Handbook on

FEMA-TAXATION

Frequently Asked Questions

All India Federation of Tax Practitioners

ETHICS EDUCATION EXCELLENCE

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FEMA-TAXATION

Frequently Asked Questions

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Preface

From the Desk of The Editorial Board

The Federation published its 1st edition of the book titled "Overseas Indians – FEMA – Taxation – Solutions to Frequently Asked Questions" in the year 2000. This publication was authored by Shri Narsinha K. Bhat, Shri Pravin P. Mashru and Shri Paresh P. Shah. The third revised publication released in the year 2009, was dedicated to Shri Narsinha K. Bhat and authored by Shri Pravin P. Mashru and Shri Paresh P. Shah, Chartered Accountants from Mumbai. This publication is the 4th revised publication which is updated by Mr. Paresh P. Shah, Chartered Accountant.

Most of us feel proud that we have a very dynamic Prime Minster, Shri Narendra Modi, who while visiting more than 58 Countries, has sincerely made an appeal to all the non-residents in those countries to visit India and participate in the development of the Nation. Pravasi Bharatiya Divas is celebrated every year to mark the contribution of the overseas Indian Community towards development of India. The World Bank released a report on 'Doing Business' (DB) in 2018, where it was pleased to announce that India Ranks 100 among 190 Countries assessed by the 'Doing Business' team. India has made a leap of over 30 ranks over its previous 130th rank in the 'Doing Business' Report of 2017, which is a great achievement for the Government.

One of the object of the All India Federation of Tax Practitioners is to spread knowledge and educate professionals and students, through various publications in a question and answer format so that even a lay-person will be able to understand and interpret the basic provisions of the Act. The All India Federation of Tax Practitioners has members from across the country out of which many are practicing in the remote corners of our country.

We are sure this publication will help all our members in enriching their knowledge and would enable them in rendering efficient professional services to their clients.

On behalf of the Federation and on my own behalf, I am grateful to Shri Paresh P. Shah for sparing his valuable time to revise the publication.

We are also grateful to Shri. Dilip J. Thakkar for editing the publication. This is a unique publication in a simple question and answer format, covering various issues of Taxation, FEMA, Citizenship, Baggage Rules, etc.

We are hopeful that this publication will be useful for tax professionals, non-residents and executives to plan and understand the various controversial issues on the subject of FEMA & Taxation.

Dr. K. Shivaram, *Senior Advocate*
For Editorial Board

About All India Federation of Tax Practitioners

- Inspired by the ideology to have a common platform for all those who practice taxation laws, irrespective of their individual affiliations and to enable them to share the benefits of their learning, experience and knowledge, eminent professionals from the fields of Direct and Indirect Taxes conceived the idea of establishing an all India body for the tax practitioners. It was at the opening ceremony of the National Conference held on 11-11-1976 organised by The Chamber of Income Tax Consultants, Mumbai under presidentship of Shri B. C. Joshi that the doyens of the Professionals christened the Association in the presence of former Chief Justice of India, Hon'ble Justice J. C. Shah, distinguished Jurist Shri N. A. Palkhivala and Shri Ram Rao Adik, Advocate General of Maharashtra. Shri N. C. Mehta, Chartered Accountant, Mumbai, was elected as Founder President and Shri P. C. Joshi was elected as Secretary General. The Federation has completed 40 years of its purposeful existence.

- The main object of AIFTP is to spread education in the matters relating to tax laws, other laws and accountancy.

- With the generous contributions by its members the Federation has been able to own, establish and run a full-fledged and a well-equipped Head Office at 215, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020. The total strength of National Executive Committee Members is 69, headed by a National President, with a Deputy President, five Vice-Presidents and five Joint Secretaries. Presently, the President is Mr. Ganesh Purohit, Sr. Advocate, Jabalpur, and Dr. Ashok Saraf, Sr. Advocate, Guwahati is Deputy President. Our eminent Past Presidents are Late Shri N. C. Mehta, Chartered Accountant, Mumbai (1978-83), Late Shri B. C. Joshi, Advocate, Mumbai (1984-90), late Shri L. M. Mahurkar, Tax Practitioner, Nagpur (1991-93), Shri P. C. Joshi, Advocate, Mumbai (1994-96), Late Shri Sukumar Bhattacharya, Advocate Kolkata (1997-99), Shri N. M. Ranka, Sr. Advocate, Jaipur (2000-02), Dr. K. Shivaram, Sr. Advocate, Mumbai (2003-05), Late Shri V. Ramachandran, Sr. Advocate, Chennai (2006 & 07), Shri Bharat Ji Agrawal, Sr. Advocate, Allahabad (2008 & 09), Shri M. L. Patodi, Advocate, Kota (2010 & 2011), Shri S. K. Poddar, Advocate, Ranchi (2012 & 2013) and Shri J. D. Nankani, Advocate, Mumbai (2014 & 2015), Dr. M. V. K. Moorthy, Advocate, Hyderabad (2016), Mrs. Prem Lata Bansal, Sr. Advocate, Delhi (2017).

- The membership of the Federation includes Advocates, Solicitors, Chartered Accountants and Tax Practitioners, practising Direct or Indirect Taxes, from all States in the country. Its members enjoy a strong bond of fellowship leading to fraternal brotherhood amongst professionals. The Federation is the symbol and spirit of national integration. As of today the Federation is the only professional organisation of our country which has 134 Professional Associations, from 18 States as its affiliated members and more than 7,171 individuals as life members.

- The Federation functions through various Sub-Committees such as Journal Committee, Law & Representation Committee (Direct & Indirect Taxes), ITAT Bar Associations' Co-ordination Committee, Membership Development & Public Relations and Times Committee. The Western Zone also functions through four Sub-Committees such as Education, Law & Representation, Membership Development and Publication.

- The Federation publishes a monthly Journal covering the latest reported & unreported decisions of the Supreme Court, High Courts and Income Tax Appellate Tribunals including the articles, opinions and latest developments on direct and indirect taxes by experts in the field. The unique feature is that every quarter, it publishes the gist of important case laws published in 33 Tax Magazines from all over the country.

- The Federation publishes a monthly newsletter called AIFTP TIMES which is sent to all the members free of charge. This newsletter contains important notifications, circulars and other topical information apart from various activities of the Federation. Eastern Zone also publishes AIFTP Times East.

- The Federation's website at www.aiftponline.org is an informative source for the members. The website is regularly updated by a team of dedicated professionals. The Journal and Times are available on our website.

- The Federation has been making representations to focus the grievances of trade, industry and professionals. It regularly sends Pre- and Post-Budget Memorandums. Many of the suggestions and the recommendations are accepted. It regularly publishes books in simple language and question answer format at a low cost. It has published more than 32 books till date.

- The Federation jointly with the Association Members organise National Seminars, Conferences and Conventions in various parts of the country to update its members on all aspects of Direct and Indirect Taxation. A unique feature of the Federation is that the faculties, chairmen, trustees, office bearers and members of the National Executive and Zonal Committees pay a registration fee and bear their own travel and stay expenses.

- For the development of the Tax Bar, the "Nani Palkhivala Memorial National Tax Moot Court Competition" and "Research in Tax Laws" was started under the banner of "Palkhivala Foundation" at Mumbai, wherein every year students from more than 25 leading law colleges of India participated and more than 100 Law Colleges participated in the Research Competition.
- Federation has voluntarily adopted the code of ethics in its Constitution for its members. As per the request of the Federation, Government of India has released Commemorative Postage Stamp in Memory of Shri N. A. Palkhivala on 16th January, 2004. The then Hon'ble Prime Minister of India, Shri Atal Bihari Vajpayee released the stamp at Mumbai.
- Today, the Federation is considered a national integration of tax professionals of India. Federation has many eminent professionals as members, some have been elevated as Judges of the High Courts, Supreme Court and Tribunals. Most of the leading Senior Advocates who practice on Direct, Indirect Taxes, many past Presidents of Institutes of Chartered Accountants of India, Chairmen and member of Bar Councils of various States, leading Lawyers, Chartered Accountants and Tax Practitioners of our country are esteemed members. Federation has great potential and ability to grow and will be recognised globally as one of the vibrant association of tax practitioners of India. The Federation is making an honest attempt to develop a strong Tax Bar for our country, which will be able to compete in International Tax Practice.

Message

I am happy to note that CA. Paresh Shah has revised his own book on Foreign Exchange Management Act.

There are lots of changes in the Act and new circulars and notifications are issued by authorities, a revised edition of the book is a welcome step in the direction of up-to-date knowledge of FEMA.

CA. Paresh Shah is a well-known name in the field of FEMA practice, the book reflects the knowledge and personal experience of the author.

I am confident, it will go a long way in educating the fraternity and shall prove to be a good guide.

I congratulate CA. Shah for his effort and successful achievement of the object.

With Best Wishes,

Ganesh Purohit
National President-AIFTP

Jabalpur, 3rd October, 2018

Introduction by Author

It has been a long, memorable and meaningful journey with AIFTP and the publication titled 'A Handbook on FEMA - Taxation - FAQs'. The journey began in July 1999 with the pious cause of contributing to the National Defence Fund in honour of our brave martyrs in Kargil through donation of the entire sale proceeds of the publication which was titled 'NRI - a legal companion'. It had 101 FAQs and received a well-deserved response and a handsome amount was donated to the cause of our national heroes who had fought valiantly at Kargil.

A new book was designed taking feedback from the users of "NRI - a legal companion' and was published in September 2000 with the current name and is referred to as the 1st Edition of the series. It had 151 FAQs and received such great response that a reprint was issued in December 2000. The 2nd Edition was completely overhauled and issued in July 2003 with 185 FAQs. It had additional coverage to make it more inclusive. It too received overwhelming response and required a reprint within the period of 6 months. The 3rd Edition continued the good work and was published in March 2009 with expanded coverage of 271 FAQs. New chapters on Import, Export, Overseas Direct Investments and Citizenship were included to cater to the requirements of our professional readers.

Since then, almost a decade has passed and the international trade, legal, tax and regulatory landscapes have changed materially as regulators across the world increase their focus on preventing cross-border illegal flows and tax leakages, including operation of Prevention of Money Laundering Act, 2002, Black Money Act, 2015 and a new treaty instrument called the 'Multi-lateral Instrument'. So popular had the Handbook become, that the Federation was inundated by professionals requesting for an update. In this background, this fourth edition has taken shape and it is a matter of great honour and privilege for me to undertake an extensive revision.

This Edition has 15 Chapters in the form of 293 FAQs with a new chapter on PMLA. It is a unique publication in simple questions and answers format simplifying and explaining various issues of Taxation, FEMA, Citizenship, Baggage Rules, as well as contemporary developments in areas of FDI, PMLA, MLI, GAAR, etc.

In revising this handbook, I have been aided by the untiring efforts of Shri Nirav Panchmia and Ms. Shetal Shah who spared their valuable time to complete the publication within a short period. I also thank Ms. Snehal Parte for her diligent work in bringing out this publication on time.

The contribution from my earlier co-author Shri Pravin P. Mashru is also noteworthy in that he readily agreed to put in effort to provide feedback on the chapter on Taxation in a very short time.

We are hopeful that this publication will inspire many young professionals to specialise in the field of FEMA and International Taxation. We wish that the Handbook will provide the necessary knowledge & stimulus to the practitioner and act as an aid in their practice as a ready reference.

Paresh P. Shah
Author

Abbreviations

AAR	Authority for Advance Rulings
AD	Authorised Dealer
ADR	American Depository Receipt
AIF	Alternate Investment Fund
BIFR	Board of Industrial & Financial Reconstruction
CAT	Foreign Exchange Management (Current Account Transaction Rules), 2000
CHIO	Chief Immigration Officer, Chennai
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
EEFC	Exchange Earners Foreign Currency Account
FCCBs	Foreign Currency Convertible Bonds
FCNR	Foreign Currency Non-Resident
FCRA	Foreign Contribution Regulation Act, 1976
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FPI	Foreign Portfolio Investor
FRRO	Foreigners Regional Registration Officer
FVCI	Foreign Venture Capital Investor
GDRs	Global Depository Receipts
I.T.	Income Tax
InvIts	Infrastructure Investment Trusts
ITO	Income Tax Officer
IVCU	Indian Venture Capital Undertaking
JV	Joint Venture
LLP	Limited Liability Partnership
NBFC	Non Banking Financial Company
NR	Non Resident
NRE	Non Resident External
NRIs	Non Resident Indians
NRNR	Non Resident - Non Repatriable
NRO	Non Resident Ordinary
NRSR	Non Resident Special Rupee
OCBs	Overseas Corporate Bodies
OCI	Overseas Citizen of India
OGL	Open General License
PIO	Person of Indian Origin
PIS	Portfolio Investment Scheme
PRII	Person Resident in India
PROI	Person Resident Outside India
R	Resident
RBI	Reserve Bank of India
REITs	Real Estate Investment Trusts
RFC	Resident Foreign Currency
RFC(D)	Resident Foreign Currency (Domestic)
RI	Returning Indian
SBLC	Standby Letter of Credit
SEBI	Securities Exchange Board of India
TDS	Tax Deduction at Source
UTI	Unit Trust of India
WOS	Wholly Owned Subsidiary

Detailed Contents

CHAPTER 1
Emigrating Indians

Q.1 Mr. Resident is leaving for U.S. on 1-8-2018 for taking up employment. He wants to know the concepts under the provisions of FEMA? 1

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1 Chapter Emigrating Indians

Resident & Non-Resident have been defined under Foreign Exchange Management Act, 1999 (FEMA) as Person Resident in India (PRII) and Person Resident outside India (PROI). Various transactions in Indian rupees as well as in foreign currency are being regulated by Reserve Bank of India (RBI), through Rules & Regulations framed under FEMA. These notifications, rules & regulations are divided into two classes, as per the residential status, either Resident or Non-Resident, of the person. The chapter is aimed to highlight, the treatment and procedure of the transactions of resident Indian under FEMA when he/she becomes non-resident. Also these rules provide for participation in the business & investment by Non-Resident within overall policy of the Government of India namely of Foreign Investment Facilitation Board (FIFB) under the Industrial Development & Regulation Act, 1951.

Q.1 Mr. Resident is leaving for U.S. on 1-8-2018 for taking up employment. He wants to know the concepts under the provisions of FEMA?

A.1 Basic Concepts under FEMA are outlined below:

i) 'FEMA' as the name suggests is Foreign Exchange Management Act, 1999. Emphasis is on Managing the Foreign Exchange as against regulating the Foreign Exchange under erstwhile FERA. Object under FERA was to conserve the scarce Foreign Exchange. The entire Foreign Exchange (except in some cases eg. FCNR A/c, NRE A/c, EEFC A/c and RFC A/c) belonged to the Government, and the Government has been rationing the same among those who needed the Foreign Exchange, depending on the priorities set by the Government.

FEMA aims at managing the Forex resources effectively for economic development of the country in an era ushered in by liberalisation.

ii) Under FERA everything was prohibited except what was permitted. On the other hand under FEMA, most of the Current Account transactions are permitted except what is prohibited and in case of Capital Account transactions they are permitted to the extent specified and rest is not permitted or they may require prior

Government approval or RBI approval as the case may be. The stranglehold of the FERA regime has been loosened to a large extent, under the FEMA Act, Rules and the Regulations. The changes were made across the law so much that entire structure of the FEMA was quite different and simplified for the implementation and operations to review the transactions in a more logical manner and until 30th January, 2005 most of the irregularities committed under the law was regularized without any penalties. On 30th January 2005 first compounding regulations were introduced to levy penalties on irregular transactions to regularized them with the penalties. For the first time in 2015 criminal provisions of prosecution are introduced similar to one which was found in FEMA although only in limited cases of holding Assets outside India without the permission of the law.

The Regulations are contained in the Notifications/Master directions and Circulars under FEMA.

iii) Although there is liberalisation, there is no total capital account convertibility and the dealings in Foreign Exchange as well as in Rupees between Resident and Non-Resident continue to be governed by FEMA and the notifications & circulars issued by the Reserve Bank of India from time to time. All the dealings in Foreign Exchange should be generally routed through the Authorised Persons who deal in Foreign Exchange. As per the scheme of FEMA two types of the transactions are recognized Current Account Transactions (CAT) and the Capital Account Transactions (CAP). CAP is allowed only to the extent it is specifically permitted and CAT is allowed generally unless it is prohibited.

iv) Thus, under FEMA, for certain types of transactions, no permission of RBI is needed, for certain types of transactions RBI is to be kept informed and for certain other types of transactions, prior permission of RBI/FIPB is needed.

Q.2 Mr. Resident has secured employment abroad. He wants to know about travel formalities. How he should go about it?

A.2 i) He should ensure that passport is marked “Emigration check not required”.

OR

If ‘Emigration check is required’ on the basis of endorsement on passport Mr. Resident should get Emigration clearance certificate from Protector of Emigrants (POE). Emigration Act, 1983 provides that no

citizen of India shall migrate unless he obtains emigration clearance from Protector of Emigrants. Similarly, it has been recognized that certain countries do not have strict laws regulating the entry and employment of foreign nationals. They also do not provide avenues for grievance redressal. Thus they have been categorized as Emigration Check Required (ECR) countries. Hence, all persons, having ECR endorsed passports and going to any of the 17 ECR countries for taking up employment require emigration clearance. However, ECR passport holders going to any ECR country for purposes other than employment do not require emigration clearance. No specific mention of ECNR is made on the passports and the ones not endorsed as ECR, automatically belong to ECNR category. The ECR countries are: Afghanistan, Bahrain, Indonesia, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Oman, Qatar, South Sudan, North Sudan, Syria, Kingdom of Saudi Arabia, United Arab Emirates and Yemen. For more information, visit https://mea.gov.in / protector-general-emigrants.htm

ii) Get PTA (Pre-paid Ticket Advice) from the foreign employer. The Air Line company gives ticket against the PTA after verifying the passport.

OR

Tickets can be booked by payment in Indian rupees.

iii) Get documents from the foreign employer for obtaining work visa.

Q.3 What is the difference regarding the status of resident and non-resident under FEMA and Income-tax Act, 1961 (IT Act)?

A.3 The concept of Non-Resident under FEMA is substantially different as compared to that under Income-tax Act. Under Income-tax Act, the residential status of a person is determined only on the basis of his stay (number of days he stays) in India whereas under FEMA, it is not so. Under section 2(v) of FEMA "Person resident in India" means

i) A person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include —

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

a) For or on taking up employment outside India, or

b) for carrying on outside India a business or vocation outside India, or

c) For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

B) A person who has come to or stays in India, in either case, otherwise than –

a) For or on taking up employment in India, or

b) For carrying on in India a business or vocation in India, or

c) For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

ii) Any person or body corporate registered or incorporated in India,

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

iv) An office, branch or agency outside India owned or controlled by a person resident in India;

As one can see the predominant test of residence still continues to be the intention for taking up employment in India, carrying on in India business or vocation or for any other purpose, in such circumstances as would indicate intention to stay in India for an uncertain period.

If a person has stayed in India during the preceding financial year for 182 days or more, he would generally be regarded as 'person resident in India', in the current financial year. For example if a person's stay in India during the financial year 2018-2019 (1st April, 2018 to 31st March, 2019) is for more than 182 days he would be generally regarded as resident in India during the financial year 2019-2020 unless his intention was not to reside in India for an uncertain period and he had not taken up any employment in India or he did not carry on any business or vocation in India.

By this reckoning, a student who has gone abroad for studies and resides there for more than 182 days in the financial year, would be 'person resident outside India', from the succeeding financial year.

