

Pune Branch of WIRC of ICAI



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



CA Rajesh S. Athavale

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Outline

- ❑ **Capital & Current Account Transactions**
- ❑ **Inbound Investment**
 - **Setting up Office in India**
 - **Foreign Direct Investment**
 - **Lending & Borrowing**
 - **Acquisition of Immovable Property in India**
- ❑ **Outbound Investment**
 - **Overseas Direct Investment**
 - **Overseas Remittances**
 - **Acquisition of Immovable Property outside India**
- ❑ **Offences, Penalties and Compounding of Contravention**

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

- 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, 2017
 - Transfer or issue of any security by a person resident outside India – Section 6(3)(b) of FEMA
 - ✓ Foreign Exchange Management (Transfer or Issue of a Security by a Person resident Outside India) Regulations, 2017

**LIAISON
/ BRANCH / PROJECT
OFFICE**

Liaison/Branch office - Meaning

Liaison office

- Defined as place of business to act as channel of communication between head office and entities in India

Branch office

- Same meaning as assigned to it in S. 2(9) of the Companies Act, 1956 :
 - *any establishment described as a branch by the company; or*
 - *any establishment carrying on same/substantially the same activity as that of head office of the company; or*
 - *any establishment engaged in any production, processing or manufacture,*
 - *but does not include any establishment specified in any order made by the Central Government under section 8.*

Regulated by the Foreign Exchange Management
(Establishment in India of Branch or Office or
Other Place of Business) Regulations, 2000

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

Branch office

- Export/Import of goods.
- Rendering professional or consultancy services.
- 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.

Liaison/Branch office - Setting up procedure and timeline

- Prior approval of Reserve Bank of India (RBI) required
- 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.
 - ✓ 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; 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 in India.
- 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 two years only.
- Post approval, Intimation to AD Bank the date on which the BO/LO/PO has been set up.

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 whereas the PO needs to submit the AAC only to the AD bank.
- 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.

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. Also,
- 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

In a recent Ruling it has been held on facts that Since the liaison office was performing part of the main Business activities it was a 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%
- In addition to corporate tax, Dividend Distribution Tax at 20.02% payable by the company distributing dividend
- Dividend exempt in the hands of shareholders
- Dividends, fees for technical services, royalty freely repatriable

FOREIGN DIRECT INVESTMENT

Meaning of Foreign Direct Investment (FDI)

- FDI means investment through capital 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.
- Latest “Consolidated FDI Policy Circular” dated August 28, 2017 - Ministry of Commerce and Industry, Department of Industrial Policy & Promotion – <http://www.dipp.nic.in>

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

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

Eligibility for Investment in India

Person	Conditions
A person resident outside India (other than a citizen of Bangladesh/Pakistan) or an entity incorporated outside India, (other than an entity incorporated in Bangladesh/Pakistan)	Subject to the FDI Policy of the Government of India
A person who is a citizen of Bangladesh/Pakistan or an entity incorporated in Bangladesh/Pakistan	Subject to the prior approval from the Government of India In case of Pakistan – Investment in defence, space, atomic energy and sectors/activities prohibited for foreign investment.
NRIs, resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan	Investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels

OCBS are treated at par with a Person Resident Outside India

Types of Instruments

- Equity shares
- Fully and mandatorily convertible debentures
- Fully and mandatorily convertible preference shares

[subject to the pricing guidelines / valuation norms and reporting requirements]

- Convertible Notes in the case of Startups
- Other types of preference shares such as, non-convertible, optionally convertible or partially convertible – Regarded as ECB – ECB guidelines

Pricing Guidelines

Types of Issue	Guidelines
Fresh issue of shares (including issue of shares against payment of lump sum technical know how fee / royalty or conversion of ECB into equity or capitalization of pre incorporation expenses/import payables)	Listed Companies - SEBI guidelines Unlisted Companies – as per any internationally accepted pricing methodology for valuation on an arm’s length basis duly certified by a Chartered Accountant or a SEBI registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company
Preferential Allotment	Listed Companies - SEBI guidelines Unlisted Companies – Same as above for fresh issue of shares

No pricing Guidelines - Investment on Non-Repatriation basis

Pricing Guidelines

Types	Conditions
Right Shares	Listed Companies - at a price as determined by the company Unlisted Companies – at a price which is not less than the price at which the offer on right basis is made to the resident shareholders
Private Arrangement (Transfer of shares from a Resident to Non-Resident)	Listed Companies - SEBI guidelines Unlisted Companies – Same as above for fresh issue of shares

