicle, subject to the limits and the conditions laid down in these rules and the said regulations

Provided that the structure of such subsidiary or step down subsidiary of the foreign entity shall comply with the structural requirements of a foreign entity:

Provided further that Overseas Investment or transfer of such investment including swap of securities in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as may be advised by the Central Government from time to time shall require prior approval of the Central Government.

Bonafide business activity shall mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be

Foreign Exchange Management (Overseas Investment) Rules, 2022

Important definitions

- “Equity capital” means equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments
- “Financial commitment” means the aggregate amount of investment made by a person resident in India by way of Overseas Direct Investment, debt other than Overseas Portfolio Investment in a foreign entity or entities in which the Overseas Direct Investment is made and shall include the nonfund-based facilities extended by such person to or on behalf of such foreign entity or entities
- “Foreign entity” means an entity formed or registered or incorporated outside India, including International Financial Services Centre that has limited liability
- “Indian entity” means– (i) a company defined under the Companies Act, 2013 (18 of 2013); (ii) a body corporate incorporated by any law for the time being in force; a Limited Liability Partnership duly formed and incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009); and a partnership firm registered under the Indian Partnership Act, 1932 (9 of 1932)

Foreign Exchange Management (Overseas Investment) Rules, 2022

Important definitions

- “Last audited balance sheet” means audited balance sheet as on date not exceeding eighteen months preceding the date of the transaction
- “Net worth” shall have the same meaning as assigned to it in Section 2(57) of the Companies Act, 2013 (18 of 2013). For the purposes of this clause, “net worth” of registered partnership firm or Limited Liability Partnership shall be the sum of the capital contribution of partners and undistributed profits of the partners after deducting therefrom the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the last audited balance sheet.
- “Overseas Direct Investment” or “ODI” means investment by way of acquisition of unlisted equity capital of a foreign entity, or subscription as a part of the memorandum of association of a foreign entity, or investment in 10% or more of the paid-up equity capital of a listed foreign entity or investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity
- “Overseas Portfolio Investment” or “OPI” means investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC

Foreign Exchange Management (Overseas Investment) Rules, 2022

Non Applicability of the Overseas Investment Rules to -

- a) any investment made outside India by a financial institution in an IFSC;
- b) acquisition or transfer of any investment outside India made,—
 - out of Resident Foreign Currency Account; or
 - out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or
 - in accordance with sub-section (4) of section 6 of the FEMA

Foreign Exchange Management (Overseas Investment) Rules, 2022

Debt instruments

- (i) Government bonds; (ii) corporate bonds; (iii) all tranches of securitisation structure which are not equity tranche; (iv) borrowings by firms through loans; and (v) depository receipts whose underlying securities are debt securities

Non-debt instruments

- (i) all investments in equity in incorporated entities (public, private, listed and unlisted);
- (ii) capital participation in Limited Liability Partnerships;
- (iii) all instruments of investment as recognised in the Foreign Direct Investment policy from time to time;
- (iv) investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts;
- (v) investment in units of mutual funds and Exchange-Traded Fund which invest more than 50% in equity;
- (vi) the junior-most layer (i.e. equity tranche) of securitisation structure;
- (vii) acquisition, sale or dealing directly in immovable property;
- (viii) contribution to trusts; and
- (ix) depository receipts issued against equity instruments

Foreign Exchange Management (Overseas Investment) Rules, 2022

Right Issue and Bonus Shares

- Any person resident in India who has acquired and continues to hold equity capital of any foreign entity in accordance with the provisions of the Act or the rules or regulations made thereunder—
 - (a) may invest in the equity capital issued by such entity as a rights issue; or
 - (b) may be granted bonus shares subject to the terms and conditions under these rules
- The person resident in India acquiring the rights under sub-rule (1) may renounce such rights in favour of a person resident in India or a person resident outside India

Foreign Exchange Management (Overseas Investment) Rules, 2022

No Objection Certificate

- Any person resident in India who,—
 - i. has an account appearing as a non-performing asset; or
 - ii. is classified as a wilful defaulter by any bank; or
 - iii. is under investigation by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office,

shall, before making any financial commitment or undertaking disinvestment under these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, obtain a No Objection Certificate from the lender bank or regulatory body or investigative agency by making an application in writing to such bank or regulatory body or investigative agency concerned

Provided that where the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within sixty days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction

Foreign Exchange Management (Overseas Investment) Rules, 2022

Transfer or Liquidation

- Unless otherwise provided in these rules, a person resident in India holding equity capital in accordance with these rules may transfer such investment, in compliance with the limits and subject to the conditions for such investment or disinvestment, pricing guidelines or documentation and reporting requirements, in the manner provided in these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.
- A person resident in India may transfer equity capital by way of sale to a person resident in India, who is eligible to make such investment under these rules, or to a person resident outside India.
- In case the transfer is on account of merger, amalgamation or demerger or on account of buyback of foreign securities, such transfer or liquidation in case of liquidation of the foreign entity, shall have the approval of the competent authority as per the applicable laws in India or the laws of the host country or host jurisdiction, as the case may be.

Foreign Exchange Management (Overseas Investment) Rules, 2022

Transfer or Liquidation

- Where the disinvestment by a person resident in India pertains to ODI—
 - (i) the transferor, in case of full disinvestment other than by way of liquidation, shall not have any dues outstanding for receipt, which such transferor is entitled to receive from the foreign entity as an investor in equity capital and debt;
 - (ii) the transferor, in case of any disinvestment must have stayed invested for at least one year from the date of making ODI:

Provided that the above conditions shall not be applicable in case of a merger, demerger or amalgamation between two or more foreign entities that are wholly-owned, directly or indirectly, by the Indian entity or where there is no change or dilution in aggregate equity holding of the Indian entity in the merged or demerged or amalgamated entity.
- **The holding of any investment or transfer thereof in any manner shall not be permitted if the initial investment was not permitted under FEMA**

Foreign Exchange Management (Overseas Investment) Rules, 2022

Restrictions

- No person resident in India shall make ODI in a foreign entity engaged in—
 - (a) real estate activity;
 - (b) gambling in any form; and
 - (c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank.
- “Real estate activity” means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.
- Any ODI in start-ups recognised under the laws of the host country or host jurisdiction as the case may be, shall be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.

Foreign Exchange Management (Overseas Investment) Rules, 2022

Restrictions

- **No person resident in India shall make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries:**
- **Provided that such restriction shall not apply to the following classes of companies mentioned in sub-rule (2) of rule 2 of the Companies (Restriction on Number of Layers) Rules, 2017 as may be amended from time to time, namely:-**
 - (a) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949)
 - (b) a NBFC as defined in clause (f) of section 45-I of the RBI which is registered with the Reserve Bank and considered as systematically important non-banking financial company by the RBI
 - (c) an insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 (4 of 1938) and the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999); and
 - (d) a Government company referred to in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013).

Foreign Exchange Management (Overseas Investment) Rules, 2022

Pricing Guidelines

- the issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India shall be subject to a price arrived on an arm's length basis
- The AD bank shall ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation

Foreign Exchange Management (Overseas Investment) Rules, 2022

Schedule I - Overseas Direct Investment by Indian entity

The ODI may be made or held by way of,—

- (i) subscription as part of memorandum of association or purchase of equity capital, listed or unlisted;
- (ii) acquisition through bidding or tender procedure;
- (iii) acquisition of equity capital by way of rights issue or allotment of bonus shares;
- (iv) capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank under the Act or any rules or regulations made or directions issued thereunder;
- (v) the swap of securities;
- (vi) merger, demerger, amalgamation or any scheme of arrangement as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

Foreign Exchange Management (Overseas Investment) Rules, 2022

Schedule I - Overseas Direct Investment by Indian entity

ODI in financial services activity.– (1) An Indian entity engaged in financial services activity in India may make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, subject to the following conditions, namely:--

- the Indian entity has posted net profits during the preceding three financial years;
- the Indian entity is registered with or regulated by a financial services regulator in India;
- the Indian entity has obtained approval as may be required from the regulators of such financial services activity, both in India and the host country or host jurisdiction, as the case may be, for engaging in such financial services:

(2) An Indian entity not engaged in financial services activity in India may make ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, subject to the condition that such Indian entity has posted net profits during the preceding three financial years: Provided that an Indian entity not engaged in the insurance sector may make ODI in general and health insurance where such insurance business is supporting the core activity undertaken overseas by such an Indian entity

(3) Overseas Investment by banks and non-banking financial institutions regulated by the Reserve Bank shall be subject to the conditions laid down by the Reserve Bank under applicable laws in this regard