The RBI considers students who have gone abroad for studies as "Resident" under FEMA as their stay abroad is for a definite period till the completion of their studies.

However such students often extend their stay for various reasons including accepting part-time job, entering into financial transactions resulting into uncertain period of stay. In these circumstances it is clarified by RBI that,

such student's residential status will be considered as PROI as provided by AP (DIR) Circular No. 45 dated 8-12-2003.

The definition under FERA was more precise and clear cut as the intention to stay in India, and the number of days presence in India was not material.

Indian branch or office or agency of a foreign company is considered as Resident under FEMA.

Indian branch or office or agency of person resident in India (Say Indian Company) and operating abroad is considered as Person Resident in India, and is subject to the provisions and Notifications of FEMA. This is likely to create difficulties in the operations of the Indian branch, office or agency operating abroad, unless specific permission for certain transaction is taken from the RBI for the operations of the branch, office or agency operating outside India. Permitted activities of branch and amount of remittance for setting up branch is provided by Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015 issued under Notification No. FEMA 10 (R) /2015-RB dated January 21, 2016 (*vide* earlier Circular No. 18 dated 4th Dec. 2006)

As per section 2(w) of FEMA, person resident outside India means a person who is not resident in India.

Residential status under Income-tax Act and under FEMA are to be determined independently, because in most cases person will have dual/ split status under FEMA, whereas he cannot have two statuses during the course of a financial year under IT Act as ITA will determine the Residential Status on the last day of the Accounting year for the whole year to apply it to any person who is liable to pay Taxes on the basis of Residential Status for that financial year as a whole.

Q.4 Mr. Resident is leaving India for taking up employment on 10-6-2018 along with relatives for different purposes such as,

i) For taking care of his daughter's post maternity care, for 4 months

ii) To sign collaboration agreement with U.S. Multinational

iii) For doing 'CPA' Course – One year

iv) For trying luck as a 'Model' in the U.S.

Kindly determine their status under FEMA

A.4 Under FEMA, a person is Non-Resident if he/she goes or stays out of India

1. Such that the stay in India is lower than 182 days in the preceding financial year, or

2. For

    a. Taking up employment outside India, or

    b. For carrying on any business or vocation outside India, or

    c. For any other purpose

Applying these tests, Residential Status of each of the members of Resident's family under FEMA, can be determined.

PURPOSE	STATUS UNDER FEMA WITH REASON
i) Mr. Resident/Employment abroad	Non-Resident from the date of going abroad – Gone to U.S. for taking up employment.
ii) Taking care of daughter's post maternity care	— Resident – Will return to India after the 'post maternity care' of daughter. – Definite period of stay. Not an uncertain period of stay abroad. Number of days stay less than 182 days.
iii) To sign collaboration agreement	— Resident – Gone for specific purpose of signing collaboration agreement. Intention is to return to India thereafter.
iv) For trying luck as a model in the US	— Non Resident – Gone to become a Model, Intention to stay in U.S. for an uncertain period.

Q.5 Mr. Resident has now become Non-Resident, whether it is advisable for him to execute power of Attorney in respect of

i) Operation of Bank Account on his behalf

ii) Dealing with Reserve Bank of India and other Government Authorities - eg. Income Tax Authorities, signing of Forms, Declaration etc.

iii) Other matters — Portfolio Investment etc.

A.5 There is no need to give Power of Attorney where there is joint account with the bank which can be operated by either of the joint account holders. There is nomination facility which should be availed of.

NRIs and/or PIOs may hold NRO account jointly with other NRIs and/or PIOs. Such accounts may also be held jointly with residents on 'former or survivor' basis.

In case of NRE accounts, they may be held on the names of two or more NRIs and/or PIOs or with resident relative(s) on 'former or survivor' basis. However, the said resident relative shall be eligible to operate the account as a Power of Attorney holder in accordance with the extant instructions during the life time of the account holder. A 'relative' means relative as defined in section 2(77) of the Companies Act, 2013.

Where there is no joint account, but the account is operated individually by Mr. Resident, he should convert such accounts into joint account so that the joint account holder will be able to operate the account when Mr. Resident is out of India. Refer Notification No. FEMA 5(R), Schedules 1 & 3 for NRE and NRO Accounts respectively.

Usually joint account holder is the spouse or close relative or any trustworthy person.

He can give Power of Attorney to operate his bank account and to deal with the Reserve Bank/other Government Authorities, sign necessary forms etc., buy and sell shares, securities, apply for rights shares and to do necessary investments and other things on his behalf. Generally Power of Attorney should not be given to deal with the immovable property.

Power of Attorney should be prepared on a stamp paper (in Maharashtra ₹ 500 for General Power of Attorney) and get it attested before the Notary Public or Magistrate.

General Power of Attorney can be registered with the registering authority.

One may note that purchase and sale of immovable properties in some of the states in India, requires registration of Power of Attorney with registrar of immovable property.

Photo copies of the Power of Attorney duly certified by the bankers should be filed with the concerned bank/s where the Power of Attorney holder has to operate the bank accounts. The Certified Copy of the Power of Attorney should be filed with the companies concerned/demat participant agent when the shares of the companies are intended to be sold or bought, or apply for rights shares.

Q.6 If passport of Mr. Resident, being a graduate, is marked with stamp "Emigration Clearance Required" then, what steps is he required to take before he buys his ticket for going abroad for employment?

A.6 In case of following categories of persons who are educated, Emigration Clearance is not required.

1. Professional degree holders – Doctors, Engineers, Chartered Accountants, Lawyers, etc.
2. Gazetted Officers of the Government.
3. Income Tax Payer – with proof of assessment for last 3 years.
4. Spouses of above persons.
5. Persons holding Permanent Immigration Visas.
6. Post Graduates.
7. Graduates who want to go abroad to work as office staff.

Therefore Mr. Resident has to go to Passport Office (and not the office of the Protector of Emigrants) and get the stamping on the Passport amended to read as "Emigrations Check Not Required" after giving proper proof that he is an Engineering Graduate.

Usually the airlines will not issue ticket if the Passport is marked "Emigration Clearance Required" unless clearance is obtained from the POE.

[Section 22 of the Emigration Act, 1983]

Q.7 Outline the steps to be taken by any emigrant from India, before buying the ticket if he is not a graduate?

A.7 a) Obtain proper form of contract terms from the prospective employer abroad, duly endorsed by the Indian Embassy in the other country.

b) Remuneration should not be below the prescribed standard rates.

c) There are proper medicare facilities.

d) There is provision for leave.

e) Passport should not expire within 6 months of proposed date of travel. In that case it should be renewed.

f) There is proper visa or fax message that visa will be granted on arrival at the airport of other country.

g) Prepaid Ticket (PTA)

h) Provision for sending the body by air to India in case of death.

Q.8 Kindly advise Mr. Resident who is to take up employment in the U.S., in respect of various bank accounts operated by him in India, as to

its operation and his business ventures after Mr. Resident becomes Non-Resident Indian.

1.	**FDRs**	**₹ 25,00,000**
2.	**Current Account**	**₹ 1,50,000**
3.	**Savings Bank Account**	**₹ 2,00,000**
4.	**Savings Bank A/c (of a Discretionary Trust)**	**₹ 3,00,000**
5.	**Flexi-Deposit A/c of Family Trust**	**₹ 30,00,000**
6.	**Current A/c of HUF**	**₹ 10,00,000**
7.	**Partnership business in Garments where Mr. Resident is 51% Partner** **– Account operated jointly with any partner**	**₹ 20,00,000**
8.	**Current A/c, of R*eal Housing Complex* a Proprietary concern owning bungalows and flats and are let out on rent, operated jointly with the Manager**	**₹ 50,00,000**
9.	**Account of Pvt. Co. operated jointly with any of the Directors**	**₹ 25,00,000**
10.	**Account of Association of Persons, operated by all the members.**	**₹ 22,00,000**
11.	**Current Account of A Joint venture for construction of commercial complex operated by Mr. Resident and co-venturers**	**₹ 30,00,000**
12.	**A partnership firm dealing in Properties**	**₹ 20,00,000**

A.8 I) Bank Accounts

Mr. Resident on his migration for the purpose of employment

— Becomes Non-Resident Indian (NRI). He is also Person of Indian Origin (PIO), so for as item No.1 to 6 are concerned, question is in respect of Bank accounts,

— Mr. Resident should inform his bank regarding the change in his status as Non Resident under the FEMA

— All the above accounts will be designated as Non-Resident Ordinary Account (NRO – A/cs) except the account of HUF, Family Trust and Discretionery Trust. Mr. Resident can continue to operate the above accounts,

— Legitimate dues such as Dividend, interest, sale proceeds of shares, rent etc. receivable in India in rupees, can be credited to the NRO accounts.

II) Business Ventures in India

The steps to be taken for the following activities and Investment are enumerated as under:

Activity/Investment	FEMA Provisions
1. a) Continuation of proprietary business in India b) As a partner of a firm – Garment Business c) As Co-venturer Real Estate Development	These are permitted Capital Account Transactions under Schedule 4 of Notification No. FEMA 20(R), therefore Mr. Resident can continue with the Banking A/c and the business
2. a) Continuing as a Director of a Company b) Continuing as a Member of Association of Persons c) Continuing as a trustee d) Having interest in Trust	No permission of RBI is required as same is not prohibited
3. Holding of Immovable Properties in India (and not dealing in them) (Item No. 8 of the question)	No permission of RBI is required [Section 6(5) of the FEMA]
4. Partner of a firm dealing in Real Estate (Item No. 12 of the question)	Should retire from the firm as RBI does not allow real estate dealings by Non-Residents including NRIs [Notification No. FEMA 20(R)]
5. Real estate development	Activity is permitted by RBI [Notification No. FEMA 1 & 20(R)]

General permission is available to hold and let out the immovable properties in India by Non-Resident Indian u/s. 6(5) of the FEMA, including holding of securities.

Q.9 Mr. Resident has Shares, debentures, fixed deposits in Companies, loans given or accepted, Units of Mutual Funds and Government securities as under.

i) 10,000 Shares of X-(P) Ltd.

ii) 20,000 Shares in A-Ltd. (Listed Company)

iii) 10,000 Debentures in B-Ltd. (Public Company — Not listed)

iv) 5,000 Debentures in C-Ltd. (Deemed Public Company)

v) 1000 Convertible Debentures in D-Ltd. (Listed Company)

vi) ₹ 25 lakhs in Fixed Deposits spread over with few private and public limited companies (Some listed, some unlisted)

vii) Units of various schemes of mutual fund

viii) National Savings Certificates

ix) Government Securities & RBI Relief Bonds

x) Public Provident Account in State Bank of India

xi) Personal Accident Policy – For 15 years ₹ 10 lakhs

xii) LIC – Policies in force, maturing after 5, 10, 15 years from date of departure.

xiii) Credit Cards – of

BOB – Gold – (Domestic – Rupees)

Citi Card – (Domestic – Rupees)

Standard Chartered – (Combined Card for both Domestic and International)

xiv) Loans given to A – Ltd. Loan to B (Friend)

xv) Loan taken from – T & from bank

xvi) Jewellery kept in safe deposit locker

What steps is Resident advised to take?

A.9 Steps to be taken in respect of each of the above activity is outlined as under:

Investment – Assets/Activity	**FEMA – Provisions – Steps to be taken**
1. a) Shares Debentures, Convertible Debentures in Private & Public Limited Companies (Item Nos. i to v)	— Inform the companies concerned about change of status as "PROI" under FEMA — PROI can hold Indian security [S.2(za) of FEMA] as provided u/s.6(5) of FEMA
b) F.D. – item (vi)	— Fixed Deposit with companies is permitted under Reg.6(2) of the Notf.5(R) of the FEMA on non-repatriation basis.

Investment – Assets/Activity	FEMA – Provisions – Steps to be taken
2. Units & Govt. Securities, PPF (Item Nos. (vii), (viii), (ix) and (x)	— No permission is required – as securities can be held by PROI as provided u/s. 6(5) of the FEMA. However he will be required to close the PPF Account as required under PPF Act, 1968.
3. Holding of Insurance Policies (Item No. xi & xii)	— No permission is required. Allowed to pay the premium on LIC Policies as per Notf.12(R) of the FEMA, out of NRE/NRO account of the policy holder
4. Credit Cards (Item No. xiii)	— Can continue to hold Domestic Cards and International Credit Cards as well. Pay for Domestic Cards from NRO / NRE accounts. Pay for International Credit Cards from NRE account or from remittance from abroad. Local expenses in rupees can only be debited through International Credit Card.
5. Loans given or loans taken (Item No. xiv & xv)	— Reg.10 of Notf. 4 permits continuation of the loans given by resident to another resident, before the lender becomes PROI. In respect of loans taken from Authorised Dealer/ bank, the same can continue as provided in Reg. 9 of the Notification 4. Lending by Resident to Non-Resident is generally not allowed to be continued as per the Notf. No. 4 except allowed specifically. and hence Mr. Resident requires RBI approval to continue with loan from T.

Investment – Assets/Activity	FEMA – Provisions – Steps to be taken
6. Jewellery (Item No. xvi)	— No permission is required for continuing to hold it in India. As what is sought to be regulated by FEMA is security, currency and immovable property.

Q.10 Mr. Resident has taken loans from various parties. Kindly advise him as to steps to be taken for continuance of the loans on change of his status from Resident to PROI.

1. **Bank of Baroda ₹ 1,00,000 (against FDR and shares)**
2. **HDFC ₹ 2,00,000 for purchase of flat and repayment to HDFC in monthly instalments over the next 15 years**
3. **From Uncle ₹ 3,00,000 (for marriage of daughter)**
4. **Hand loan ₹ 10,000 from friend**
5. **HUF ₹ 20,000 @ 12% interest where Mr. Resident is a Karta**

A.10 1. Mr. Resident should inform all lenders regarding change of his status.

1.1. Bank of Baroda can continue the loan (Notification No. 4 – Regulation 9).

2. Regulation 8 of FEMA Notification No. 4, permits certain financial institutions providing housing finance; e.g. HDFC, LIC Housing Corporation Ltd. etc. to grant housing loans to Non-Resident Indians. In view there of HDFC also can continue the loan to Mr. Resident.

3. Regulation 8B of FEMA Notification No. 4 permits a resident individual to grant loan to NRI relative. Regulation 5 of FEMA Notification No. 16 also deals with loan in Rupees to non-resident who is NRI relative. FEMA Ntf. 4 does not define 'Relative'; however, FEMA Ntf. 16 defines 'Relative' to mean a relative as defined in Section 6 of erstwhile Companies Act, 1956. Father's brother i.e. Uncle is not included in the definition of Relative in both Companies Act, 1956 as well as Companies Act, 2013. However, relative includes members of the same HUF. Hence, if Uncle and Mr. Resident are members of the same HUF, the loan can continue, else Uncle of Mr. Resident & Mr. Resident should inform RBI regarding loan and take RBI permission, to continue with the loan to Mr. Resident as he has become PROI. However loan in Foreign Exchange under LRS will be permitted from uncle after Mr. Resident becomes PROI.

4. A friendly loan of ₹ 10,000 will require RBI approval.

5. Loan from HUF also stands on the same footing & rate of interest on loan is also a subject matter of approval by RBI as HUF is not treated as Relative as opposed to members of the same HUF are treated as relatives.

Note: Lending in Rupees by Resident to Non-Resident is not permitted except in some cases of lending by Authorised Dealer in India, Housing institutions and by companies to its employees who are PROI, resident individuals to NRI relatives [Reg. 7, 8, 8A, 8B & 9 of Notf.4]

Q.11 Mr. Resident is a founder partner of International Enterprises and has 60% share in profit. It deals in engineering items. His capital in the firm is ₹ 10 lakh, loan a/c is ₹ 20 lakh. What formalities he/firm should observe?

A.11 FEMA permits Non-Resident Indians to invest on Non-Repatriation basis by way of capital contribution in any proprietary or partnership concern in India engaged in any industrial, commercial or trading activity in India. The firm can also retain the loan as provided in Reg.10 of the Notf. 4.

Schedule 4 to Notification No. FEMA 20(R)/2017-RB, dated 7-11-2017 deals with the investment by NRI in the Indian Partnership firm on non-repatriation basis.

Q.12 Mr. Resident (R) has following shares and Debentures, kindly advise Mr. R as to steps to be taken to continue with the investment.

1.	**ITC Ltd.**	**1,000 Shares**
2.	**ABB Ltd.**	**2,000 Shares**
3.	**TISCO**	**5,000 Shares and 1,000 Debentures**
4.	**Indian Cotton Co. (P) Ltd.**	**20,000 Shares (55% shareholding)**

A.12 Mr. Resident should write to each and every company/demat participant agent to record the change in his status as 'Non Resident' and his overseas address. This should be done preferably just before his proceeding to the U.S. in the following format stating that he will not seek repatriation of capital.

a) Nationality

b) Date of leaving India

c) Purpose and duration of stay abroad

d) Foreign address

e) No. of shares held and their face value.

The concerned companies have to take an undertaking from Mr. Resident that he will not seek repatriation of capital from India.

In case of Indian Cotton Co. (P) Ltd. it is a company registered in India treated as an Indian company despite majority holding of shares by Non-Resident. The investment was made when investor was Resident. Such a company can do almost anything which an Indian company can do, subject to overall FDI policy of the Government of India and certain prohibited activities.

a) It does not need RBI permission to carry on any activity in India.

b) It can take loans and overdrafts in India, accept deposits and lend monies in India.

c) It can not carry specified prohibited activity as provided in Schedule 4 of the Notf. 20 R read with Notf. 1. such as agricultural operations, real estate trading, Nidhi & trading of TDR.

Q.13 Mr. Resident is the Chairman-cum-Managing Director of X Ltd. a quoted company and Director of Y (P) Ltd. He received annual remuneration of ₹ 6 lakhs per annum, superannuation of 25% of salary. He is also Director of ABC Engineering Co. (P) Ltd. He received sitting fees of ₹ 1,000 per meeting. He wants to know whether he can continue to receive salary as before and contribution to superannuation as before, by visiting India for about 14-15 days every month and advising on crucial policy matters and being available on FAX / E-mail / Mobile throughout 365 days even when he is in U.S. He is also reluctant to give up sitting fees from private company for sentimental reasons. He wants to have your considered views on the matter.

A.13 Regulation 3 of Notification No. FEMA 16/RBI dated 3rd May, 2000, provides that a company in or resident in India is permitted to make payment in rupees to its non wholetime director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the Memorandum of Association or Articles of Association or any agreement entered into by it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirements of any law, rules, regulations, directions applicable for making such payments are duly complied with.

The question should be approached in view of the above position.

If Mr. Resident claims to be PROI, then what is required to be demonstrated is the intention of Mr. Resident that he has migrated to USA for uncertain period.

Further to above Mr. Resident may find himself in a difficult position if he were to stay in India for more than 182 days and or draw a remuneraton for his regular and continuous services to the X Ltd.

If he is staying in India for more than 182 days in a year, if Mr. Resident is also Managing Director of X Ltd.,then in the subsequent year or from the time of his return to India as may be apparent from his conduct, he may be regarded as Resident as per Section 2(v)(i)(A) of the FEMA.

Therefore it is advisable for Mr. Resident to cease all executive position of Indian business and if possible control the affairs of his business from abroad if he wants to continue with his claim that he is PROI.

Q.14 Mr. Resident has given guarantee to Indian Bank for car loan of ₹ 4,00,000 taken by his son. Besides he has given his shares of ₹ 2,00,000 as collateral security to the said bank. He seeks your advice on his becoming Non Resident?