The pricing of shares / convertible debentures / preference shares should be decided / determined upfront at the time of issue of the instruments. The price for the convertible instruments can also be a determined based on the conversion formula which has to be determined / fixed upfront, however the price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments, in accordance with the extant FEMA regulations

Mode of Payment

- Inward remittance through normal banking channels
- Debit to NRE / FCNR account of a person concerned maintained with AD bank
- Conversion of import dues deemed as ECB or trade credit or payables against import of second hand machinery (after net of tax)
- Conversion of Import of capital goods/ machinery/ equipment (excluding second-hand machinery)/ pre-operative or pre-incorporation expenses / share swap, subject to certain conditions

Mode of Payment

- If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE / FCNR(B) / Escrow account the amount of consideration shall be refunded
- Application to RBI in case of delay in refund / allot shares beyond 180 days from the date of receipt

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

Issue of Shares - Reporting Requirement

Filing of details of remittance with the Regional office of the RBI within 30 days of the date of receipt:

- Name and address of the foreign investor;
- Date of receipt of remittance and its rupee equivalent;
- Name and address of the authorised dealer in India through whom the remittance received, and
- Details of the Government approval, if any (not applicable in the present case).

Reporting in SMF on the login page of the FIRMS application using <https://firms.rbi.org.in> on the internet with effect from September 1, 2018

Issue of Shares - Reporting Requirement

- Form FC-GPR
- A certificate from the CS of the company or independent CA where the company does not have a CS certifying that:
 - all the requirements of the Companies Act, 1956 have been complied with;
 - terms and conditions of the Government approval, if any, have been complied with;
 - the company is eligible to issue shares under these regulations and
 - the company has all the original certificates issued by authorised dealers in India evidencing receipt of amount

Issue of Shares - Reporting Requirement

- A certificate from the Statutory Auditors or CA indicating the manner of arriving at the price of the shares issued to the persons resident outside India. In case the shares are allotted at par, the CA certificate should give the working of valuation based on internationally accepted method

Subscription to Memorandum of Association – At face value subject to entry route and sectoral cap

Shares to be issued within 180 days from receipt of funds

Transfer of Shares/Conv. Deb

From - To	Permission	Pricing Guidelines
Non-Resident (other than NRI/OCB) to Non-Resident (including NRI but excluding OCBs) by way of Sale / Gift	No Permission	Any Price
NRI to NRI		
NRIs/OCIs to Non Resident (Sale/Gift)	No Permission	Any Price
Non-Resident to Resident (Gift)	No Permission	-
Non-Resident to Resident (Sale)	Automatic Route	FDI compliant and Adhere Pricing Guidelines (non-compliant RBI approval)
Non-Resident to Resident (Sale) through a registered stock broker	No Permission	Price as per Recognized Stock Exchange in India

Transfer of Shares/Conv. Deb

From - To	Permission	Pricing Guidelines
NRI/OCI (non-repatriation)/Res- Non Resident (Sale)	Automatic Route	FDI compliant and Adhere Pricing Guidelines (non-compliant RBI approval)
NRIs/OCIs (non-repatriation)-to NRIs/OCIs (non-repatriation) (Gift)	No Permission	Any Price
NRI/OCI (non-repatriation)/Res - Non-Resident (Gift)	RBI Permission	- (upto 5% of paid up capital, Relative, upto USD 50,000)
Res- Non-Resident (Sale)	Automatic Route	FDI compliant and Adhere Pricing Guidelines (non-compliant RBI approval)

Transfer of Shares/Conv. Deb

- Acquisition of existing shares by Non-resident from Resident (sale / buy-back of shares / capital reduction) permitted under automatic route
 - Form FC TRS along with prescribed documents such as consent letters, valuation certificate from a CA, undertaking from buyer that it is eligible to acquire shares, tax clearance certificate in case of sale by NR etc. to be filed with banker
 - On receipt of the certificate in form FC TRS from the authorised dealer, the company can record the transfer in its books

Transfer of existing shares

- Shares to be transferred at fair value
 - ✓ Prevailing market price in case of listed shares
 - ✓ any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a SEBI registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