Foreign Exchange Management (Overseas Investment) Rules, 2022

Schedule III - Overseas Direct Investment by Resident Individual

- Any resident individual may make ODI by way of investment in equity capital or OPI in the manner provided in this Schedule and unless otherwise provided hereunder, shall be subject to the overall ceiling under the **Liberalised Remittance Scheme** of the RBI
- A resident individual may make or hold Overseas Investment by way of,—
 - (i) ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step down subsidiary where the resident individual has control in the foreign entity:
 - (ii) OPI, including by way of reinvestment;
 - (iii) ODI or OPI, as the case may be, by way of—
 - (a) capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due from the foreign entity the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank;
 - (b) swap of securities on account of a merger, demerger, amalgamation or liquidation;
 - (c) acquisition of equity capital through rights issue or allotment of bonus shares;

Foreign Exchange Management (Overseas Investment) Rules, 2022

Schedule III - Overseas Direct Investment by Resident Individual

(d) gift **(without any limit from Resident and Non-resident (subject to FCRA Regulations))**;

(e) **Inheritance (without any limit from a person resident in India who is holding such securities in accordance with the provisions of the Act or from a person resident outside India)**;

(f) acquisition of sweat equity shares;

(g) acquisition of minimum qualification shares issued for holding a management post in a foreign entity;

(h) acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme **(without any limit are offered by the issuing overseas entity globally on a uniform basis)**;

Provided that ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control:

Provided further that the acquisition of less than 10% of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), shall be treated as OPI.

Foreign Exchange Management (Overseas Investment) Rules, 2022

Schedule IV - Overseas Direct Investment by person resident in India other than Indian entity and resident Individual

- ODI by Registered Trust or Society
- OI by Mutual Funds or Venture Capital Funds or Alternative Investment Funds.—
- Acquisition and transfer of foreign securities by domestic depository
- Acquisition and transfer of foreign securities by AD bank

(Subject to certain conditions)

Schedule V - Overseas Investment in IFSC by person resident in India

(Subject to certain conditions)

Overseas Direct Investment

Reporting in Form FC

- Application for allotment of Unique Identification Number (UIN) and reporting of Remittances / Transactions:
 - ✓ Section A – Details of the Indian entity/Resident Individual/Trust/Society
 - ✓ Section B – Details of Foreign entity/Step down subsidiary
 - ✓ Section C - Details of Transaction/ Remittance/ Financial Commitment of Person Resident of India
 - ✓ Section D – Declaration by Indian entity/ Resident Individual
 - ✓ Section E – Certificate by the statutory auditors of the Indian Entity/ self-certification by Resident Individual
 - ✓ Section G - Details to be reported at the time of disinvestment in the foreign entity
 - ✓ Other certificates/declaration prepared by ADs
- SPECIFIED LIMITS – 400% of net worth/USD 2,50,000 per FY
- Share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the Reserve Bank within six months of the remittance to be submitted

Overseas Direct Investment

Reporting in Form APR

- Form APR and other criteria to be seen while certifying Annual Performance Report
- Submit to the RBI, through the designated Authorized Dealer, every year on or before December 31, an Annual Performance Report (APR) in Part II of Form ODI in respect of each JV or WOS outside India, and other reports or documents as may be prescribed by the RBI from time to time.
- The APR, so required to be submitted, has to be based on the audited annual accounts of the JV/WOS for the preceding year, unless specifically exempted by the RBI
- Repatriation to India, all dues receivable from the foreign entity, like dividend, royalty, technical fees etc., within 60 days of its falling due, or such further period as the RBI may permit.
- Reporting requirements including submission of Annual Performance Report are also applicable for investors in unincorporated entities in the oil sector.

Overseas Direct Investment

Reporting in Form APR

- Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the APR may be submitted by the Indian Party based on the un-audited annual accounts of the JV / WOS provided:
 - ✓The Statutory Auditors of the Indian Party certify that law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS and the figures in the APR are as per the un-audited accounts of the overseas JV / WOS;
 - ✓That the un-audited annual accounts of the JV / WOS have been adopted and ratified by the Board of the Indian Party.
 - ✓The above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country / jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or any other country / jurisdiction as prescribed by RBI.

Acquisition of Immovable Property Outside India

- Section 6(4) of the FEMA - a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India.
- A resident can acquire immovable property outside India by way of gift or inheritance from:
 - ✓ a person referred to above; or
 - ✓ a person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of the RBI.
 - ✓ a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- A resident can purchase immovable property outside India out of foreign exchange held in his/ her Resident Foreign Currency (RFC) account.