A.14 In terms of Notification No. FEMA 8/2000 RB dated 3rd May, 2000, Mr. Resident giving guarantee to Indian bank is not prohibited either when he is resident or when he becomes Non Resident. In fact Notf. 8 regulates only, guarantees provided by PRII to PROI and not the one provided by PROI as guarantees provided by PROI are not regarded as Capital Account Transactions.

As regards bank continuing the grant of loan to the resident on the security of shares of person who has become non resident, it is not prohibited. Authorised dealer can continue the loan to son of Mr. Resident on the collateral security of shares provided by Mr. Resident.

Q.15 Mr. Resident is Karta of R. (HUF) consisting of self, son, wife and daughter. HUF has lot of movable and immovable properties in India. Mr. R desires to know the residential status of HUF under FEMA as all properties are in India and their management will have to remain in India. He seeks your guidance in the matter?

A.15 RBI had clarified earlier under FERA that HUF cannot be Non Resident. It continues to be Resident though the Karta is Non Resident. HUF can continue to hold the properties in India. However, it may be noted that FEMA includes “HUF” in the definition of a person u/s.2(u).

Q.16 Mr. R had finalised the sale of the house property owned by him to resident for ₹ 50 lakh in June, 2012. Mr. R leaves India on 10-7-2018; Whether Mr. R will need permission from RBI in this liberalised environment?

A.16 Regulation 3(d) and 3(e) of Notification No. FEMA 21(R)/2018-RB, dated 26th March, 2018 states that an NRI or OCI may transfer (sell) any immovable property in India to a person resident in India [Regulation 3(d)] and transfer any immovable property other than agricultural or plantation property or farm house to an NRI or an OCI [Regulation 3(e)].

In view of the provision of Notification No. FEMA-21, sale of immovable property (house property) by non-resident to resident is freely permitted.

Mr. R can sell his immovable property without the RBI permission to Resident. However sale proceeds are not repatriable because the property was not acquired out of foreign exchange brought into India. Mr. R can remit in each financial year the amount upto US $ 1 mn. under Notification 13(R)/2016-RB dated 1st April, 2016 of FEMA and if he requires to remit in excess of US $ 1mn. then he can apply to RBI under the conditions of hardship as provided in the notification.

Q.17 What would be your advice in the instant case, had the buyer been a Non-Resident and ready to pay the total price to Mr. Resident in U.S. $ in the U.S. itself and credit his account in the U.S. Mr. Resident desires to know whether he can retain the sale proceeds in the U.S.?

A.17 Property is located in India and–

I. Sale is to an NRI or OCI i.e. erstwhile Person of Indian Origin

Mr. R can sell the property to a Non-Resident who is an NRI or OCI as defined in Notification No.21(R).

Such Non-Resident maybe a citizen of India i.e. NRI or may not be a citizen of India, but he should be a Person of Indian Origin i.e. OCI.

As per the said notification.

'Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India.

'Overseas Citizen of India (OCI)' means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.

A reference to Person of Indian origin is now removed from the FEMA except in Notf 5(R) in respect of the Banking Accounts and deposits.

II. Sale to a Non-Resident who is not a citizen of India and who is not a Person of Indian Origin.

There is no permission for sale of property to a Non-Resident who is not a Person of Indian Origin and who is not an Indian citizen except (a) the Long term Resident Visa Holder in India being citizen of Afghanistan, Pakistan or Bangladesh belonging to minority community in those countries namely Hindus, Sikhs, Buddhists, Jains, Parsis and Christians under conditions as provided in Reg 7 of the Notf 21 (R) and (b) a spouse of the NRI and OCI under conditions as provided in Ref 6 of the Nitf 21(R).

Therefore Mr. R has to obtain specific permission from Reserve Bank of India for the purpose.

In any case the consideration will not be allowed to be retained in USA.

Q.18 Mrs. S mother of Mr. R is a widow. She was born in Sweden. She wants to return to Sweden for good. She desires to take with her the sale proceeds of movable and immovable properties situated in India. She wants to know:

Whether it is possible for her? If yes, how to go about it?

A.18 Foreign born widows can avail of the facility of remittance of sale proceeds of assets.

Facts

Mrs. S is a foreign born widow, who has inherited assets of her deceased husband, who was an Indian Citizen resident in India.

Facility of Repatriation

In such a case Mrs. S may remit an amount not exceeding US $ 1 mn. per financial year on production of documentary evidence in support of acquisition, inheritance or legacy of assets by her. However, the annual ceiling on remittance does not include the funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign state on repatriation basis under the relevant FEMA Notifications 20(R) and 21(R) respectively and any current Income earned by her.

This facility is also available to an NRI or Person of Indian Origin which will have the same meaning assigned under the Foreign Exchange Management (Deposit) Regulations, 2016 wherein it is defined as under:

'Person of Indian Origin (PIO)' means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or

c) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or

d) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c)

Explanation: for the purpose of this sub-regulation, the expression 'Person of Indian Origin' includes an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

In the present case Mrs. S is a spouse of an Indian Citizen and is covered by the above definition of PIO. Therefore, she can remit the proceeds up to US$ 1 mn. per annum, as stated above in addition to the current Income as well as other assets/investments held on repatriation basis.

2 Chapter Non-Resident Indians

Q.19 Who is considered as an Non-Resident Indian (NRI) and Overseas Citizen of India (OCI) under FEMA?

A.19 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' (OCI) cardholder within the meaning of section 7(A) of the Citizenship Act, 1955.

'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19-8-2002 issued by the Central Government are now deemed to be 'Overseas Citizen of India' cardholders w.e.f. 12-5-2015

Person of Indian origin are now required to compulsorily convert their status to OCI card holders or else they will be required to apply for OCI card afresh after 30th September, 2018.

Following categories of foreign nationals are eligible for registration as Overseas Citizens of India (OCI) Cardholder:-

(1) Who was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26-1-1950; or

(2) Who was eligible to become a citizen of India on 26-1-1950; or

(3) Who belonged to a territory that became part of India after 15-8-1947; or

(4) Who is a child or a grandchild or a great grandchild of such a citizen; or

(5) Who is a minor child of such persons mentioned above; or

(6) Who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or

(7) Spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.

Note : No person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder.

Thus, OCI is wider in scope than PIO which used to be up to 3 generations of foreign citizens. Now up to 4th generation of foreign citizens can be considered as OCI. Further, there are additional conditions in case of spouses that marriage should have subsisted for at least two years prior to application for OCI card.

Q.20 Mr. NR desires to know about the avenues available to him for investment into India ?

A.20 Avenues for investment available to NRIs/PIOs for investment into India are briefly summarized below

1. Bank Accounts and Deposits [As per Notification 5(R) of the FEMA]

a) Non-Resident (External) Rupee (NRE) Accounts (Principal / Interest Repatriable)

- *Savings* - As specified in Master Direction DBR. Dir. No.84/13.03.00/2015-16 dated 3rd March, 2016, Interest rates on NRE/ NRO deposits shall not be higher than those offered by the banks on comparable domestic rupee term deposits. The benefit of additional interest rate on deposits by senior citizens shall not be available to NRE and NRO deposits. Currently the interest rate offered by State Bank of India (SBI) is 3.5% for balance up to ₹ 1 crore and 4% p.a. for balance above ₹ 1 crore.
- *Term deposits* – Currently the interest rate offered by SBI on NRE fixed deposits ranges from 6.7% to 6.85% based on tenor (1 yrs to 10 yrs) and size (below ₹ 1 crore to above ₹ 10 crore).

b) FCNR (B) (Principal/Interest Repatriable)

Deposits of funds in the account may be accepted in any permitted currency with effect from October 19, 2011. ‘Permitted currency’ for this purpose would mean a foreign currency which is freely convertible as defined in terms of Regulation 2(v) of FEMA 14/2000-RB dated May 3, 2000, as amended from time-to-time

- Rate of Interest - Fixed or floating within the ceiling rate of LIBOR/SWAP rates for the respective currency/ corresponding term plus (i) 200 basis points for period of deposit of 1 year to less than 3 years; (ii) 300 basis points for period of deposit 3 years and above up to and including 5 years.
- Maturity of deposits: 1-5 years.

c) NRO Accounts (Current earnings repatriable)

- Savings - Normally operated for crediting rupee earnings / income such as dividends, interest. Currently the interest rate is 3.5 per cent similar to as discussed in (a) above. Current income is repatriable after payment of taxes if so deposited in the NRO account.
- Term Deposits - Similar to as discussed in (a) above.
- Repatriation from NRO balances - Authorised Dealers can allow remittance/s upto USD 1 million per financial year (April-March) for *bona fide* purposes, from balances in NRO accounts subject to payment of applicable taxes. The limit of USD 1 million per financial year includes sale proceeds of immovable properties held by NRIs/PIO.

2. Other Investments on repatriation basis [Notification 20(R) read with FDI policy of GOI]

- Equity Shares, Share warrants, fully compulsorily and mandatorily Convertible Debentures ('CCDs') and Fully compulsorily and mandatorily Convertible Preference shares ('CCPs') of Indian companies under FDI scheme (including automatic route & FIFB).
- Equity Shares, Share warrants, Fully compulsorily and mandatorily Convertible Debentures ('CCDs') and Fully compulsorily and mandatorily Convertible Preference shares ('CCPs') of Indian companies through stock exchange under Portfolio Investment Scheme.
- Government dated securities/treasury bills.
- Units of domestic mutual funds.
- Bonds issued by a public sector undertaking (PSU) in India.

- Shares in Public Sector Enterprises being dis-invested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.
- Perpetual debt instruments and debt capital instruments issued by banks in India.
- Rupee denominated bonds/ units issued by Infrastructure Debt Funds
- Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20(R)
- National Pension Scheme

3. Other Investments on non-repatriation basis [As per Notification 20(R), unless specified otherwise]

- Government dated securities (other than bearer securities)/ treasury bills.
- Units of domestic mutual funds.
- Units of Money Market Mutual Funds in India.
- The capital of a LLP, firm or proprietary concern in India, not engaged in any agricultural or plantation activity or real estate business.
- Convertible Note issued by startup company.
- Units in Investment Vehicle.
- Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20(R).
- National Savings Certificates.
- Authorised Chit funds.
- Equity Shares, Share warrants, Fully compulsorily and mandatorily Convertible Debentures ('CCDs') and Fully compulsorily and mandatorily Convertible Preference shares ('CCPs') of Indian companies other than under Portfolio Investment Scheme.
- Deposits with a company registered under the Companies Act, 1956 including NBFC registered with RBI, or a body corporate created under an Act of Parliament or State Legislature, a

proprietorship concern or a firm out of rupee funds which do not represent inward remittances or transfer from NRE/FCNR(B) Accounts into the NRO Account. [Notification 5(R) of FEMA]

- Commercial Paper issued by an Indian company. [Notification 5(R) of FEMA]

4. Investment in immovable Property [Notification 21(R) of FEMA]

- Mr. NR may acquire immovable property in India other than agricultural land/ plantation property or a farm house out of repatriable and non-repatriable funds.

  In respect of such investments NRIs are eligible to repatriate

- Sale proceeds of immovable property acquired in India to the extent of repatriable funds used for acquiring the property, up to two residential properties. The balance will be repatriable through NRO Account upto USD 1 million per financial year.

- Refund of (a) application / earnest money / purchase consideration made by house-building agencies/seller on account of non-allotment of flats / plots and (b) cancellation of booking/deals for purchase of residential/commercial properties, together with interest, net of taxes, provided original payment is made out of NRE/FCNR(B) account/inward remittances and the authorised dealer is satisfied about the genuineness of the transaction.

- Housing Loan in rupees availed of by NRIs from ADs / Housing Financial Institutions can be repaid by the close relatives in India of the borrower.

5. Facilities to returning NRIs/PIO

- May continue to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security or property was acquired, held or owned when resident outside India. [Section 6(4) of FEMA]

- May open, hold and maintain with an authorised dealer in India a Resident Foreign Currency (RFC) Account to transfer balances held in NRE/FCNR(B) accounts. Proceeds of assets held outside India at the time of return, can be credited to RFC account. The funds in RFC accounts are free from all restrictions regarding utilisation of foreign currency balances

including any restriction on investment in any form outside India. [Notification 10(R) of FEMA]

Q.21 NRIs can open various types of bank accounts in India, kindly explain the comparative provisions of such bank accounts.

A.21

Particulars	Non-Resident (External) Rupee Account Scheme [NRE Account]	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
(1)	(2)	(3)	(4)
Who can open an account	NRIs and PIOs himself Individual/entities of Pakistan and Bangladesh shall requires prior approval of the Reserve Bank of India		Any person resident outside India himself for putting through bonafide transactions in rupees. Individuals/ entities of Pakistan nationality/ origin and entities of Bangladesh origin require the prior approval of the Reserve Bank of India. Post Offices in India may maintain savings bank accounts in the names of persons resident outside India and allow operations on these accounts subject to the same terms and conditions as are applicable to NRO accounts maintained with an authorised dealer/ authorised bank.
Joint account	May be held jointly in the names of two or more NRIs/ PIOs. NRIs/ PIOs can hold jointly with a resident relative on 'former or survivor' basis (relative as defined in Companies Act, 2013). The resident relative can operate the account as a Power of Attorney holder during the life time of the NRI/ PIO account holder.		May be held jointly in the names of two or more NRIs/ PIOs. May be held jointly with residents on 'former or survivor' basis.
Currency	Indian Rupees	Any permitted currency i.e. a foreign currency which is freely convertible	Indian Rupees

Particulars	Non-Resident (External) Rupee Account Scheme [NRE Account]	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
(1)	(2)	(3)	(4)
Type of Account	Savings, Current, Recurring, Fixed Deposit	Term Deposit only	Savings, Current, Recurring, Fixed Deposit
Period for fixed deposits	From one to three years, However, banks are allowed to accept NRE deposits above three years from their Asset-Liability point of view	For terms not less than 1 year and not more than 5 years	As applicable to resident accounts.
Permissible Credits	Credits permitted to this account are inward remittance from outside India, interest accruing on the account, interest on investment, transfer from other NRE/ FCNR(B) accounts, maturity proceeds of investments (if such investments were made from this account or through inward remittance). Current income like rent, dividend, pension, interest etc. will be construed as a permissible credit to the NRE account. Care: Only those credits which have not lost repatriable character. Foreign Currency and travelers cheque can be deposited only by account holder during his temporary visit to India subject to Currency declaration Form.		Inward remittances from outside India, legitimate dues in India and transfers from other NRO accounts are permissible credits to NRO account. Rupee gift/ loan made by a resident to a NRI/ PIO relative within the limits prescribed under the Liberalised Remittance Scheme may be credited to the latter's NRO account.
Permissible Debits	Permissible debits are local disbursements, remittance outside India, transfer to other NRE/ FCNR(B) accounts and investments in India.		The account can be debited for the purpose of local payments, transfers to other NRO accounts or remittance of current income abroad. Apart from these, balances in the NRO account cannot be repatriated abroad except by NRIs and PIOs up to USD 1 million, subject to conditions specified in Foreign Exchange Management (Remittance of Assets) Regulations, 2016.

Particulars	Non-Resident (External) Rupee Account Scheme [NRE Account]	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
(1)	(2)	(3)	(4)
			Funds can be transferred to NRE account within this USD 1 Million facility.
Repatriablity	Repatriable		Not repatriable except for all current income. Balances in an NRO account of NRIs/ PIOs are remittable up to USD 1 (one) million per financial year (April-March) along with their other eligible assets.
Taxabilty	Income earned in the accounts is exempt from income tax and balances exempt from wealth tax		Taxable
Loans in India	AD can sanction loans in India to the account holder/ third parties without any limit, subject to usual margin requirements. These loans cannot be repatriated outside India and can be used in India only for the purposes specified in the regulations. In case of loans sanctioned to a third party, there should be no direct or indirect foreign exchange consideration for the non-resident depositor agreeing to pledge his deposits to enable the resident individual/ firm/ company to obtain such facilities. In case of the loan sanctioned to the account holder, it can be repaid either by adjusting the deposits or through inward remittances from outside India through banking channels or out of balances held in the NRO account of the account holder. The facility for premature withdrawal of deposits will not be available where loans against such deposits are availed of. The term "loan" shall include all types of fund based/ non-fund based facilities.		Loans against the deposits can be granted in India to the account holder or third party subject to usual norms and margin requirement. The loan amount cannot be used for relending, carrying on agricultural/ plantation activities or investment in real estate. The term "loan" shall include all types of fund based/ non-fund based facilities.

Particulars	**Non-Resident (External) Rupee Account Scheme [NRE Account]**	**Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]**	**Non-Resident Ordinary Rupee Account Scheme [NRO Account]**
(1)	**(2)**	**(3)**	**(4)**
Loans outside India	Authorised Dealers may allow their branches/ correspondents outside India to grant loans to or in favour of non-resident depositor or to third parties at the request of depositor for bona fide purpose against the security of funds held in the NRE/ FCNR (B) accounts in India, subject to usual margin requirements. The term "loan" shall include all types of fund based/ non-fund based facilities		Not permitted
Rate of Interest	As per guidelines issued by the Department of Banking Regulations		
Operations by Power of Attorney in favour of a resident	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local payments or remittance to the account holder himself through normal banking channels but not to any other account outside India or to another NRE Account or any Gift to Resident.		Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local payments in rupees, remittance of current income to the account holder outside India or remittance to the account holder himself through normal banking channels but not to any other account outside India or to another NRE Account or any Gift to Resident While making remittances, the limits and conditions of repatriability will apply.
Change in residential status from Non-resident to resident	NRE accounts should be designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts, at the option of the account	On change in residential status, FCNR (B) deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by the account holder.	NRO accounts may be designated as resident accounts on the return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period.

Particulars	Non-Resident (External) Rupee Account Scheme [NRE Account]	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
(1)	(2)	(3)	(4)
	holder, immediately upon the return of the account holder to India for taking up employment or on change in the residential status.	Authorised dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder.	Likewise, when a resident Indian becomes a person resident outside India, his existing resident account should be designated as NRO account.

Note:

a. When a person resident in India leaves India for Nepal and Bhutan for taking up employment or for carrying on business or vocation or for any other purpose indicating his intention to stay in Nepal and Bhutan for an uncertain period, his existing account will continue as a resident account. Such account should not be designated as Non-resident (Ordinary) Rupee Account (NRO).

b. ADs may open and maintain NRE / FCNR (B) Accounts of persons resident in Nepal and Bhutan who are citizens of India or Persons of Indian origin, provided the funds for opening these accounts are remitted in free foreign exchange, Interest earned in NRE/FCNR(B) accounts can be remitted only in Indian rupees to NRIs and PIO resident in Nepal and Bhutan.

c. In terms of Regulation 4(4) of the Notification No.FEMA.5(R) ADs may open and maintain Rupee accounts for a person resident in Nepal/Bhutan.

d. AD Category-I banks and authorized banks may credit proceeds of demand drafts/bankers' cheques/account payee cheques issued against encashment of foreign currency to the NRE account of the NRI account holder where the instruments issued to the NRE account holder are supported by encashment certificate issued by AD Category-I/Category-II.

e. AD Category – I banks and authorised banks may permit remittance of the maturity proceeds of FCNR(B) deposits to third parties outside

India, provided the transaction is specifically authorised by the account holder and the authorised dealer is satisfied about the *bona fides* of the transaction.

Q.22 Mr. NR desires to know how to operate NRO / NRE A/c?