Reporting to RBI within 60 days

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

Gift of Securities by a Resident to a Non-Resident

- Proposed transferee is eligible to hold such security under FEMA
- Gift does not exceed 5% of the paid-up capital of the Indian company / each series of debentures / each mutual fund scheme
- Within Sectoral Cap limit in the Indian company
- Transferor and the transferee are close relatives as per Section 6 of the Companies Act, 1956
- Value of gift should not exceed USD 50,000 per financial year
- Such other conditions as stipulated by the RBI in public interest from time to time

Other Regulations

- FIIs can make portfolio investments on repatriation basis in shares, debentures, dated Govt. securities, treasury bills, bonds and units of domestic MFs subject to ceiling specified
- NRI/OCI can purchase on repatriation basis, without limit, Government dated securities (other than bearer securities) or treasury bills or units of domestic MFs; bonds issued by a PSU and shares in Public Sector Enterprises being disinvested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids, bonds/units by Infrastructure debt funds, listed non convertible/redeemable preference shares or debentures

Other Regulations

- ❑ NRI/OCI can purchase shares / convertible debentures issued by an Indian company on non-repatriation basis without any limit
- ❑ NRI/OCI can also, without any limit, purchase on non-repatriation basis dated Government securities, treasury bills, units of domestic MFs, units of Money Market MFs. Investments in Small Savings Schemes including PPF not permitted.
- ❑ Shares Swap – Govt. Route

Other Regulations

- ❑ Indian companies permitted to issue ADRs/GDRs abroad under the automatic route subject to conditions
- ❑ SEBI registered FVCI can make investments in domestic VCF/VCU subject to compliance with SEBI regulations
- ❑ Issue of shares by Indian company under ESOP scheme to own employees or employees of JV/WOS outside India permitted, subject to certain conditions

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

Indirect Foreign Investment

- 'Indirect Foreign Investment' is 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 ⁵³

Indirect Foreign Investment

Conditions for downstream investment that is treated as Indirect Foreign Investment for the investee Indian Entity

- Indian entity which has received indirect foreign investment is required to comply with the entry route, sectoral caps, pricing guidelines and other FDI linked performance conditions as applicable for foreign investment.
- Downstream investment by an LLP which has received foreign investment and is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions.
- Indirect foreign Investment is permitted in an LLP in sectors where foreign investment is allowed 100% under automatic route and there are no FDI linked performance conditions.

Indirect Foreign Investment

Conditions for downstream investment that is treated as Indirect Foreign Investment for the investee Indian Entity

- If the sponsors/ managers/ investment managers of an investment vehicle are individuals, for the downstream investment made by such investment vehicle not to be considered as Indirect Foreign Investment for the investee, the sponsors/ managers/ investment managers of the investment vehicle should be resident Indian citizens. In case the sponsor/ manager/ investment manager is organised in any other form, SEBI will determine whether it is foreign owned and/ or controlled or not.
- The downstream investment that is treated as Indirect Foreign Investment for the investee Indian entity should have the approval of the Board of Directors as also a Shareholders' Agreement, if any, of the investing Indian entity.

Indirect Foreign Investment

Conditions for downstream investment that is treated as Indirect Foreign Investment for the investee Indian Entity

- Indian entity making the downstream investment that is treated as Indirect Foreign Investment for the investee Indian entity is required to bring in the requisite funds from abroad and not use funds borrowed in the domestic markets. Subscription by persons resident outside India to non-convertible debentures issued by an Indian company will not be construed as funds borrowed/ leveraged in the domestic market. However, raising of debt and its utilisation will have to comply with the Act and the rules or regulations made thereunder.
- Downstream investments which is treated as Indirect Foreign Investment for the investee Indian entity can be made through internal accruals.
- When a company which does not have any operations makes downstream investment which is treated as Indirect Foreign Investment for the investee Indian entity or commences business(s), it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

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

- 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);
- 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;
 - The utilisation of loans shall meet the provisions given at (i) above;
 - 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 exempt if the dividend declared by the company is subject to dividend distribution tax in India

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”)
- The Non-Resident can choose between the two, whichever is more beneficial [Section 90(2)]
- Tax Residency Certificate 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)	<p>The negative list, for which the ECB proceeds cannot be utilised, would include the following:</p> <ul style="list-style-type: none">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).
- The Indian Party submits Form ODI, duly completed, to the designated branch of an authorized dealer.