Acquisition of Immovable Property Outside India

- A resident can acquire immovable property outside India jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.
- A resident individual can send remittances under the LRS for purchasing immovable property outside India.
- **Companies having overseas offices** - A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, provided total remittances do not exceed the following limits prescribed for initial and recurring expenses, respectively:
 - ✓ 15% of the average annual sales/ income or turnover of the Indian entity during the last 2 FYs or up to 25% of the net worth, whichever is higher;
 - ✓ 10% of the average annual sales/ income or turnover during the last 2 FYs.

Foreign Liabilities and Assets Information Reporting (FLAIR)

- Reporting to be made before 15 July for the previous financial year
- RBI has provided a web-portal interface <https://flair.rbi.org.in> to the reporting entities for submitting “User Registration Form” (containing entity identification and business user details, where LLPs and AIFs will no longer required to use dummy CIN). The successful registration on web-portal will enable users to generate RBI-provided login-name and password for using FLA submission gateway and would include system-driven validation checks on submitted data
- The form will seek investor-wise direct investment and other financial details on fiscal year basis as hitherto, where all reporting entities are required to provide information. In addition, the revised form seeks information on first year of receipt of FDI/ODI and disinvestment
- Reporting entities will get system-generated acknowledgement receipt upon successful submission of the form

Not Applicable to Resident Individual making overseas investment and Person Resident out of India making investment in India on non-repatriation basis

Current Account Transactions

Current account transactions are divided into 3 schedules in Foreign Exchange Management (Current Account Transactions) Rules, 2000 -

- Schedule I – Prohibited Transactions
- Schedule II – Transactions requiring prior approval of Government of India
- Schedule III – Transactions requiring prior approval of RBI
- Drawal of foreign exchange is prohibited for –
 - ✓ Transactions specified in Schedule I; or
 - ✓ Travel to Nepal and / or Bhutan; or
 - ✓ Transaction with person resident in Nepal or Bhutan (this prohibition may be relaxed by special approval).

Current Account Transactions

Schedule I – Prohibited Transactions

- Remittance out of lottery winnings (*)
- Remittance of income from racing/riding etc., or any other hobby
- Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- Payment of commission on exports made towards equity investment in JV/WOS abroad of Indian companies.
- Payment of commission on exports under Rupee State Credit route except commission up to 10% of invoice value of exports of tea and tobacco.
- Payment related to 'Call Back Services' of telephones
- Remittance of interest income of funds held in Non-resident Special Rupee Scheme A/c. (NOT PERMISSIBLE EVEN FROM RFC and EEFC ACCOUNT)

* In terms of FDI Policy even technology collaboration (franchise, trademark, brand name, management contract is prohibited for lottery business and **112** gambling and betting)

Current Account Transactions

Schedule II – Permission Required from Central Govt.

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
1. Cultural Tours	Ministry of Human Resources Development, (Department of Education and Culture)
2. Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public Sector Undertakings	Ministry of Finance, (Department of Economic Affairs)
3. Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport, (Chartering Wing)
4. Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e. other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport, (Chartering Wing)
5. Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
6. Remittance of hiring charges of transponders by (a) TV Channels (b) Internet Service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology
7. Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8. Remittance of prize money/sponsorship of sports activity abroad by a person other than International / National / State Level sports bodies, if the amount involved exceeds USD 100,000.	Ministry of Human Resources Development (Department of Youth Affairs and Sports)
9. Remittance for membership of P&I Club	Ministry of Finance (Insurance Division)

Current Account Transactions

Schedule III – Prior Approval of RBI

Facilities for individuals— Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the RBI.

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

Not applicable and No
Limite for remittance
from RFC/EEFC account

(*) May avail exchange facility in excess of the LRS limit if it is so required by a country of emigration, medical institute offering treatment or the university

Current Account Transactions

Schedule III – Prior Approval of RBI

Facilities for Persons other than individuals— Prior approval of the RBI required (Not applicable for remittance from RFC/EEFC account):

- Donations exceeding 1% of their foreign exchange earnings during the previous 3 Fys or USD 5,000,000, whichever is less, for-
 - ✓ creation of Chairs in reputed educational institutes,
 - ✓ contribution to funds (not being an investment fund) promoted by educational institutes; and
 - ✓ contribution to a technical institution or body or association in the field of activity of the donor Company.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or 5% of inward remittance whichever is more.
- Remittances exceeding USD 10 million per project for any consultancy services in respect of infrastructure projects and USD 1 million per project, for other consultancy services procured from outside India.
- Remittances exceeding 5% of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Withholding tax obligation under Section 195