A.22 The procedure for operating NRO/NRE Account is outlined below.

1. Debits for local payments in rupees including payments for investments subject to compliance with the relevant regulations made by the Reserve Bank are allowed freely from the NRO accounts. Legitimate dues in India of the account holder (Rent, Interest, Dividend and other local receipts) and remittances received from abroad through banking channels are permitted to be credited freely.
2. Local payments/disbursements can be made by debit to NRE account freely. Remittances from abroad can be credited to the NRE account. Even, funds received locally being of repatriable nature can be credited to NRE account. E.g., Sale proceeds of shares, purchased under Portfolio Investment Scheme on repatriation basis.
3. Funds held in NRE accounts can be repatriated abroad freely. Funds held in NRO accounts from a local source cannot be repatriated outside India. However, interest earned on NRO accounts and current income can be repatriated or credited to NRE A/c.
4. Funds in NRE/NRO accounts can be utilised for payment of air fare to/from/in India of the account holder and/or his dependents or any legitimate disbursements in India is permitted.
5. Power of Attorney holder can also operate NRO/NRE account to make local payments or make investments in India if account holder or a bank designated by him has been granted permission by Reserve Bank to make investments in India. He can repatriate the funds outside India to account holder, however he cannot make gift to any resident or transfer funds from one account to another NRE account.

[Notification No. FEMA 5(R), Schedule 1]

Q.23 Please explain Mr. NR about overdraft facility in NRO/NRE A/c.

A.23 Overdraft facilities and loan facilities against NRO/NRE Account are explained as under:

1. Authorised dealers are permitted to allow overdraft in NRO account holder subject to their commercial judgment.

2. NRO / NRE account holders can take loans/overdrafts against their fixed deposits. Proceeds of such loans/overdrafts cannot be used for relending, carrying on agricultural/plantation activities or for investments in real estate business.

   However, such loans can be utilised for direct investments in India on non repatriation basis by way of contribution to the capital of Indian firms/ companies subject to the provisions of the relevant Regulations made under the Act and for acquisition of flat / house in India for his own residential use subject to the provisions of the relevant Regulations made under the Act.

3. Repayment of such loans/overdrafts will have to be made either by adjustment of the deposits or by fresh remittances from abroad or out of local rupee resources in the NRO account of the borrower.

   [Paragraph 6, schedule 1 of Notf. No.5(R)]

Q.24 Whether nomination facility is allowed in NRO/NRE accounts?

A.24 Yes.

1. Nomination facility is allowed in NRO/NRE accounts.

2. Funds held in NRO accounts will be allowed to be credited to the non-resident nominee's NRO account only and no repatriation is permitted. However, funds held in NRE account will be permitted by the authorised dealers to be repatriated, in case nominee is non Resident.

Q.25 Whether transfer of funds is allowed between two NRE Account?

A.25 1. Authorised dealers can permit transfer of funds from the NRE account of one person to the NRE account of another person for bona fide personal purposes such as personal expenses, education of children and gift. However such transfer has to be made by account holder himself and not through Power of Attorney holder.

2. Remittances made for credit to rupee accounts (i.e., NRE/NRO accounts) maintained by NRIs are permitted.

   [Notification No. FEMA 5(R), Schedule 1]

Q.26 Please explain the procedure for opening Foreign Currency Accounts and method of operating them?

A.26 1. NRIs can maintain accounts in foreign currencies (FCNR accounts) with authorised dealers in India. FCNR accounts can be maintained

in any permitted currency which is freely convertible such as Pound Sterling (£) U.S. Dollar ($), Deutsche Mark, Japanese Yen and Euro. FCNR accounts can be maintained only in the form of term deposits (deposits for 1 year to 5 years) and not in the form of current/savings accounts. Premature withdrawal is permitted subject to levy of penalty (rate of interest is reduced by 1% from the agreed rate). Interest on these deposit, is payable only if they are kept for a minimum period of 1 year.

Funds in FCNR accounts are freely repatriable abroad.

Nomination is allowed in FCNR accounts with another non-resident.

Repatriation of funds to the non-resident nominees is permitted.

2. Debits to FCNR accounts are allowed freely for local payments, and for certain investments in India. These are dealt with separately elsewhere.

   [Notification No. FEMA 5(R), Schedule 2]

3. OCB's have been prohibited to open or continue with these accounts w.e.f. 3-10-2003.

Q.27 Mr. NR informs you that NRIs can remit income from investment made in India on Non-repatriation basis. Is it true?

A.27 Repatriation of income from investments made on Non Repatriation basis is permitted.

Income earned on such investments/Banks, deposits (made on Non Repatriation basis) by NRIs can be repatriated abroad.

Income which can be remitted is net of tax.

[AP (DIR.) CIRCULAR NO. 56 DATED 26th NOV., 2002 read with Section 2(j) of the FEMA; Notification FEMA 5(R) - Schedule 3]

Q.28 Please explain various direct investment schemes under which both principal and income can be repatriated by NRIs and other Non-residents.

A.28 Foreign direct investment ("FDI") is the investment by persons resident outside India in Indian company (i.e. in an unlisted company or in 10 per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company) and in Indian LLP. FDI in India is regulated by the Reserve Bank of India ("RBI"), Department of Industrial Policy and Promotion ("DIPP") in the Ministry of Commerce, along with

the relevant sectoral regulators by issuing Press Notes/Press Releases which were thereafter notified by the Reserve Bank of India as amendments to the erstwhile FEMA 20.

Over the years, investments through the FDI route have been very beneficial to India. This can be noted from the following:

a. FDI provides an external source of financing for the country (including during economic hardships).

b. FDI leads to transfer of resources, know-how and capital from developed countries; and

c. FDI provides a track for economic development, job creation, literacy growth and improves the competitiveness of domestic producers/ service providers.

The following regulations / policies lay down the framework for FDI in India:

a. The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("FEMA 20(R)") issued by the RBI which will be effective from 8th November 2017 in supersession of the FEMA 20;

b. Consolidated FDI Policy Circular that is issued by the DIPP, under the aegis of the Ministry of Commerce and Industry, ever year which consolidated all the Press Notes or Press Releases that are notified by RBI. The latest Consolidated FDI Policy No. 5(1)/2017-FC-1 is dated 28 August 2017 ("FDI Policy");

c. Master Direction on Foreign Investment in India issued by RBI which consolidates all the direction issued by RBI throughout the year. The latest Master Direction on Foreign Investment in India was issued on 4 January 2018 (updated as on 24th September 2018) ("MD-FI")

FDI can be made in: (i) ordinary equity shares (including partly paid shares), warrants, compulsorily convertible preference shares, and compulsorily convertible debentures of a company; (ii) convertible notes of start-up companies and (iii) partnership interests of an LLP.

FDI investment procedure depends on the sector in which the investment is made as explained below. Regulation 5 of FEMA Notification 20(R) stipulates that any investment made by a person resident outside India shall be subject to the entry routes, sectoral caps or the investment limits, as the case may be, and the attendant conditionalities for such investment as laid down in these Regulations or the relevant Schedules.

Accordingly, there are schemes available to the NRIs for making strategic investments wherein both the principal as well as income are repatriable. They are referred to as direct investments or bulk investments.

These have been outlined in regulation 5(1) read with Schedule 1 to Notification No. FEMA 20(R).

The regulations contained in the said Notifications are in regard to sale and purchase of Indian Securities by Non-Residents including person of non Indian origin.

For the sake of convenience and clarity the various types of Investments have been classified (grouped) under separate schedules.

Schedule – 1 [*Vide* Regulation 5(1)]

Purchase/ Sale of capital instruments of an Indian company by a person resident outside India

Note: Investment under this scheme is available to both Non-Resident Indians as well as other Non-Residents on repatriation basis.

The rules and procedure have been explained in detail in the following paragraphs.

1. Investment in equity /share warrants / convertible preference shares and convertible debentures

   Automatic Route of RBI for issue of shares etc. by an Indian company

   Important Preconditions for Issue of Securities by Indian company to Non-Residents

   i) The company should not be engaged in any activity which is included in Regulation 15 such as Lottery, Gambling / Betting / Casinos (including foreign technology collaboration / licensing for franchise, trademark, brand name in these areas), Chit funds (except NRIs / OCIs on non-repatriation basis), Nidhi company, Trading in Transferable Development Rights (TDRs), Real estate business or construction of farm houses, cigars/ cigarettes of tobacco / tobacco substitutes, activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations.

   ii) The entry routes and sectoral caps for the total foreign investment in an Indian entity shall be as specified in Regulation 16B. The detailed table is available for reference in Notification No. FEMA 20(R)/2017-RB dated November

7, 2017 at https://www.rbi.org.in/Scripts/ NotificationUser.aspx?Id=11253&Mode=0#F24

iii) Sectoral cap for the specified sectors/ activities is the limit indicated against each sector. The total foreign investment shall not exceed the sectoral/statutory cap. Further, Foreign investment in the specified sectors/activities is subject to applicable laws/ regulations, security and other conditionalities.

iv) In sectors/ activities not specified in Regulation 16B or not prohibited under regulation 15 of these Regulations, foreign investment is permitted up to 100 percent on the automatic route, subject to applicable laws/ regulations, security and other conditionalities. However, foreign investment in financial services other than those indicated under serial number "F" in table to Regulation 16B would require prior Government approval.

v) If issue of shares is by offering of ADR/GDR then it is issued in accordance with the scheme of issue of FCCB and ordinary shares (through Depository Receipt Mechanism Scheme, 1993) & amendment from time to time.

vi) Payment for Shares or Debentures should be received by Inward Remittance through normal banking channel or by debit to NRE /FCNR Account.

vii) The price of the shares issued shall not be less than

(a) Price in accordance with the SEBI guidelines, in case of listed companies

(b) Valuation of capital instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company

Q.29 Mr. NR is interested to know the various Portfolio Investment Schemes available exclusively for the benefit of NRIs and OCIs – both on Repatriation basis as well as on Non-Repatriation basis.

A.29 Various investment opportunities available to NRIs for making investment under portfolio scheme has been detailed in Notification FEMA 20(R) in Schedule 3 [*vide* Regulation No. 5(3)].

Purchase/ Sale of Capital Instruments of a listed Indian company on a recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis.

Schedule – 3 [Regulation 5(3)]

1. A Non-resident Indian (NRI) or an Overseas Citizen of India (OCI) may purchase or sell Capital Instruments (i.e. equity shares, share warrants, fully & compulsorily convertible debentures, fully & compulsorily convertible preference shares) of a listed Indian company on repatriation basis, on a recognised stock exchange in India, subject to the following conditions:

   (i) NRIs or OCIs may purchase and sell Capital Instruments through a branch designated by an Authorised Dealer for the purpose;

   (ii) The total holding by any individual NRI or OCI shall not exceed 5 percent of the total paid-up equity capital on a fully diluted basis or should not exceed 5 per cent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company and the total holdings of all NRIs and OCIs put together shall not exceed ten percent of the total paid-up equity capital on a fully diluted basis or shall not exceed ten percent of the paid-up value of each series of debentures or preference shares or share warrants;

   Provided that the aggregate ceiling of 10 per cent may be raised to 24 percent if a special resolution to that effect is passed by the General Body of the Indian company.

2. The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a Non-Resident External (NRE) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

3. The NRE account will be designated as an NRE (PIS) Account and the designated account shall be used exclusively for putting through transactions permitted under this Schedule.

4. The sale proceeds (net of taxes) of the capital instruments may be remitted outside India or may be credited to NRE (PIS) account of the person concerned.

   W.e.f. 29th November, 2001, by Notification No. FEMA 46, RBI has prohibited the portfolio investment scheme for OCB and hereafter

OCB can only hold or sell their holdings, acquired prior to 29th Nov, 2001.

(Refer Notification 101 dt. 3-10-2003 in respect of other investment and deposits by OCBs).

It may however be noted that OCB have been now designated as Foreign company and such Foreign companies owned and/or controlled by NRIs/OCBs are permitted to invest in portfolio Scheme as recently announced by SEBI under RFPI regulations provided that they are not in the adverse notice of the RBI.

Q.30 Please explain the scheme for investment in shares/convertible debentures, on Non-Repatriation basis, available to NRIs whether by public issue, or private placement or rights issue without any limit. Are there any prohibited Investments?

A.30 This has been detailed in Schedule-4 to the Notification No. FEMA 20(R) which is detailed below.

Schedule – 4 [*Vide* Regulation 5(4)]

1. Purchase/ sale of capital instruments or convertible notes or units or contribution to the capital of an LLP

(1) A Non-resident Indian (NRI) or an Overseas Citizen of India (OCI), including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, may purchase/ contribute, as the case may be, on non-repatriation basis the following:

(a) Any capital instrument issued by a company without any limit either on the stock exchange or outside it.

(b) Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.

(c) The capital of a Limited Liability Partnership without any limit.

(d) Convertible notes issued by a startup company in accordance with these Regulations.

(2) The investment detailed at sub-para 1 above will be deemed to be domestic investment at par with the investment made by residents

2. Prohibited investments:

   Prohibition on purchase of capital instruments of certain companies.

   An NRI or an OCI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, shall not make any investment, under this Schedule, in capital instruments or units of a Nidhi company or a company engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

   Explanation: Real estate business will have the same meaning as laid down in regulation 16 wherein 'Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Investment in units of SEBI-approved Real Estate Investment Trusts (REITs) is excluded from definition of 'real estate business'. Similarly, earning of rent income on lease of the property, not amounting to transfer will not amount to real estate business.

3. Method of payment:

   The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

4. Sale/Maturity proceeds:

   i) The sale/maturity proceeds (net of applicable taxes) of capital instruments purchased or disinvestment proceeds of a LLP shall be credited only to NRO account of the investor, irrespective of the type of account from which the consideration was paid.

   ii) The amount invested in capital instruments of an Indian company or the consideration for contribution to the capital of a LLP and the capital appreciation thereon shall not be allowed to be repatriated abroad.

Q.31 Can an NRI make investment in securities other than shares or convertible debentures?

A.31 **1. Investment on repatriation basis**

An NRI may purchase without limit on repatriation basis

i) Government dated securities (other than bearer securities) or treasury bills;

ii) Units of domestic mutual funds;

iii) Bonds issued by a public sector undertaking (PSU) in India;

iv) shares in Public Sector Enterprises being dis-invested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids;

v) Perpetual debt instruments and debt capital instruments issued by banks in India;

vi. Rupee denominated bonds/units issued by Infrastructure Debt Funds;

vii) Listed non-convertible/redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20(R);

viii) National Pension Scheme.

NRI shall make payment either by inward remittance through normal banking channels or out of funds held in his/its NRE/FCNR account.

2. Investment on non-repatriation basis

An NRI may purchase without limit on non repatriation basis

i) Dated Government securities (other than bearer securities), treasury bills;

ii) Units of domestic mutual funds;

iii) Units of Money Market Mutual Funds in India; or

iv) National Plan/Savings Certificates;

v) The capital of a LLP, firm or proprietary concern in India, not engaged in any agricultural or plantation activity or real estate business;

vi) Convertible Note issued by startup company;

vii) Units in Investment Vehicle;

viii) Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20(R);

ix) National Savings Certificates;

x) Authorised Chit funds.

NRI shall make payment either by inward remittance through normal banking channels or out of funds held in his/its NRE/FCNR/NRO account.

3. Sale of Securities

NRI can

i) Sell such securities through a registered stock broker on a recognised stock exchange or

ii) Tender units of mutual funds to the issuer for repurchase or for payment of maturity proceeds or

iii) Tender Government securities/treasury bills to the Reserve Bank for payment of maturity proceeds.

4. Maturity proceeds of sale

Net sale/ maturity proceeds (after payment of taxes) of such securities, shall be credited to his NRO account.

Q.32 How rights shares and bonus can be issued to NRIs? Can they sell their rights entitlements?

A.32 1. Issue of Rights Shares

There is general permission (subject to certain conditions) for issue of Rights Shares to the NRIs (Regulation No. 6 of Notification No. 20(R)) on Repatriation basis provided the payment for the same is made out of NRE/FCNR A/c or direct remittance from abroad. However, (subject to certain conditions) rights entitlement on non-repatriation basis would be covered by the general permission even out of NRO A/c. The offer on rights basis and application for additional shares should not exceed the overall sectoral cap for non resident investment. The rights offer to NRI shall be at a price not less than offer price for residents. NRI exercising a right which was issued when he/ she was a person resident in India shall hold the capital instruments (other

than share warrants) so acquired on exercising the option on a non-repatriation basis.

2. Sale of Rights

NRIs intending to sell the rights, can make an application to Reserve Bank by a letter giving details of folio number, number of shares held and the manner in which the rights are being sold.

3. Bonus Shares

NRI can acquire bonus shares if the original shares were acquired or held by him in accordance with the Rules/ Regulations under FEMA. Bonus shares shall be subject to same conditions and restrictions as applicable to original shares.

Q.33 Can loans and overdrafts be granted against security of shares of NRIs. How the same are repaid?

A.33 Loans and overdrafts against shares etc.

1. An authorised dealer 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 following terms and conditions:

   i. The utilisation of loans shall be only for the own business of the borrower other than (i) Agricultural/plantation/real estate business, (ii) Trade in transferable development rights, (iii) Act as Nidhi or Chit fund company, and (iv) Investment in capital market including margin trading and derivatives. 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;

   ii. The loan amount shall not be remitted outside India or credited to NRE/FCNR(B)/NRNR account of the borrower;

   iii. The directives of RBI on such loans and directives on advances against shares/securities/immovable property shall be duly complied with;

   iv. 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;

[Regulation 7, Notification No. FEMA 4; FED Master Direction No. 6/2015-16 dated 1st Jan. 2016]

Q.34 Mr. NR is interested to know about 100% investment in housing sector. Is it permitted only to NRIs and not to foreigners? He wants to know more about the FDI regulations relating to such investment.

A.34 1. Under FDI Policy, investment in Housing and Real Estate Development is covered under the sector 'Construction Development: Townships, Housing, Built-up infrastructure' which is available for investment by all PROIs and not only NRIs. Earlier, the conditionalities specified for the sector were not applicable to NRIs but now such exception has been removed (except no lock-in period for certain kinds of projects for NRIs/OCIs) thereby bringing NRIs on par with other PROIs so far as investment in this sector is concerned.

Some of the important conditions which are required to be complied with for 100% investment in this sector under the automatic route are:

i. Each phase of the construction development project is to be considered as a separate project subject to the conditions.

ii. Minimum area to be developed and minimum capitalization conditions deleted.

iii. Foreign investment is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs).

iv. The project shall conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/ Local Body concerned.

v. The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy "developed plots" will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.

vi. Exits simplified

- Foreign investor can exit before the completion of project under automatic route subject to a lock-in-period of three years (calculated with reference to each tranche of foreign investment).

  This condition is not applicable to NRIs.

- Transfer of stake from non-resident investor to another non-resident investor not involving repatriation neither subject to lock-in period nor Government approval.

- Condition of lock-in period will not apply to Hotels and Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs/ OCIs.

vii. Prohibited Real estate business ambit is now relaxed to exclude (i) Investment in Real Estate Investment Trusts (REITs) registered with SEBI, (ii) Real estate broking services, and (iii) earning of rent /income on lease of the property not amounting to transfer and the term transfer includes:

- Sale, exchange or relinquishment.

- Extinguishment of any rights or compulsory acquisition under law.

- Allowing possession under Section 53A of Transfer or Property Act.

- Any arrangement including transfer of shares which has effect of transferring or enabling enjoyment of immovable property.