Overseas Direct Investment

Reporting in Form ODI

- Application for allotment of Unique Identification Number (UIN) and reporting of Remittances / Transactions:
 - ✓Section A – Details of the Indian party (IP).
 - ✓Section B – Capital Structure and other details of JV/ WOS/ SDS.
 - ✓Section C - Details of Transaction/ Remittance/ Financial Commitment of IP.
 - ✓Section D – Declaration by the IP.
 - ✓Section E – Certificate by the statutory auditors of the IP/ self-certification by RI.
- SPECIFIED LIMITS – 400% criteria; USD 1 billion /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.

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 be 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.

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 gambling and betting) **92**

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 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.

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.

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, Salaries and Exempt Dividends

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) if law of that country provide such certificate; 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 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

Rule 37BB – TDS on Payment made to NRs

Specified List :

1. Indian investment abroad-in equity capital (shares)
2. Indian investment abroad-in debt securities
3. Indian investment abroad-in branches and wholly owned subsidiaries
4. Indian investment abroad-in subsidiaries and associates
5. Indian investment abroad-in real estate
6. Loans extended to Non-Residents
7. Advance payment against imports
8. Payment towards imports-settlement of invoice
9. Imports by diplomatic missions
10. Intermediary trade
11. Imports below Rs.5,00,000-(For use by ECD offices)
12. Payment for operating expenses of Indian shipping companies operating abroad
13. Operating expenses of Indian Airlines companies operating abroad
14. Booking of passages abroad - Airlines companies
15. Travel under basic travel quota (BTQ)
16. Travel for pilgrimage
17. Travel for medical treatment
18. Travel for education (including fees, hostel expenses etc.)
19. Postal services
20. Construction of projects abroad by Indian companies including import of goods at project site

Rule 37BB – TDS on Payment made to NRs

Specified List :

21. Booking of passages abroad - Airlines companies
22. Freight insurance - relating to import and export of goods
23. Payments for maintenance of offices abroad
24. Maintenance of Indian embassies abroad
25. Remittances by foreign embassies in India
26. Remittance by non-residents towards family maintenance and savings
27. Remittance towards personal gifts and donations
28. Remittance towards donations to religious and charitable institutions abroad
29. Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30. Contributions or donations by the Government to international institutions
31. Remittance towards payment or refund of taxes
32. Refunds or rebates or reduction in invoice value on account of exports
33. Payments by residents for international bidding.

Rule 37BB – TDS on Payment made to NRs

- The information in Form 15CA and the certificate in Form 15CB shall be furnished and verified electronically in accordance with the procedures, formats and standards specified by the Principal Director-General of Income tax (Systems). The printouts of the Form 15CA shall be submitted to the authorised dealer, prior to remitting the payment
- The authorised dealers shall furnish a quarterly statement for each quarter of the financial year in Form 15CC to the Principal Director-General of Income tax (Systems) or the person authorised by the Principal Director-General of Income tax (Systems) electronically under digital signature within 15 days from the end of the quarter of the financial year to which such statements relates.

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

Round Tripping Prohibited under FEMA

OFFENCES, PENALTIES, COMPOUNDING OF CONTRAVENTION

General principles

- Offences treated as civil offences
- No presumption of existence of guilty mind and hence prosecution to prove person committed offence
- Civil detention only when person fails to pay the penalty. That is also coupled with adequate safeguards
- Powers for search and seizure are those conferred on Income tax authorities
- Provisions also apply to company and director / person responsible for conduct of its business

Penalties

- Where amount is quantifiable -300% of the amount involved in the contravention
- In all other cases-upto INR 2 lacs
- Where contravention continuing – INR 5,000 for every day of default
- Power to confiscate currency, security or property in respect of which contravention has taken place in addition to the penalty

Prosecution

- Subject to the appellate process and stay of demand, failure to pay penalty u/s. 13 within 90 days would make the person liable for civil imprisonment
- Order for arrest and detention to be made only after show cause notice and if the Adjudicating Officer is satisfied that defaulter is obstructing recovery or is not paying in spite of means to pay
- Civil detention can be:
 - Demand exceeding INR 3 crores- up to three years
 - Any other case – 6 months

Compounding of contraventions

- RBI granted power to compound contraventions of all sections except s. 3(a)
- RBI guidelines (Circular no 31 dated 1.2.2005)
- Directorate of Enforcement to compound contraventions of s. 3(a)
 - Essentially Hawala transactions

Thank You



CA Rajesh S. Athavale
Chartered Accountant
Contact no : 99 6706 4422
Email id : rajeshanila001 @yahoo.co.in