- Section 195 (1)
 - Any person responsible for making payment to a non-resident shall withhold tax
 - Only in respect of interest or other sum chargeable under the Income Tax Act, 1961
 - At the time of credit or payment whichever is earlier
 - At the 'rates in force'

Does not apply to specified Interest and Salaries

Rates of deduction

- At the rates in force
 - Section 2(37A) defines 'rates in force' as rates as per Finance Act or Treaty whichever is applicable
 - Reference to rates as per DTAA included from 1.6.1992
 - CBDT vide Circular No. 728 dated 30.11.95 , rates as per DTAA to be applied where they are more favorable to the assessee
- Section 206AA

Rule 37BC [Section 206AA(7)]

- CBDT has issued a notification dated 24/6/2016 providing that even in the absence of PAN higher rate of tax of 20% shall not be applicable in case of payments in nature of Interest, Royalty, Fees for technical services and payments on transfer of capital assets, if the non-resident furnishes following information/documents
 - Name, email ID and contact number;
 - Address in the country of which he is a resident;
 - Tax Residency Certificate (TRC) and Form 10F and
 - Tax Identification Number (TIN) or any other unique identification number of his residence country

Procedure for Remittance

- Circular No. 759 dated 18.11.1997, No. 767 dated 22.5.1998 and No. 10/2002 dated 9.10.2002
 - To dispense with the requirement of submission of a No Objection Certificate from IT Authorities for remittance to a non-resident as required by the RBI
 - Alternate procedure is to obtain a Chartered Accountant's certificate in Form 15CB
 - In order to streamline the procedure as well as to ensure the correct deduction of tax at source, Form and application for remittance u/s. 195 have been revised to provide the basis on which the tax is to be deducted

Procedure for Remittance

- There was a substantial increase in foreign remittance making the manual handling and specially tracking of such payments difficult
- To monitor and track transactions in an efficient manner, it was proposed to introduce e-filing of information in the certificates and undertaking
- Finance Act, 2008 introduced the process of e-filing of information relating to payment of any sum to a non-resident [Section 195(6)-Rule 37BB]
- Finance Act, 2015 amended Section 195(6) – Form 15CA and Form 15CB compulsory irrespective of taxability

Rule 37BB – TDS on Payment made to NRs

	Applicable to
Part A	If the remittance amount, which is chargeable to tax during the FY to a particular party, is less than INR 5 lakh.
Part B	If the remittance amount, which is chargeable to tax during the FY to a particular party, is more than INR 5 lakh and a certificate under Section 197,195(2) or 195(3) of the Act has been obtained from tax department.
Part D	If the remittance is not chargeable to tax as per provisions of the Act [other than the remittance where no RBI approval is required as per Schedule III of the Foreign Exchange (Current Account Transaction) Rules, 2000; and of the nature specified in column (3) of the specified list appended to notification – 33 items of payments].
Part C	Transactions other than those covered Above

Place of Effective Management

- Finance Act, 2015 introduced a concept of Place of Effective Management (POEM) to determine the residential status of companies u/s 6 of the Income-tax Act and the new provisions are applicable from AY 2017-18. CBDT issued final POEM guidelines in January 2017.
- Section 6(3) - A company is said to be resident in India in any previous year, if –
 - ✓ it is an Indian company; or
 - ✓ its place of effective management, at any time in that year, is in India.

POEM is a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

Not to target Indian MultiNationals which are engaged in business activity outside India, but to target shell companies and companies which are created for retaining income outside India although real control and management of affairs is located in India. – CBDT Press Release

Place of Effective Management

Determination of POEM

- The POEM concept is one of substance over form.
- It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time.
- POEM will also be required to be determined on year to year basis.
- The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority meetings of the board of directors of the company are held outside India.
- However, if on the basis of facts and circumstances it is established that the Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person (s) resident in India, then the place of effective management shall be considered to be in India.

POEM Guidelines not to apply to a company whose gross receipts or turnover below INR 50 crore in a FY

Other Issues

- Prevention of Money Laundering Act
- Benami Transactions (Prohibition) Act
- Income Tax Act
 - Withholding Tax & DTAA
 - Transfer Pricing
 - Income tax Return
 - Section 56
 - GAAR
- Foreign Contribution Regulations Act

Thank You



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