Q.35 What is Portfolio Investment Scheme and how to go about it?

A.35 The relevant provisions facilitating NRIs are included in schedule 3 to the Notf. No.20(R) of the FEMA. Under this scheme NRIs are permitted to acquire capital instruments of listed Indian companies through the stock exchange/s in India.

For this purpose (for portfolio investment under repatriation scheme),

NRI is required to designate a branch of Authorised Dealer for routing the transactions of purchase and sale of shares etc. All transactions should be routed only through the designated branch. All other conditions of portfolio

investment as explained earlier at Q.29 through stock exchange and at Q. 30 on Non-repatriation basis shall apply.

It may be noted that scheme has been withdrawn for OCB w.e.f. 29-11-2001.

Q.36 What is the relevance of the Foreign Direct Investment (FDI) policy of the Government of India for investment by PROI under FEMA?

A.36 The policy of the Government states overall investment objectives in India. It lays down conditions with the sector under which foreign investment is permitted under Automatic Route or with the permission of the Government.

Regulation 16.B specifies the sectoral caps and approval route for various sectors / activities. Sectoral cap for the specified sectors/ activities is the % of capital Instruments limit indicated against each sector. The total foreign investment shall not exceed the sectoral/ statutory cap. Also, whether such investment is under Automatic route or Govt. route is specified therein.

In sectors/ activities not specified in Regulation 16.B or not prohibited under regulation 15 of these Regulations, foreign investment is permitted up to 100 percent on the automatic route, subject to applicable laws/ regulations, security and other conditionalities.

These sectors are decided on the basis of various criteria such as local expertise and the required protection in the sector, technology import, indigenisation, priority of Infrastructure, hazardous Industry, Strategic importance and Security concern etc.

Q.37 What provisions will prevail in case of difference between FEMA & FDI policy?

A.37 As referred above, Government policy is the legal basis for investment in India, therefore in such cases of difference Government policy will prevail however now with the non ambiguous language in the consolidated policy announced every year, provisions under FEMA will prevail over the policy.

Q.38 Whether investment in prohibited sector can be made by NRI on repatriation basis?

A.38 No. As this investment are prohibited by Government policy NRI cannot make investment even on non-repatriation basis.

Q.39 Can NRIs make gifts of shares/debentures to be given away to relatives?

A.39 General permission is available to NRIs to transfer, by way of gift capital instruments of Indian companies held by them on repatriation basis either

to Resident Indians or PROIs (including NRIs / OCIs). [Notification No. FEMA 20(R), Regulation 9(2) & 9(3)]

In case of an NRI / OCI holding capital instruments of an Indian company or units on a non-repatriation basis under Schedule 4, he may transfer the same by way of gift to an NRI / OCI who shall hold it on a non-repatriable basis under Schedule 4 [Notification No. FEMA 20(R), Regulation 9(6)]. In case such gift is being made to a PROI (not being NRI/OCI) then certain conditions as specified in Regulation 9(5) have to be met in order to be eligible under the automatic route.

Q.40 How NRIs can keep money in fixed deposits with Companies (on non repatriation basis) and in Commercial Paper?

A.40 Company Deposits

1. A company is not permitted to accept deposits on repatriation basis from a NRI / PIO. The company may, however, renew the deposits which had been accepted on repatriation basis from an NRI or a PIO subject to terms and conditions mentioned in Schedule 6 of FEMA Ntf. 5(R).

   A company is permitted to accept deposits from a NRI / PIO on non-repatriation basis, subject to the terms and conditions mentioned in Schedule 7 of FEMA Ntf. 5(R).

2. Similarly, permission for placement of funds in fixed deposits with proprietorship concern / firms in India is granted on non-repatriation basis, subject to certain terms & conditions as provided under Schedule 7 of FEMA Ntf. 5(R).

   In respect of schedule 7, the deposits on non-repatriation basis, by proprietory concern/firms and companies, the remittance funded from NRE/FCNR account or by remittance from abroad is not permitted.

3. Commercial Paper (CP)

   General permission is granted to Indian companies to issue CP to NRIs and OCBs subject to the conditions that the amount invested will not be repatriated outside India and the CP will not be transferable.

[Regulation 6(3) of Notification No. FEMA 5(R)]

Q.41 Mr. NR desires to know all about the investment in Immovable properties (Purchase, sale etc.)

A.41 Purchase of Residential Premises by Person of Indian Origin

1. Non-residents both Indian citizens (NRIs) and non Indian citizens (OCIs) do not require permission to acquire immovable property in India as general permission is available to such persons to purchase immovable property in India for their *bona fide* residential purpose. They are, therefore, not required to obtain separate permission from Reserve Bank.

   The property should not be agricultural land, farm house, or plantation property.

2. The purchase consideration should be met either out of inward remittances in foreign exchange through normal banking channels or out of funds from NRE/FCNR/NRO accounts maintained with banks in India. [Reg.3(a) of Notf. No.21(R)]

3. Sale of immovable properties

   General permission is also available for sale of immovable property to a person resident in India. [Reg.3(d) of Notf. No.21(R)]. Further, if such property is not agricultural land/ farm house/ plantation property, it can be transferred to an NRI / OCI.

4. Repatriation of sale proceeds

   Repatriation in respect of properties other than agricultural farm house and plantation property purchased by PIO is allowed to be remitted provided the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account.

   In the case of residential property the repatriation of sale proceed is restricted to not more than two such properties.

   [Regulation 8(b) of Notification No. FEMA 21(R)]

5. No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years. However, this prohibition shall not apply to an OCI. For the purpose of this regulation the term "citizen" shall include natural persons and legal entities [Regulation 9 of FEMA Ntf. 21(R).

Q.42 Can NRI let out the properties in India?

A.42 Yes. General permission is available to NRIs for letting out any immovable property in India. The rental income or proceeds of any investment of such income may to be credited to NRO/NRE account.

Q.43 a) Can NRIs/PIO avail of housing loans to buy houses in India?

b) Can he pay in Rupee (NRO A/c) to purchase a property?

c) Can he repatriate the sale proceeds?

A.43 General permission is available to authorised dealers and housing finance institutions approved by National Housing Bank, providing housing finance to grant housing loans to non-resident Indians or PIO for purchase of residential accommodation, subject to the following conditions.

a) The quantum of loans, margin money and the period of repayment shall be at par with those applicable to housing finance provided to resident in India.

b) The loan amount shall not be credited to Non Resident External (NRE) / Foreign Currency Non-Resident (FCNR) account of the borrower.

c) 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.

d) The instalment of loan, interest and other charges, if any, shall be paid by the borrower by remittances from outside India through normal banking channels or out of funds in his Non-Resident External (NRE)/Foreign Currency Non Resident (FCNR)/Non-Resident Ordinary (NRO) account in India, or out of rental income derived from renting out the property acquired by utilisation of the loan.

e) The rate of interest on the loan shall conform to the directives issued by the Reserve Bank or, as the case may be, by the National Housing Bank.

[Regulation 8 of Notification No. FEMA 4]

If Sale proceeds of house is financed through the loan and repayment of installments of loan is out of NRO account then in such a case sale proceeds cannot be repatriated. However, if instalments of loan is paid by remittance in foreign exchange received through banking channel or out of NRE/FCNR account then repatriation of sale proceeds in foreign currency is permitted.

Q.44 What are the advantages under FEMA after becoming Non-Resident Indian?

A.44 When a person leaves India for taking up employment or for business or vocation or for any purpose which indicates his intention to remain outside India for an uncertain period, he becomes non-resident (Indian) under FEMA.

Apart from the various types of investments which one can make which have been detailed elsewhere in this publication, there are several other advantages which are outlined below.

1. NRI can acquire movable and immovable properties abroad out of the earnings abroad. Acquisition of the properties abroad is subject to the local laws abroad.

   Eg., Non Resident can invest anywhere in the world. He can buy the shares of the companies, quoted in New York Stock Exchanges, London Stock Exchange and other Stock Exchanges in the world. He can set up a company/trust, be Trustee or/and beneficiary in Trust abroad. He can be a partner in any firm abroad. He can start any business abroad. For this purpose he need not take permission of the RBI.

   He can retain foreign assets/security even after his return to India. He need not even intimate about his foreign assets to RBI.

2. He can bring 1 kgs. of gold (on payment of duty) and 10 kgs. of silver (on payment of duty) once in six months on his visit to India.

3. His foreign income is not liable to tax in India. Provided he is also non-resident under the Income-tax Act.

4. He can set up joint ventures abroad with the foreign exchange earned abroad.

5. Quota is reserved for NRI's children for Engineering/ Medical/MBA courses in certain Institutions in India provided the fees are paid in Foreign Exchange.

6. NRIs can come to India for medical treatment and pay for their treatment in Rupees.

7. NRIs can set up family trusts abroad for education of their children/ maintenance of their family members. Such trusts can also be Asset Protection Trusts where the assets held by the Trust are free from attachment by the creditors.

8. NRIs can seek an Advance Ruling from the Advance Ruling Authority on taxability of their transactions.

9. There are benefits under Double Tax Avoidance Agreements (DTAAs). The non-residents can avail of the benefits of DTAAs entered into by India with several countries.

   Under the DTA Agreements, if some tax is payable by non-residents in India on their income in India, credit for tax payable in India is available against tax payable in foreign country on such incomes. Effectively, there will be no double tax on the same income.

   Tax on dividends, royalty, fees for technical services earned in India by NRIs are taxed at lower rates as provided in the Double Tax Avoidance Agreements. In some cases tax may not be payable at all on such incomes if the NRI is the tax resident of a Treaty Country. Dividend is not chargeable to tax in India.

   One has to study the Double Tax Avoidance Agreements in detail, before applying the provisions of the treaties and now they are also required to look at the impact of the multilateral Instrument signed by India which has an impact of modifying the tax treaty.

10. NRIs enjoy several tax concessions in India on their assets in India. These have been outlined elsewhere. In short NRIs enjoy best of both the worlds Foreign Income and Indian tax shelter!

Q.45 Mr. NR is informed that the NRIs and PIOs can remit sufficient funds out of NRO Accounts, kindly explain?

A.45 Under liberalised environment of FEMA, liberalisation appears to be the order of the day. The Authorised Dealers can repatriate funds upto US$ 1 million per financial year held by the NRIs/PIOs in their NRO accounts/ sale proceeds of assets / the assets acquired by him by way of inheritance/ legacy on production of documentary evidence in support of acquisition, inheritance or legacy of assets by him. Where the remittance is to be made from the balances held in the NRO account, the account holder shall furnish an undertaking to the Authorised Dealer that "the said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA."

Current income deposited in the NRO account can also be repatriated without any limit subject to payment of Indian taxes.

[Notification No. 97 dated 8th July 2003 and FED Master Direction No. 8 on other remittance facilities dated Jan. 1, 2016]

Q.46 Please explain in detail about Special Non-Resident Rupee Account - SNRR account.

A.46 Special Non-Resident Rupee Account - SNRR account [Schedule 4 of FEMA Ntf. 5(R)]

i. Any person resident outside India, having a business interest in India, may open SNRR account with an authorised dealer for the purpose of putting through *bona fide* transactions in rupees, not involving any violation of the provisions of the Act, rules and regulations made thereunder.

ii. The SNRR account should carry the nomenclature of the specific business for which it is in operation.

iii. The operations in the SNRR account should not result in the account holder making available foreign exchange to any person resident in India against reimbursement in rupees or in any other manner.

iv. The SNRR account shall not bear any interest.

v. The debits and credits in the SNRR account should be specific/ incidental to the business proposed to be done by the account holder.

vi. Authorised dealers should ensure that the balances are commensurate with the business operations of the account holder.

vii. All the operations in the SNRR account should be in accordance with the provisions of the Act, rules and regulations made thereunder.

viii. The tenure of the SNRR account should be concurrent to the tenure of the contract/ period of operation/ the business of the account holder and in no case should exceed seven years. No operations are permissible in the account after seven years from the date of opening of the account.

ix. The balances in the SNRR account shall be eligible for repatriation.

x. Transfers from any NRO account to the SNRR account are prohibited.

xi. All transactions in the SNRR account will be subject to payment of applicable taxes in India.

xii. SNRR account may be designated as resident rupee account on the account holder becoming a resident.

xiii. The amount due/ payable to non-resident nominee from the account of a deceased account holder, shall be credited to NRO account of the nominee with an authorised dealer/ authorised bank in India.

xiv. The transactions in the SNRR accounts shall be reported to the Reserve Bank in accordance with the directions issued by it from time to time.

xv. Opening of SNRR accounts by Pakistan and Bangladesh nationals and entities incorporated in Pakistan and Bangladesh requires prior approval of Reserve Bank.

Q.47 Mr. NR wants to know whether he can execute Power of Attorney from abroad and if so how?

A.47 Mr. NR can execute a Power of Attorney from abroad and it should be duly notarized by the Notary Public abroad. (Attested before the Notary Public).

The Power of Attorney can be executed before the Consul General of India/ Officials of the Consulate and duly authenticated by them.

This Power of Attorney can be registered in India with the registering authority.

For operating bank account, portfolio investment etc., this Power of Attorney can also be registered with the concerned banks and companies in India.

Chapter 3
Returning Indians

Indians who have settled outside India, established themselves in the foreign countries and now looking forward to return to India for good, may like to know what happens to their assets and income outside India. This chapter aims to highlight the facilities available to such returning Indians to hold their assets abroad and certain other transaction of such returning Indians. However, except the transaction relating to such foreign assets, most of the provisions, rules & regulation as applicable to resident Indians shall apply to returning Indians also, once they are treated as resident under FEMA.

Q.48 Having stayed in the U.S. for nearly a decade Mr. Returning Indian (RI) now wants to return to India. He has built up huge assets both in India as well as abroad. He seeks your advice on the facilities available to Returning Indians under FEMA?

A.48 In terms of section 6(4) of FEMA, persons who return to India after being non-resident can retain funds/assets acquired by him abroad out of foreign exchange earned abroad (through employment, business or vocation outside India, inheritance etc.). Such persons can retain their foreign currency accounts with banks abroad and/or hold, transfer or dispose of their assets abroad such as shares, securities or investments in business, etc. and immovable properties as and when they decide to do so. (Foreign Securities, Currency and properties).

Under FERA, there was holding approval for even income earned on these assets held abroad. However it appears from the language of section 6(4) that such approval is not necessary under FEMA. Based on representations received by RBI with regards to nature of transactions covered under Section 6(4) of FEMA, it issued clarifications *vide* A.P. (DIR Series) Circular No. 90 dated 9-1-2014 that Section 6(4) covers the following transactions:

(i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;

(ii) Income earned through employment or business or vocation outside India taken up or commenced while such person was resident outside India, or from investments made while such person was

resident outside India, or from gift or inheritance received while such a person was resident outside India;

(iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.

(iv) A person resident in India may freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/ or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.

Repatriation of assets to India

They can repatriate these assets to India and hold them separately in India with authorised dealers under the Resident Foreign Currency Accounts Scheme.

Q.49 Describe 'Resident Foreign Currency Account'. What are its benefits?

A.49 1. Resident Foreign Currency (RFC) Account Scheme

This is a scheme approved by Reserve Bank permitting persons of Indian nationality or origin, who have returned to India for permanent settlement (Returning Indians) to open foreign currency accounts with banks in India for holding funds brought by them to India.

No RBI permission is required to open RFC accounts with Authorised Dealers.

RFC Accounts can be maintained in any convertible currency.

2. The features of the different kinds of Resident Foreign Currency Accounts are as under:

Particulars	Exchange Earners Foreign Currency (EEFC) Account	Resident Foreign Currency (Domestic) [RFC(D)] Account	Resident Foreign Currency (RFC) Account
Who can open the account	Exchange Earners	Individuals	Individuals

Particulars	Exchange Earners Foreign Currency (EEFC) Account	Resident Foreign Currency (Domestic) [RFC(D)] Account	Resident Foreign Currency (RFC) Account
Joint account	Jointly with eligible persons; or With resident relative(s) on former or survivor' basis. Relative as defined under Companies Act, 2013 (viz. members of HUF, spouse, parents, step-parents, son, step-son, daughter-in-law, daughter, son-in-law, brother/sister, step-brother/ step-sister) Relative joint account holder cannot operate the account during the life time of the account holder	Jointly with any person eligible to open the	Same as EEFC
Type of Account	Current only	Current only	Current/ savings/ term deposits
Interest	Non-interest earning	Non-interest earning	Deregulated (as decided by the AD bank)
Permitted Credits	1) 100% of foreign exchange received on account of export transactions. 2) Advance remittance received by an exporter towards export of goods or services 3) Repayment of loans given to foreign importers 4) Disinvestment proceeds on conversion of ADR/ GDR	1) Foreign exchange received as payment/ service/ gift/ honorarium while on visit abroad or from a non-resident who is on a visit to India 2) Unspent amount of foreign exchange acquired from AD for travel abroad 3) Gift from close relative 4) Earning through export of goods/ services, royalty	1) Foreign exchange received by him as superannuation/ other monetary benefits from overseas employer 2) Foreign exchange realised on conversion of the assets referred to in Sec 6(4) of FEMA 3) Gift/ inheritance received from a person referred to in Sec 6(4) of FEMA

Particulars	Exchange Earners Foreign Currency (EEFC) Account	Resident Foreign Currency (Domestic) [RFC(D)] Account	Resident Foreign Currency (RFC) Account
	5) Professional earnings like director's/ consultancy/ lecture fees, honorarium and similar other earnings received by a professional by rendering services in his individual capacity 6) Interest earned on the funds held in the account 7) Re-credit of unutilised foreign currency earlier withdrawn from the account 8) Payments received in foreign exchange by an Indian startup arising out of sales/ export made by the startup or its overseas subsidiaries	5) Disinvestment proceed on conversion of shares into ADR/ GDR 6) Foreign exchange received as earnings of LIC claims/ maturity/ surrendered value settled in forex from an Indian insurance company	4) Foreign exchange acquired before the July 8, 1947 or any income arising on it held outside India with RBI permission 5) Foreign exchange received as earnings of LIC claims/ maturity/ surrendered value settled in forex from an Indian insurance company 6) Balances in NRE/ FCNR (B) accounts on change in residential status
Permitted Debits	1) Any permissible current or capital account transaction 2) Cost of goods purchased 3) Customs duty 4) Trade related loans and advances	Can be used for any permissible current/ capital account transactions.	No restrictions on utilisation in/ outside India.

Q.50 Mr. RI is determined to return to his motherland. What steps should he take after his return to India?

A.50 Once NRI returns to India for good he ought to inform his bankers about the change in status that he has now become PRII.

He also should inform the change of status to companies where he is a shareholder/Debentures holder and firms where he is a partner.

On his return, his NRO bank Account will be redesignated as regular bank account.

NRE Fixed Deposit, FCNR(B) deposits can be continued till the date of maturity at the contracted rate of interest. On maturity the proceeds of NRE/FCNR deposits can be converted into RFC Account.

Q.51 Mr. RI is interested to know what are the other facilities to Non-Residents by which they can be of some benefit to Residents?

A.51 a) Loans to Residents against guarantees by Non-Residents is permitted

Authorised dealers to decide on the merits of each case and subject to certain conditions.

b) Loans to Residents against shares/securities/properties in India of Non-residents is permitted

Authorised Dealers can grant loans to resident family members of NRI for certain activities.

c) Loans to Residents from NRIs / PIOs

RBI has given general permission in case of rupee loan provided.

i) Purpose of loan is for the own business of the borrower other than agricultural / plantation / real estate business, Trade in transferable development rights, Nidhi or Chit Fund. The proceeds shall not be used for investment or for on-lending in any manner.

ii) Period of loan does not exceed 3 years. Rate of interest on the loan is not more than two per cent above Bank Rate prevailing on the date of availment of loan;

iii) Loan is received through normal banking channel or out of NRE/FCNR accounts.

iv) Borrowing shall be only on a non-repatriation basis. Payment of interest and repayment of loan is by credit to the NRO account of the lender.

Loans not meeting above criteria require prior approval of RBI

d) In case if loan is given by Non-resident close relative in foreign currency then such loan

i) Has to be for a minimum period of 1 year

ii) Is of an amount not exceeding US $ 2,50,000

iii) Is free of interest

iv) Received by inward remittance in free foreign exchange through normal banking channels or by debits to the NRE/FCNR account of the non-resident lender

v) Is utilised for borrower's personal purposes, but not for investment in shares, agricultural activity or for relending.

[Notification No. FEMA 3 and Notification No. FEMA 4]

Q.52 Mr. RI would like to know in what way residents can be of assistance to non-residents e.g. guarantees, hospitality while on visit to India etc.

A.52 1. Guarantees by Residents for Non-residents

Prior approval of RBI is required to be obtained by the residents for giving guarantees to NRs. RBI has granted general permission to shipping agents subject to certain conditions. RBI has granted general permission to authorised dealers to give guarantee in favour of residents on behalf of their non-resident customers in accordance with the prescribed detailed guidelines. An Indian Party promoting or setting up outside India, a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS) in accordance with terms and conditions stipulated in FEMA Ntf. 120, is also permitted to give a guarantee to or on behalf of the latter and also to its first generation step-down operating company in connection with its business.

[Notification No. FEMA 8]

2. Hospitality to Non-Resident visitors

General permission is given to residents to spend on NR guest on a account of boarding, lodging and services related thereto and or travel within India.

Indian firms and companies are allowed to pay for cost of to and fro passage fare if their Non-Resident directors, foreign technicians, etc. coming to India for official business purposes.

Loan by Resident relative is also permitted in favour of the NRI.

[Notification No. FEMA 16]

Q.53 Mr. RI is tax shy. He wants to save tax on his foreign income on his return to India. He seeks your advice in the matter.

A.53 For tax free income arising outside India

1. Before returning to India for good, if NRI is Non-Resident under the Indian Income-tax Act, 1961, for nine out of ten previous years

or has been in India for less than 730 days during seven years preceding the year in question then in such a case he will be treated as not ordinarily resident.

2. His foreign income will not be taxable provided it is not out of business controlled in or profession set up in India.

   In case income accrues/arises out side India (foreign income) but received in India, it may be taxable in India.

   In order to steer clear of that possibility, he should ensure that the foreign income is not received by him directly, but should be deposited in his bank account abroad. This would mean the income is not only earned outside India, but also received outside India. Bank can then remit the amount to him. Alternatively certain activity and/or assets may be transferred to NRI owned company incorporated outside India before returning to India under the overall supervision and monitoring of investment advisor/trustees of the overseas managers/directors.

   After returning to India transfer from third party account to Indian account may be avoided.

4 Chapter — Facilities For Resident Indians/ Returning Indians

The chapter aims at highlighting the liberalized form of exchange control in India which may be considered by the returning Indians. The information contained here may assist such returning Indians to make up their minds before settling in India.

Q.54 Kindly explain to Mr. R detail provisions in FEMA as regards foreign travel?

A.54 Mr. R may note the following points in connection with drawal of Foreign Exchange for foreign travel

1. Restrictions on Drawal of Foreign Exchange

   For travel to Nepal and/Bhutan drawal of foreign exchange is not allowed.

2. Ticket held by the traveller is for journey commencing not later than 180 days from the date of drawal of foreign exchange.

3. a) Payment in rupees in cash for drawal of foreign exchange should not exceed ₹ 50,000 for a single journey/visit.

   b) Where the amount exceeds ₹ 50,000, the entire payment should be made by way of a crossed cheque/ banker's cheque/ pay order/ demand draft/ debit card / credit card / prepaid card only.

4. Foreign currency notes and coins

   Out of the overall foreign exchange sold to a traveller, amount of foreign currency, notes and coins sold to him shall be within limits as set below:

   a) US $ 3,000 to travellers proceeding to all countries other than those listed in (b) and (c).

   b) US $ 5,000 to travellers proceeding to Iraq or Libya.

   c) Entire exchange (up to USD 250,000) released can be in the form of currency notes in case of travellers proceeding to Iran,

Russian Federation and other Republics of Commonwealth of Independent States. For travellers proceeding for Haj/Umrah pilgrimage, full amount of entitlement (USD 250,000) in cash or up to the cash limit as specified by the Haj Committee of India, may be released by the ADs and FFMCs.

5. A drawal up to US$ 2,50,000 can be made for all travel related purpose in a financial year including in currency as explained in above paragraphs. Thus the amount can be other than in cash by way of debit card or a credit card including cash within the oveall limit of US$ 2,50,000.

Q.55 Please explain Mr. R as regards retention of foreign currency notes, coins, travellers cheques etc.

A.55 A person resident in India is allowed to retain foreign coins without any ceiling or foreign currency notes and foreign currency travellers cheques up to US$ 2,000 or its equivalent provided such foreign exchange

a) Was acquired by him while on a visit to any place outside India by way of payment for services (not arising from any business in or anything done in India) or by way of honorarium or gift; or

b) Was acquired by him as honorarium or gift or for services rendered or in settlement of any lawful obligation from any person not resident in India and who is on a visit to India; or

c) Represents unspent amount of foreign exchange acquired by him from any authorised person for travel abroad.

Such foreign exchange can also be used to open Resident Foreign Currency (Domestic) Account.

Q.56 Mr. R is interested to know the formalities in connection with unspent foreign exchange drawn for travel abroad.

A.56 1. Unspent foreign exchange in currency notes, should be surrendered within 180 days from the date of return.

In case he has to travel abroad again within 180 days of return, the unspent foreign exchange can be used by him for his subsequent journey.

2. A returning Indian is permitted to retain with him, foreign currency travellers cheques and notes up to an aggregate amount of US$ 2,000 and foreign coins without any time limit as specified in (1) above.

3. In case of cancellation of journey the amount of foreign exchange drawn should be surrendered within 180 days. In such cases US$ 2,000 cannot be retained. (Notification No. 169 dated 23-10-2007)

   It may also be noted that earlier limit of duration of time where exchange/currency was required to be deposited, were specified as 7 days, 60 days, 90 days & 180 days for different nature of receipt, have been now made uniform to 180 days only in case of persons who are individuals.

4. Resident Foreign Currency (Domestic Account) can be opened by a Resident with an unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

Q.57 Mr. R desires to know the provision in connection with unutilised foreign exchange acquired for purposes other than foreign travel.

A.57 a) In case the foreign exchange is purchased for any purpose other than for foreign travel and is not used for that purpose or for any other purpose for which purchase or acquisition of foreign exchange is permitted under the provisions of FEMA, 1999 or Rules or Regulations made thereunder, the same or the unused portion thereof is required to be surrendered to an authorised person within a period of 180 days from the date of its purchase.

b) Where a person approaches an authorised person for surrender of foreign exchange after the prescribed period, authorised person should not refuse to purchase the foreign exchange on the ground that the prescribed period has expired.

Q.58 Mr. R desires to send small remittance not exceeding US$ 25000 abroad. He needs your guidance in the matter?

A.58 Release of Foreign Exchange for small value remittance not exceeding US$ 25,000

Authorised dealers may release an amount up to US$ 25000 or its equivalent for all permissible current account transactions on obtaining a simple letter from the applicant containing the basic information, viz., names and the addresses of the applicant and the beneficiary, amount to be remitted and the purpose of remittance. However, this is subject to the condition that the payment is made by a cheque drawn on the applicant's bank account or by a Demand Draft. AD banks shall prepare and keep a dummy A-2.

(Master Direction on Other Remittance facilities for Residents dated 1-1-2016)

Q.59 Mr. R desires to go abroad on a business tour. He has approached you for familiarising himself with the provision under FEMA.

A.59 General provisions

a) Remittances for all permissible current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip / attending conferences / specialized training; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015 ('CAT Rules') are subsumed under the Liberalised Remittance Scheme (LRS) of US$ 2,50,000 per Financial Year (FY) with effect from May 26, 2015.

Accordingly, for aforesaid permissible current account transactions including for a business tour, an individual is permitted to avail foreign exchange up to US$ 250,000 per Financial Year irrespective of the number of visits undertaken during the year.

However, if an employee is being deputed by an entity for any of the above and the expenses are borne by the latter, such expenses shall be treated as residual current account transactions outside LRS and may be permitted by the AD without any limit, subject to verifying the *bona fides* of the transaction.

b) If the payment towards remittance is to be made out of funds held in Resident Foreign Currency (RFC) Account/Exchange Earners' Foreign Currency (EEFC) Account of the remitter, then the remittance even if it is exceeding US$ 250,000 is allowed. (Notf. No. 10(R))

c) If the remittance to be effected by a remitter exceeds US$ 250,000 and the payment is not to be made out of RFC/EEFC Account of the remitter, prior approval of the Reserve Bank of India is to be obtained. The request for approval is to be routed through the authorised person (from whom foreign exchange is to be drawn), giving reasons.

d) Payment for expenses in foreign exchange can be made through credit card up to the limit prescribed by the issuing credit card company. Authorised Dealer banks are also permitted to issue Store Value Card/ Charge Card/ Smart Card to residents traveling on private/business visit abroad which are used for making payments at overseas merchant establishments and also for drawing cash from ATM terminals for permissible current account transactions and subject to prescribed limits under the aforesaid CAT Rules.

e) Any drawal made for the purposes of travel or for charity for a particular purpose then it can be utilized only for the purpose for which it is granted.

Q.60 Mr. R is a prosperous businessman. He is knowledge savvy. He wants to go abroad for participation in International Conference to USA./ Seminars in USA/Specialised training in horticulture. He wants to know how much foreign exchange is available to him?

A.60 Participation in International Conferences/Seminars, Specialised training

a) As mentioned in reply to Q.59, remittances for all permissible current account transactions including for attending a conference or specialised training abroad are subsumed under the LRS limit of USD 250,000 as stipulated in Schedule III of the CAT Rules. Accordingly, for aforesaid permissible current account transactions including for international conferences / seminars which are treated as business visits, an individual is permitted to avail foreign exchange up to US$ 250,000 per Financial Year irrespective of the number of visits undertaken during the year.

However, if an employee is being deputed by an entity for any of the above and the expenses are borne by the latter, such expenses shall be treated as residual current account transactions outside LRS and may be permitted by the AD without any limit, subject to verifying the bonafides of the transaction.

b) For other aspects, please refer to A.59 sub-paras (b) to (d) which are also applicable to remittances towards international conferences / seminars.

c) In the appropriate circumstances, if it is for the purpose of business, remittance by such a proprietary concern can be made without any limit if it is a Current account residual transaction.

Q.61 Mr. R wants to go abroad on a private visit. Please advise him how much foreign exchange he can avail of under FEMA?

A.61 Private visits

a) As mentioned in reply to Q.59 above, remittances for all permissible current account transactions including for private visits (except Nepal & Bhutan) are subsumed under the LRS limit of USD 250,000 as stipulated in Schedule III of the CAT Rules. Accordingly, for aforesaid permissible current account transactions including for private visit other than to Nepal & Bhutan, an individual is permitted to avail

foreign exchange up to US$ 250,000 per Financial Year irrespective of the number of visits undertaken during the year.

Further, all tour related expenses including cost of rail/road/water transportation; cost of Euro Rail; passes/tickets, etc. outside India; and overseas hotel/lodging expenses shall be subsumed under the LRS limit. The tour operator can collect this amount either in Indian rupees or in foreign currency from the resident traveller.

b) For other aspects, please refer to A.59 sub-paras (b) to (d) which are also applicable to remittances towards private visits abroad other than to Nepal & Bhutan.

Q.62 Mr. R is a prosperous exporter. He wants to know all about maintenance of various foreign currency accounts in India?

A.62 Exchange Earners' Foreign Currency Accounts (EEFC Accounts) under Schedule I to FEMA Ntf. 10(R):

Authorised dealers are allowed to open, hold and maintain foreign currency denominated accounts for the purpose of transacting foreign exchange business and other matters of the account holders. The account may be maintained in the currency of the remittance or any other permitted currency at the option of the depositor. The accounts can be maintained with one/more than one ADs in one/more currencies.

Following credits may be made to an EEFC Account:–

a) Foreign exchange earnings received by way of inward remittances through normal banking channel. The payment received through an international credit card for which reimbursement will be provided in foreign exchange may be regarded as a remittance through normal banking channels.

b) Payments received in foreign exchange by a 100 per cent Export Oriented Unit or a unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park for supply of goods to similar such unit or to a unit in Domestic Tariff Area and also payment received in foreign exchange by a unit in Domestic Tariff Area for supply of goods to a unit in Special Economic Zone (SEZ).

c) Payment received from an account maintained with an authorised dealer for the purpose of counter trade, in accordance with the approval granted in terms of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015.

d) Advance remittance received towards export of goods or services.

e) Payment received for export of goods and services from India, out of funds representing repayment of State Credit in U.S. dollar held in the account of Bank for Foreign Economic Affairs, Moscow, with an authorised dealer in India.

f) Professional earnings including director's fees, consultancy fees, lecture fees, honorarium and similar other earnings received by a professional by rendering services in his individual capacity.

g) Payments received in foreign exchange by an Indian startup, or any other entity as may be notified by the Reserve Bank in consultation with the Central Government, arising out of exports/ sales made by the said entity or its overseas subsidiaries, if any. 'Startup' means an entity which complies with the conditions laid down in Notification No. G.S.R 180(E) dated February 17, 2016 issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

h) Interest earned on the funds held in the account.

i) Re-credit of unutilised foreign currency earlier withdrawn from the account.

j) Amount representing repayment by the account holder's importer customer, of loan/ advances granted to him from the EEFC account in terms of clause (iv) of Paragraph 3 of Schedule I to FEMA Ntf. 10(R).

k) Disinvestment proceeds received by the resident account-holder on conversion of shares held by him to ADRs / GDRs under the DR Scheme, 2014 approved by the Government of India.

Following debits may be made to an EEFC Account, namely:—

a) Payment outside India towards a current account transaction in accordance with the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and towards a capital account transaction permissible under the Foreign Exchange management (Permissible Capital Account Transactions) Regulations, 2000.

b) Payment of customs duty in accordance with the provisions of Export Import Policy of the Central Government in force.

c) Payment in foreign currency to a person resident in India for supply of goods/services including payments for air fare and hotel expenditure.

d) Payment in foreign exchange towards cost of goods purchased from a 100 per cent Export Oriented Unit or a Unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park.

e) Trade related loans/advances by an exporter to his importer customer outside India in accordance with Notification No. FEMA 3 on borrowing and lending in foreign exchange.

f) For overseas investment in JV/WOS.

g) To repay packing credit advances, whether availed of in rupee or in foreign currency, from balances in their EEFC account to the extent exports have actually taken place. While allowing utilisation of this facility, authorised dealers should advise exporters to adhere to the current exchange control requirements for exports and ensure compliance specifically, with regard to realisation of export proceeds in accordance with the Notification No. 23 of the FEMA.

Miscellaneous provisions relating to EEFC

i) There is no restriction on withdrawal in rupees of funds held in EEFC account. However, the amount withdrawn in rupees shall not be eligible for conversion into foreign currency and for re-credit to the account.

ii) Authorised dealer may issue cheque books of separate series with the superscription "EEFC Account" to the account holders maintaining such accounts, and also satisfy himself while honouring the cheques that the payment made by the account holder by issue of a cheque is permissible under these Regulations.

(iii) Resident individuals are permitted to include resident relative(s) as a joint holder(s) in their EEFC account on 'former or survivor' basis. However, such resident Indian relative(s) shall not be eligible to operate the account during the life time of the resident account holder.

[Notification No. FEMA 10(R)]

Q.63 What is Resident Foreign Currency (Domestic) Account? What are its features?

A.63 Resident Foreign Currency (Domestic) Account

A person resident in India may open a Resident Foreign Currency (Domestic) Account with an authorised dealer in India out of foreign

exchange acquired by him in the form of currency notes, bank notes and travellers cheques:

a) While on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or

b) From any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or

c) By way of honorarium or gift while on a visit to any place outside India; or

d) Represents the unspent amount of foreign exchange acquired by him from an authorised person for travel abroad; or

e) As gift from close relatives; or

f) By way of earning through export of goods / services, or as royalty, honorarium or by any other lawful means; or

g) Representing the disinvestment proceeds received by the resident account-holder on conversion of shares held by him to ADRs/GDRs under the DR Scheme, 2014 approved by the Government of India; or

h) By way of earnings received as the proceeds of life insurance policy claims/maturity/surrender values settled in foreign currency from an insurance company in India permitted to undertake life insurance business by the Insurance Regulatory and Development Authority.

The account has to be maintained in the form of non-interest bearing current account and there shall be no ceiling on the balances of the account. Debits to the account shall be for payment towards a current account transaction in accordance with the provision of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and towards a capital account transaction permissible under the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

[Notification No. FEMA 10(R)]

Q.64 Can a Resident maintain Foreign Currency Account abroad?

A.64 Maintenance of Foreign Currency Accounts abroad:

Maintenance of bank accounts abroad constitutes a capital account transaction and is not permitted without prior approval of Reserve Bank

of India. However, for the following transactions, general permission has been given by RBI *vide* FEMA Ntf. 10(R):

a. A firm or a company or a body corporate registered or incorporated in India may open, hold and maintain in the name of its office (trading or non-trading) or its branch set up outside India or its representative posted outside India, a foreign currency account with a bank outside India by making remittances from India (subject to specified limits) for the purpose of normal business operations of the office/ branch or representative.

b. A person resident in India, being an exporter who has undertaken a construction contract or a turnkey project outside India or who is exporting services or engineering goods from India on deferred payment terms may open, hold and maintain a Foreign Currency Account with a bank outside India.

c. An Indian party may open, hold and maintain Foreign Currency Account abroad for the purpose of making overseas direct investments subject to specified terms and conditions.

d. An Indian startup or any other entity as may be notified by the Reserve Bank in consultation with the Central Government, having an overseas subsidiary, may open a foreign currency account with a bank outside India for the purpose of crediting to it foreign exchange earnings out of exports/ sales made by the said entity and/ or the receivables, arising out of exports/ sales, of its overseas subsidiary subject to certain conditions.

e. A shipping or airline company incorporated in India may open, hold and maintain with a bank outside India, a Foreign Currency Account for the purpose of undertaking transactions in the ordinary course of its business.

f. Insurance/ reinsurance companies registered with Insurance Regulatory and Development Authority of India (IRDA) may open, hold and maintain a Foreign Currency Account with a bank outside India for the purpose of meeting the expenditure incidental to the insurance/ reinsurance business carried on by them and for that purpose, credit to such account the insurance/reinsurance premia received by them outside India.

g. Resident individuals may open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the Liberalised Remittance Scheme. The account may be used for putting though all transactions connected with or arising from remittances eligible under this Scheme.

h. A person resident in India who has gone abroad for studies or who is on a visit to a foreign country may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India provided that on his return to India, after completion of studies, such an account will deemed to have been opened under the Liberalised Remittance Scheme.

i. A person resident in India who has gone out of India to participate in an exhibition/ trade fair outside India may open, hold and maintain a Foreign Currency Account with a bank outside India for crediting the sale proceeds of goods on display in the exhibition/trade fair Provided that the balance in the account is repatriated to India through normal banking channels within a period of one month from the date of closure of the exhibition/trade fair.

j. A person resident in India who is on a visit to a foreign country may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India, provided that on his return to India, the balance in the account is repatriated to India.

k. A citizen of a foreign state resident in India being an employee of a foreign company or a citizen of India employed by a foreign company outside India and in either case on deputation to the office/ branch/ subsidiary/ joint venture in India of such foreign company may open, hold and maintain a foreign currency account with a bank outside India and receive the salary payable to him for the services rendered to the office/ branch/ subsidiary/ joint venture/ group company in India of such foreign company, by credit to such account, subject to payment of taxes, as applicable in India.

l. A citizen of a foreign State resident in India being in employment with a company incorporated in India may open, hold and maintain a foreign currency account with a bank outside India and remit the whole salary received in India in Indian Rupees, to such account, for the services rendered to such an Indian company, subject to payment of taxes, as applicable in India.

Q.65 Mr. R, resident of India, wants to know what is the meaning of Current Account Transactions?

A.65 Section 2(j) of FEMA defines Current Account transaction as under:

"Current Account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes:

i) Payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.

ii) Payment due as interest on loans and as net income from investments.

iii) Remittances for living expenses of parents, spouse and children residing abroad, and

iv) Expenses in connection with foreign travel, education and medical care of parents, spouse and children".

It should be read with section 5 of FEMA which states that,

"Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a Current Account transaction.

Provided that the Central Government may in public interest and in consultation with the Reserve Bank, may impose such reasonable restrictions for Current Account transactions as maybe prescribed".

Accordingly restriction on current account transaction is divided into three categories,

a) Transactions which are prohibited;

b) Transactions which require permission of Central Government if exceeds certain limit;

c) Transactions which require permission of RBI if exceeds certain limit.

Q.66 Are there any Current Account transactions which are prohibited?

A.66 A few transactions on Current Account are prohibited. In this connection, Foreign Exchange Management (Current Account Transactions) Rules, 2000 has been issued by the Central Government on 3rd May, 2000 ('CAT Rules') as amended from time-to-time which, *inter alia*, lists the prohibited transactions on Current Account

They are referred to as Prohibited Transactions

Prohibited Transactions – No drawal of Foreign Exchange is permitted under Current Account in the following cases:

1. For travel to Nepal or Bhutan

2. Transaction with a resident of Nepal or Bhutan

3. Items listed in Schedule I (Rule No. 3) of CAT Rules which are as under:

    a) Remittance out of lottery winning

b) Remittance of income from racing/riding etc. or any other hobby.

c) Remittance for purchase of lottery tickets, banned/proscribed magazines, football, pools, sweepstakes etc.

d) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.

e) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.

f) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.

g) Payment related to "Call Back Services" of telephones.

h) Remittance of interest income on funds held in Non-Resident Special Rupee Scheme Account.

Q.67 Which types of Current Account transactions by Resident require the permission of the Central Government?

A.67 Current Account Transaction in Foreign Exchange requiring the permission of Central Government (Item listed in Schedule II to Rule No. 4 of CAT Rules) are given below indicating Purpose of Remittance and the Ministry/ Department of Government whose permission is required.

	Purpose of Remittance	Ministry/Department of Government of India whose approval is required
1.	Cultural Tours	Ministry of Human Resource 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 US$ 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)

	Purpose of Remittance	Ministry/Department of Government of India whose approval is required
4.	Payment of import by a Government 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	Ministry of Information and Broadcasting
(b)	Internet service providers	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.	[Omitted: Remittances under technical collaboration agreements where payment of royalty exceeds 5 per cent on local sales and 8 per cent on exports and lump sum payment exceeds US$ 2 million]	[Omitted: Ministry of Industry and Commerce]
9.	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 US$ 1,00,000	Ministry of Human Resource Development, (Department of Youth Affairs and Sports)
10.	[**Omitted**: Payment for securing Insurance for health from a company abroad]	[Omitted: Ministry of Finance (Insurance Division)]
11.	Remittance for membership of P&I Club	Ministry of Finance (Insurance Division)

Note: Amounts from RFC and EEFC A/c. (except item 11) can be used for such transaction without the permission of Central Government

Q.68 Mr. R wants to know which types of Current Account Transactions by residents require the permission of Reserve Bank of India, on exceeding specified limits?

A.68 The following types of Current Account Transactions are permitted up to certain monetary limits. These are listed in Schedule III under Rule 5 of CAT, as under:

Facilities for individuals—

1. Individuals can avail of foreign exchange facility for the following purposes within the limit of US$ 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

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

It may be noted that for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from US$ 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted :

In case of a person who is resident but not permanently resident in India and—

(a)		is a citizen of a foreign State other than Pakistan; or
(b)		is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

he may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions). For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident :

Also, a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

Facilities for persons other than individual—

2. The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

(i)		*Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or US$ 5,000,000, whichever is less, for—*
		(a) Creation of Chairs in reputed educational institutes;
		(b) Contribution to funds (not being an investment fund) promoted by educational institutes;
		(c) Contribution to a technical institution or body or association in the field of activity of the donor Company.
(ii)		*Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding US$ 25,000 or five per cent of the inward remittance whichever is more.*
(iii)		*Remittances exceeding US$ 10,000,000 per project for any consultancy services in respect of infrastructure projects and US$ 1,000,000 per project, for other consultancy services procured from outside India*
		Explanation :— For the purposes of this sub-paragraph, the expression "infrastructure" shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000- RB, dated the May 3, 2000.
(iv)		*Remittances exceeding five per cent of investment brought into India or US$ 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.*

It may be noted that

a) Items not covered under Schedules I, II and III above can be freely remitted (transacted) in foreign exchange; E.g. Import of goods, other current business expenses etc.

b) No prior reference is required to be made to Reserve Bank of India by authorised persons for release of foreign exchange for permitted purposes up to the stipulated ceiling amount.

c) The procedure for drawal or remit of any foreign exchange under this Schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

d) In the appropriate circumstances, if it is for the purpose of business, remittance by such a proprietary concern can be made without any limit if it is a Current account residual transaction. If a company is remitting the sponsored amount for more than one individual for studies then the LRS limit shall apply to the Company with respect to each such individual and hence company would be able to remit more than the above limit.

Q.69 Mr. R wants to know what precautions/steps the Authorised Dealer is required to take before undertaking transactions in foreign exchange on behalf of person applying to make payment in foreign exchange

A.69 As per the provisions contained in sub-section (5) of section 10 of FEMA, 1999, authorised person is required to obtain a declaration and such other information from the person (applicant) on whose behalf the transaction in foreign exchange is being undertaken and reasonably satisfy himself that the transaction is not designed to contravene or evade the provisions of the Act or any or the Rules or Regulations made or Notifications or directions or orders issued under the Act. Authorised dealers should preserve the information/ documents obtained by them from the applicant before undertaking the transactions for verification by the Reserve Bank. If the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the RBI.

Q.70 Please explain Mr. R about the provisions under FEMA in connection with maintenance of close relatives/dependents abroad

A.70 Maintenance of close relatives/dependents – Position under FEMA [Item No. 1(v) of Schedule III to CAT]

a) For maintenance expenses of close relatives abroad, a person, who is resident but not permanently resident in India and is a citizen of a foreign state other than Pakistan or a citizen of India who is on deputation to the office or branch or subsidiary or joint venture in India of such foreign company, is permitted to remit in foreign exchange up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanations:

Resident but not permanently Resident:

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

b) In all other cases (other than 'a' above), remittance up to US$ 250,000 per year, per recipient, is allowed.

c) If the payment towards remittance of maintenance expenses of close relatives is made out of Resident Foreign Currency (RFC) Account / Exchange Earners' Foreign Currency (EEFC) Account of the remitter, then the above restriction is not applicable.

d) If the remittance exceeds the above ceiling prior approval of Reserve Bank of India is to be obtained. The request for approval be routed through the authorised dealer (from whom foreign exchange is to be drawn), giving reasons.

Q.71 Mr. R desires to know what are Capital Account Transactions?

A.71 Capital Account Transaction has been defined under section 2(e) of FEMA as under:

"Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6."

It should be read with section 6 of FEMA which reads as under:

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

2. The Reserve Bank may, in consultation with the Central Government, specify –

a) Any class or classes of capital account transactions, involving debt instruments, which are permissible.

b) The limit up to which foreign exchange shall be admissible for such transactions.

(c) Any conditions which may be placed on such transaction

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

3. Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following –

a) Transfer or issue of any foreign security by a person resident in India.

b) Transfer or issue of any security by a person resident outside India.

c) Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India.

d) Any borrowing or lending in foreign exchange in whatever form or by whatever name called.

e) Any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India.

f) Deposit between persons resident in India and persons resident outside India.

g) Export, import or holding of currency or currency notes.

h) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India.

i) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.

j) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred —

i) By a person resident in India and owed to a person resident outside India;

or

ii) By person resident outside India.

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

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

6. Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India or 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.

Finance Act, 2015 has amended Section 6 by inserting new sub-section (2A) and deleting sub-section (3) whereby the Central Government would have the power to regulate Capital Account transactions and not the RBI. However, these amendments are not yet effective as the amendments are so far not notified by the Government.

Q.72 Which types of Capital Account Transactions are permitted?

A.72 Permitted Capital Account Transactions are listed in Schedule-I and Schedule II *vide* Notification No. FEMA 1/RB-2000 dated 3rd May, 2000. They are given below:

SCHEDULE-I [Regulation 3(1)(A)]

Classes of Capital Account Transactions of persons resident in India

a) Investment by a person resident in India in foreign securities

b) Foreign currency loans raised in India and abroad by a person resident in India.

c) Transfer of immovable property outside India by a person resident in India.

d) Guarantees issued by a person resident in India in favour of a person resident outside India.

e) Export, import and holding of currency/currency notes.

f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.

g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.

h) Taking out of insurance policy by a person resident in India from an insurance company outside India.

i) Loans and overdrafts by a person resident in India to a person resident outside India.

j) Remittance outside India of capital assets of a person resident in India.

k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

SCHEDULE-II [Regulation 3(1)(B)]

Classes of Capital Account Transactions of persons resident outside India

a) Investment in India by a person resident outside India, that is to say,

i) Issue of security by a body corporate or any entity in India and investment therein by a person resident outside India, and

ii) Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.

b) Acquisition and transfer of immovable property in India by a person resident outside India.

c) Guarantee by a person resident outside India in favour of, or on behalf of a person resident in India.

d) Import and export of currency/currency notes into/from India by a person resident outside India.

e) Deposits between a person resident in India and a person resident outside India.

f) Foreign currency accounts in India or a person resident outside India.

g) Remittance outside India of capital assets in India of a person resident outside India.

Q.73 Mr. R wants to know whether there are any type of Capital Account Transactions which are prohibited?

A.73 There are few Capital Account Transactions which have been prohibited expressly under FEMA. Prohibited Capital Account Transactions are contained in Regulation No. 4 of Notification No. FEMA – 1/RB-2000 as under:

"No person resident outside India shall make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage –

i) In the business of chit fund, or

ii) As Nidhi Company, or

iii) In agricultural or plantation activities, or

iv) In real estate business, or construction of farm house, or

v) In trading in Transferable Development Rights (TDRs)

Explanation

For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential/commercial/premises, road, or bridges.

Above list of the prohibited capital account transactions may always be read with Foreign Direct Investment Policy issued by Government of India from time to time. The last Consolidated FDI Policy dated 28th August, 2017 giving prohibited items may be reproduced as under

a) Lottery Business including Government/private lottery, online lotteries, etc.

b) Gambling and betting including casinos etc.

c) Chit funds

d) Nidhi company

e) Trading in Transferable Development Rights (TDRs)

f) Real Estate Business or Construction of Farm Houses

'Real estate business' shall not include development of townships, construction of residential /commercial premises, roads or bridges and

Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

g) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

h) Activities/sectors not open to private sector investment e.g. (I) Atomic Energy and (II) Railway operations (other than permitted activities mentioned in para 5.2).

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.

Q.74 Explain Mr. R about the liberalized scheme of remittance facility available to residents.

A.74 Remittance facility for resident individuals i.e. Liberalised Remittance Scheme ('LRS') was introduced initially *vide* Cir. No. 64/2003-04-RB, dated 4-2-2004, permitting a remittance of US$ 25000 per calendar year for any current or capital account transactions or a combination of both. The ceiling of remittance has been changed from time to time. The current permissible limit is US$ 250,000 per Financial Year (April-March). All the existing instructions on LRS have been consolidated in FED Master Direction No. 7/2015-16 dated 1st January, 2016 as amended from time-to-time.

The remittance under this liberalized scheme shall be over and above the limit specified, if any, in the regulations relevant to each capital account or the current account transaction.

<u>The permissible Capital Account transactions by an individual under LRS are</u>

(i) Opening of foreign currency account abroad with a bank;

(ii) Purchase of property abroad;

(iii) Making investments abroad- acquisition and holding shares of both listed and unlisted overseas company or debt instruments; acquisition of qualification shares of an overseas company for holding the post of Director; acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration; investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;

(iv) Setting up Wholly Owned Subsidiaries and Joint Ventures (with effect from August 5, 2013) outside India for *bona fide* business subject to the terms & conditions stipulated in Notification No FEMA.263/ RB-2013 dated March 5, 2013;

(v) Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

Permissible Current Account transactions by an individual under LRS

The remittance under the scheme is permitted for all current account transactions other than those which are prohibited under Schedule I or restricted under Schedule II of the CAT Rules. The limit of US$ 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015. Release of foreign exchange exceeding USD 2,50,000 requires prior permission from the Reserve Bank of India.

Prohibitions under the scheme

a) Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery/sweep stakes, tickets proscribed magazines etc.) or any item restricted under Schedule II (requiring permission of Central Government) of Foreign Exchange Management (Current Account Transactions) Rules, 2000.

b) The transactions which are otherwise not permissible under FEMA and those in the nature of remittance for margins or margin calls to overseas exchanges/overseas counterparty.

c) Remittances made directly or indirectly to Bhutan, Nepal, Mauritius or Pakistan.

d) Remittance to countries identified by Financial Action Task Force (FATF) as non co-operative countries.

e) Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

It may be noted that Master Circular No. 3 of 1st July 2005, Master Circular No. 5 of 1st July 2006 & Master Circular No. 5 of 2nd July 2007 and Master Circular No. 4 dated 1-7-2008, on Miscellaneous remittances from India – facilities for residents do not specify that remittances to

Bhutan, Nepal, Mauritius or Pakistan is prohibited under the liberalized remittance scheme.

In view of the prohibitions as explained above, although master circular does not refer to prohibitions of remittance to Bhutan, Nepal, Mauritius or Pakistan, the remittance to those countries will not be permissible under the scheme since provisions of Cir. No. 64 dated 24th February 2004 is still in operation and issue of subsequent circular/s are not superceding the earlier circular.

Repatriation of funds / income

Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. At present, the resident individual is not required to repatriate the funds or income generated out of investments made under the Scheme. However, a resident individual who has made overseas direct investment in the equity shares; compulsorily convertible preference shares of a JV/WoS outside India Notification No. FEMA 263/ RB-2013 dated March 5, 2013. Within the LRS limit, shall have to comply with the terms and conditions prescribed by the overseas investment guidelines under Notf. 120 of FEMA.

Procedure for remittance

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

Q.75 What are the types of Foreign borrowings that can be availed by Residents?

A.75 Under the extant FEMA regime, the RBI has permitted several avenues to avail borrowings from non-residents, whether in the form of pure commercial loans or by way of securitized instruments. Based on the different regulations and rules that apply, the types of permitted borrowings from non-residents can be categorized broadly under the following heads.

- External Commercial Borrowings (ECBs), including,
  - Foreign currency convertible bonds (FCCBs) / foreign currency exchangable bonds (FCEBs)
  - Masala Bonds
  - ECB by start ups

- Trade Credits (TCs);
- Portfolio investments in Debt Instruments;
- Deposits; and
- Other borrowings.

The borrowings under the respective categories listed above may be permitted either in foreign currency (FC) (generally in convertible foreign currency like USD, Euro, Yen, CHF, GBP, etc.) or in Indian Rupees. Over the years, the RBI has permitted INR denominated borrowings even under the ECB framework which hitherto only dealt with FC denominated borrowings. Of the above, trade credit and ECB are most often availed by Indian Corporates although debt instruments like corporate bond / NCDs have also gained flavour of late, with the deepening of the domestic bond market.

The following Table identifies the relevant RBI regulations dealing with the respective categories of foreign borrowings:

Table 1 – Regulatory framework for foreign borrowings

Category of Foreign Borrowing	Relevant Regulations	Notification reference
ECBs	• FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000 • FEM (Transfer or Issue of Any Foreign Security) Regulations, 2004 (for FCCBs & FCEBs)	• FEMA 3/2000 • FEMA 120/2004
Trade Credits	• FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000	• FEMA 3/2000
Portfolio investments in Debt instruments	• FEM (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017	• FEMA 20 (R)/2017
Deposits	• FEM (Deposit) Regulations, 2016	• FEMA 5(R)/2016

Table 1 – Regulatory framework for foreign borrowings		
Category of Foreign Borrowing	**Relevant Regulations**	**Notification reference**
Other Loans	• FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000 • FEM (Borrowing and Lending in Rupees) Regulations, 2000	• FEMA 3/2000 • FEMA 4/2000

Q.76 What is the role of the Authorised Dealers (Authorised Persons)

A.76 Under FEMA the burden of ensuring the compliance of the provisions of FEMA is cast on the Authorised Dealers.

Section 10(5) provides that before undertaking any transactions in foreign exchange on behalf of any person, Authorised Dealer is required to obtain a declaration and such other information from the person (applicant) on whose behalf the transaction is being undertaken that will reasonably satisfy him that the transaction is not designed to contravene or evade the provisions of the Act or any of the Rules or Regulations made or Notifications or directions or orders issued under the Act. Authorised Dealers should preserve the information/documents obtained by them from the applicant before undertaking the transactions for verification by the Reserve Bank.

With a view to maintaining uniform practices Authorised Dealers may consider prescribing requirements or documents to be obtained by their branches to ensure compliance with provisions of sub-section 5 of section 10 of the Act.

The Act further provides that in case the person on whose behalf the transaction is being undertaken refuses or does not give satisfactory compliance of the requirements of an Authorised person, Authorised person (Authorised Dealer) shall refuse in writing to undertake the transactions. Where an Authorised person has reasons to believe that a contravention or evasion of the Act or the Rules or Regulations made or Notifications issued thereunder was contemplated in the transaction that Authorised person has refused to undertake, Authorised person shall report the matter to the RBI.

Remittances for all other current transactions which are not specifically prohibited under the Rules or which are not included in Schedule II or III maybe permitted by Authorised Dealers without any monetary/percentage

ceilings subject to compliance with the provisions of sub-section (5) of section 10 of the Act. Remittances for transactions included in Schedule III maybe permitted by Authorised Dealers up to the ceilings prescribed therein (See Q. No. 68).

The RBI has not prescribed the documentation which should be verified by the Authorised Dealers while permitting remittances for various transactions, particularly of current account. Sub-section (5) of section 10 of the Foreign Exchange Management Act, 1999 provides that an authorised person shall before undertaking any transaction in foreign exchange on behalf of any person require that person to make such a declaration and to give such information as will reasonably satisfy him that the transaction will not involve and is not designed for the purpose of any contravention or evasion of the provisions of the Act or of any rule, regulation, notification, direction or order issued thereunder.

Therefore, Authorised Dealers ought to keep on record any information/ documentation on the basis of which the transaction was undertaken for verification by the RBI.

In case the applicant refuses to comply with necessary requirement or makes unsatisfactory compliances therewith, the Authorised person should refuse in writing to undertake the transaction and should report the matter to the RBI if he has reason to believe that any contravention/evasion of the provisions of FEMA is contemplated by the person (applicant).

Under FERA, most of the documents had to be submitted to the Reserve Bank of India before undertaking the transaction or after undertaking transaction. However, under FEMA most of the responsibility of ensuring compliance of FEMA, Rules and Notifications has been entrusted to the Authorised persons (Authorised Dealers). Therefore, the applicant has to satisfy the Authorised Dealers about the compliance of the provisions of FEMA. Authorised Dealer will take an undertaking from the applicant to the effect that there has been no contravention of the provisions of FEMA, Rules and Notifications.

The Authorised Dealer has to report certain types of transactions to the RBI for information in FETERS (an online information system) in the normal course. The Authorised Dealers may also prepare and keep on record dummy Form A2, in respect of remittances less than USD 25,000. In addition, AD banks may be guided by FED Master Direction No. 18/2015-16 dated January 1, 2016 (as updated from time to time) on Reporting under FEMA, 1999 for reporting related instructions under the Scheme.

Reserve Bank of India does not issue any instructions under the FEMA, regarding the procedure to be followed in respect of deduction of tax at source while allowing remittances to the non-residents. It is be mandatory on the part of Authorised Dealers to comply with the requirement of the tax laws, as applicable.

While allowing the facility to resident individuals, Authorised Dealers are required to ensure that "Know Your Customer" guidelines have been implemented in respect of bank accounts. They should also comply with the Anti-Money Laundering Rules in force while allowing the facility.

The applicants should have maintained the bank account with the bank for a minimum period of one year prior to the remittances for capital account transactions. If the applicant seeking to make the remittances is a new customer of the bank, Authorised Dealers are required to carry out due diligence on the opening, operation and maintenance of the account. Further, the Authorised Dealers are required to obtain bank statement for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by the applicant may be obtained.

The Authorised Dealer is required to ensure that the payment is received out of funds belonging to the person seeking to make the remittances, by a cheque drawn on the applicant's bank account or by debit to his account or by Demand Draft / Pay Order. Authorised Dealer may also accept the payment through credit /debit/prepaid card of the card holder.

The Authorised Dealer is required to certify that the remittance is not being made directly or indirectly by /or to ineligible entities and that the remittances are made in accordance with the instructions contained herein.

AD bank is not permitted to extend any kind of credit facilities to resident individuals to facilitate remittances for capital account transactions under the Scheme.

Authorised Dealer is required to keep a record of the countries identified by FATF as non-co-operative countries and territories and accordingly update the list from time to time for necessary action by their branches handling the transactions under the Liberalised Remittance Scheme. For this purpose, they may access the website www.fatf-gafi.org to obtain the latest list of non-co-operative countries notified by FATF.

Q.77 What are the possible consequences of violations of the provision under FEMA?

A.77 If any person contravenes any provisions of FEMA Rule, or Regulation, Notification, Direction or Order issued under the Act or contravenes any condition subject to which authorisation issued by the RBI, he/she shall be liable to a penalty up to thrice the sum involved in such contravention, where the amount is quantifiable, or up to Rs. two lakhs where the amount is not quantifiable. If the contravention is a continuing one, further penalty which may extend to ₹ five thousand per day from the date of contravention. The penalty is leviable after the process of adjudication is complete. [Section 13(1) of the FEMA].

As per newly inserted sub-sections 1A to 1D *vide* Finance Act, 2015,

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

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fit, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director

(1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

As stipulated by Section 13(2), in addition to the penalty for contravention, the Adjudicating Authority may direct that the currency, security, or any other money or property in respect of

which contravention as taken place maybe confiscated by the Central Government.

Failure to pay the penalty within 90 days of issue of notice, will entail imprisonment of the person committing the offence.

Section 37A provides special provisions relating to assets held outside India in contravention of section 4 as under:

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

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

Q.78 Can you suggest a check-List (things to be kept in mind by an emigrating Indian)

A.78 General checklist:

1. Ensure there is “Emigration Clearance Not Required” on the Passport in the case of graduates, and professionals, and those who have gone abroad on employment earlier.

2. In case there is “Emigration Clearance Required” stamped on the passport, he should go to the (POE) office of the “Protector of Emigrants” and get the endorsement from the office of the POE on the passport, after submitting proper form of contract from the employer duly endorsed by the Indian Embassy in the other country. (for more details Refer to Q. No. 7).

3. Get the visa endorsed on the Passport from the respective Embassy/ High Commission/Consulate General of the country concerned.

4. Obtain foreign exchange for travel, from the bank or dealer in Foreign Exchange and get the same endorsed on the Passport.
5. Not to carry prohibited articles.
6. Always keep the telephone number and address of the Indian Embassy.
7. For taking out jewellery or valuables etc., get the same endorsed so that there is no duty on your return.

Under FEMA

1. Intimate your bankers about the change in the status as "Non-Resident" under FEMA.
2. Give Power of Attorney to the trusted friend or relative to do things on your behalf during your stay abroad.
3. Intimate the companies, firms where you are a shareholder, partner and deposit holder about the change in your status as Non-Resident under FEMA.
4. Retire from the firm if it is carrying on real estate business.
5. Open Non-Resident (External) Account/take necessary form for opening the account from the bankers to be sent on going abroad.
6. Do not carry more than ₹ 25,000/- [Regulation 3 of FEMA Ntf. 6(R)].

Q.79 Mr. Returning Indian wants to know how the overseas Indians can take benefit of their status as NRIs

A.79 Overseas Indians should make the best of their status as Non-Resident under FEMA and under the Income-tax Act. These have been elaborately dealt with in Question No. 48.

Q.80 Steps a returning Indian should take prior to his return to India?

A.80 Check list for returning Indians is as under:

General

Things to do

1. Go through the appropriate channel in the Customs enclosure.
2. Make an honest and correct declaration.
3. Make a voluntary and honest declaration immediately on landing in the event you intend to tranship the baggage, or part of it, or keep

it with the Customs for transhipment or taking it back with you when you eventually leave the country. In case any of the items are permitted for reshipment or transhipment and are therefore in the custody of the Customs, the Customs authorities must be contacted well in advance and all dues paid to enable them to keep the items ready for handing over in time at the time of departure.

4 Obtain proper receipts for payments made by you.

5. Keep handy purchase receipts for articles, especially major items like TV, tape deck, video, stereo set, etc., brought in as baggage.

6. Foreign exchange, in the form of currency notes, bank notes or travellers cheques, exceeding in aggregate US$ 10,000 (Value of currency notes not to exceed US $ 5,000) must be declared in writing in the Currency Declaration Form which should be got countersigned by the concerned Customs Officer to facilitate re-export of the unutilised amount by the tourist.

7. Obtain a 'Landing Certificate' from the concerned Customs Officer on arrival, in the event of any baggage is mishandled i.e., found missing on landing; please note that such a certificate will not be issued subsequently by the Customs.

8. Ensure shipment of unaccompanied baggage within the time limit prescribed viz, it is dispatched within one month of your arrival in India as laid down in Rule 8 of the Baggage Rules, 2016.

9. Ensure safety of the items allowed on baggage Re-Export basis or those requiring export certificate/drawback, and produce all the items physically before the Customs Officer at the time of departure from India. If such items are placed in checked-in suitcases, then the airline staff at the check-in counter should be advised to make available the said package(s) for customs examination. You should ensure that the carriers do comply with this requirement.

10. If any item allowed on the reexport basis has been lost, misplaced or gifted, you should contact the Public Relations Officer, Customs, well in advance of departure and should avoid check-in at the last moment. Sufficient amount of money for payment of duty/fine should be kept handy.

11. In certain States in India, which enforce prohibition the tourist should obtain, on arrival from abroad, the requisite liquor consumption permit at the airport from the tourist counter.

12. If claiming concessions on transfer of residence, keep current / previous passport handy to establish your period of stay abroad.

13. In order to qualify for the duty free concession on transfer of residence, the items should be in actual possession and use of the passenger and, in order to establish the fact, the passenger should preferably possess the original purchase vouchers, as evidence. He should also ensure that the Bill of Landing or House Airway Bill is issued before the date of actual departure from abroad.

    The concessional rate of duty on new items, applies to articles in his possession abroad before leaving and those purchased at the duty free shop at the airport of arrival.

14. Firearms are not allowed to be imported as baggage. Firearms on export must be covered by valid licences and the airline/shipping agents should be kept informed. The firearms will be kept in the custody of the Pilot/ Master for security reasons. Firearms of prohibited bore shall not be dealt with.

15. Convert foreign exchange through authorised dealers/money changers.

16. Indian nationals (non-tourists) must surrender unutilised foreign exchange within 90 days (180 days in case of unspent travellers cheques) from the date of their arrival.

17. You should note that the following types of compensatory payments involving foreign exchange constitute offences under the law:

    i) Receiving or making payments at the instance of or on behalf of a person resident outside India.

    ii) Placing amounts to the credit of a person resident outside India, or, at his instance or on his behalf, making payments out of these amounts.

    iii) Maintaining a foreign currency account without proper authority or using such an account for selling, lending or transferring foreign exchange or failing to surrender the balance to an authorised foreign exchange dealer in India.

18. Currency Declaration Form may be surrendered to the Customs Officer at the time of the tourist's departure to facilitate re-export the unutilised foreign exchange.

Things not to do

1. Don't bring in any contraband goods or goods in trade quantities, dangerous drugs and prohibited goods by concealing these items

either on your person or in you baggage or otherwise, as they do not constitute bona fide baggage.

2. Do not misdeclare, fail to declare or conceal any item of your baggage, otherwise you may be deprived of the free allowances permitted under the rules in force. Further, you may be penalised and/or prosecuted.

3. Don't involve yourself in bringing in or taking out, directly or indirectly, any package owned by another party or parties, whether known or otherwise, without fully satisfying yourself about its actual contents and admissibility for import or export.

4. Don't act as a carrier directly or indirectly or accept free passage, free hotel accommodation or any other monetary benefit for such service which may attract penal action under the law in force.

5. Note that a motor vehicle is not considered to be a baggage item. The rules and conditions for import of a motor vehicle are set out in Chapter on Baggage Rules of the book.

6. Don't bring in any crude gold jewellery which may be classified as gold bullion.

7. Don't carry with you foreign exchange such as foreign bank drafts or traveller's cheques drawn in favour of another person.

8. Don't import firearms (including air guns) as baggage.

9. Import of firearms through the medium of post is prohibited.

10. Don't import or export counterfeit coins or literature or paintings or figures, which are obscene/prohibited.

11. Don't import plants, vegetables or fruits unless these items are covered by proper documents issued at the port of embarkation, as some of these items are liable to be fumigated at the port of landing by an entomologist.

12. Tourists should refrain from importing jewellery of high value, as it may be detained for valuation by the Customs Jewellery Appraiser and, if the value exceeds ₹ 50,000 in case of male passenger or ₹ 100,000 in case of lady passenger, a suitable guarantee or bond may be required for its release.

13. Don't import pets/birds without valid health certificate for the pet.

Under FEMA

1. Evaluate Foreign Investments, Foreign Bank Accounts such as shares, investment in OCBs, immovable properties before return. Plan gifts prior to his return.
2. Convert his FCNR, NRE accounts to RFC Account.
3. Allow NRNR A/c. to remain till maturity.
4. Intimate the bankers, companies, firms where he has investments; about his status as resident.
5. Watch out for the tax liability under Income-tax Act.

5 Chapter
Direct Investment Outside India

This chapter deals with the provisions of Direct Investment outside India for Resident Indians. It also covers various investments which can be made other than direct investment including prohibition and exceptions where provisions do not apply. Returning Indian may like to know what are the possibilities, facilities or hurdles for them to maintain their cross border trade from India, once they have settled in India.

Q.81 What are the overall provisions relating to overseas investment? Who can invest outside India? Non-Residents, returning to India would like to know, if their overseas activities could be carried out smoothly?

A.81 1. Section 6(3)(a) of FEMA deals with the "Transfer or issue of any foreign security by a person resident in India". Regulation relating to overseas investment is notified by RBI as Notification No. FEMA 120/RB dated 7-7-2004 (the notification) as amended from time-to-time. A Master Direction titled 'Master Direction on Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad' has been issued *vide* FED Master Direction No. 15/2015-16 dated 1-1-2016. The Master Directions consolidates instructions on rules and regulations framed by the Reserve Bank from time-to-time.

A person proposing to make investment outside India may do so either by way of participating in any Joint Venture (JV) or by way of incorporating Wholly Owned Subsidiary (WOS) anywhere outside India.

The regulation defines applicant as "Indian Party" and contemplates group/association of more than one company as Indian party. Thus it is possible to have an applicant comprising of more than one entity.

2. A company incorporated in India or a body created under an Act of Parliament or a Partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), can make investments abroad under the automatic route of Investment. [Regulation 6(1)]

Navaratna Public Sector Undertakings, ONGC Videsh Ltd. and Oil India Ltd are allowed to invest in overseas unincorporated/ incorporated entities in oil sector (i.e., for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route.

Resident corporates and partnership firms registered under the Indian Partnership Act, 1932 may undertake agricultural operations including purchase of land incidental to such activity either directly or through their overseas offices, provided: a) the Indian party is otherwise eligible to invest under Regulation 6 of the Notification and such investment is within the overall specified limits, and (b) for the purpose of such investment by acquisition of land overseas the valuation of land is certified by a certified valuer registered with the appropriate valuation authority in the host country. (Regulation 6A of the notification).

Listed Indian companies are permitted to invest in shares and other securities of investment grade up to 50% of their networth into listed companies abroad. [Regulation 6B]

Indian mutual fund registered with SEBI can also invest upto US $ 7 bn. abroad in accordance with the SEBI guidelines. [Regulation 6C]

A Registered Trust or the Society engaged in manufacturing/ educational/hospital sector can also invest abroad if, they are in existence for more than three years, and they have obtained approval of their Governing bodies or the trustees as the case may be. This is subject to RBI approval with certain standard conditions of KYC and they are not in adverse notice of Enforcement agencies in India [Regulation 9A].

A proprietary concern can invest abroad by capitalising not more than 50% fees realisable from the overseas company up to 10% of the capital of the overseas company with standard conditions subject to RBI approval. [Regulation 19]

Unregistered partnership firm and proprietorship concern with a proven track record of exports (i.e., the export outstanding does not exceed 10% of the average export realisation of the preceding three years and a consistently high export performance), and classified as 'Status Holder' as per the Foreign Trade Policy can also invest outside India upto 10% of their average export realisation in last three preceding financial years or upto 200% of their net owned funds whichever is lower. This is subject to RBI approval & other standard conditions. [Regulation 19A]

Individuals are also permitted to invest abroad by capitalisation of professional fees or consideration in lieu of director's remuneration within the LRS ceiling in force at time of acquisition. In case the LRS ceiling is exceeded, prior approval of RBI is required [Regulation 20].

With effect from August 05, 2013, as stipulated by Ntf. No. 263 dated March 5, 2013, a resident individual (single or in association with another resident individual or with an 'Indian Party' as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. Such investment shall be within the overall limit prescribed under the provisions of Liberalised Remittance Scheme [Regulation 20A].

Certain non-portfolio and other than direct investment outside India is also permitted such as acquisition of foreign securities by way of gift from PROI, acquire foreign shares by way of inheritance from a person whether resident in or outside India, acquire qualification shares, purchase shares under ESOP scheme of the Foreign Company to the employees/directors of Indian affiliates, ADR/GDR linked option to the employees of the Indian company, etc. [Regulation 22, 23 & 24]

Q.82 What is prohibited investment outside India and what are exempted from the restrictive conditions of these provisions of overseas investment?

A.82 1) Prohibition

An investment by Indian Party into Overseas Venture is not permitted

a) into Real Estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs)) and Banking Sector [Regulation 5(2)]. Real Estate Sector is defined to exclude development of townships, construction of residential/commercial premises, roads and bridges. Therefore such developmental activities shall qualify for overseas investment.

b) if investment is in Pakistan

c) by way of portfolio investment except in case of listed Indian companies which can invest by way of portfolio investment, as mentioned elsewhere in this chapter.

An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

2) Exceptions [Regulation 4]

However, investment

a) from Resident Foreign Currency Account (RFC A/c) are freely permitted and provisions of this notification are not applicable.

b) by persons not permanently resident in India, in a foreign security from his foreign exchange resources outside India is permitted.

c) by acquisition of bonus shares also do not require any permission if original investment is as per the provisions of the Act.

Q.83 What is the meaning of Financial commitment and Direct investment outside India

A.83 Financial commitment means the amount of direct investments outside India by an Indian Party -

i. By way of contribution to equity shares or CCPS of the JV/WOS abroad.

ii. Contribution to the JV/WOS as preference shares (for reporting purpose to be treated as loan).

iii. As loans to its the JV/WOS abroad.

iv. 100% of the amount of corporate guarantee issued on behalf of its overseas JV/WOS and

v. 50% of the amount of performance guarantee issued on behalf of its overseas JV/WOS.

vi. Bank guarantee/standby letter of credit issued by a resident bank on behalf of an overseas JV/WOS of the Indian party, which is backed by a counter guarantee/collateral by the Indian party.

vii. Amount of fund/non fund based credit facility availed by creation of charge (pledge/mortgage/hypothecation) on the movable/immovable property or other financial assets of the Indian party/its group companies.

Direct investment outside India means investment by way of contribution to the capital or subscription to the M/A of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange but does not include portfolio investment. Thus, direct investment outside India signifies a long-term interest in the foreign entity (JV or WOS).

It may be noted that Indian party can advance loan to overseas JV/ WOS only if it has subscribed to the capital of the JV/WOS.

Q.84 What are conditions of Overseas Investments?

A.84 Conditions of investments [Regulation 6(2)]

These conditions are specified in Regulation 6(2) of the notification. It would be noticed that ceiling of quantum of investment is based on the sources through which investment is made and some other conditions is based upon sector in which investment is proposed.

1) Overall investment financial commitment is permitted up to 400% of the networth of Indian company. Financial commitment exceeding USD one billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank. This limit is not applicable where the investment is made out of the proceeds of ADR/GDR and the amount available in the EEFC A/c of the Indian party. Networth of Indian party will include the net worth of its 51% subsidiary or it's parent, provided that subsidiary and the parent has not availed of this facility.

   The overall ceiling of 400% of networth shall comprise of contribution to capital of the JV/WOS, loan granted to JV/WOS and guarantees issued to or on behalf of JV/WOS.

2) Party proposing to make investment is not on the exporter's caution list of the Reserve Bank of India or under investigation by Enforcement Directorate or under defaulter list of banking system of India.

3) All the transactions relating to investment in a JV or WOS is to be routed through only one branch of the Authorised dealer. However it may designate different ADs for different JV/WOS abroad.

4) The Investment in Financial Sector and investment by exchange of shares of an Indian company, in overseas venture are covered by the special conditions. They have to fulfil certain additional conditions specified elsewhere in this Book.

In case of partial or full acquisition of existing foreign company where investment is more than US $ 5 million, valuation of the company will be made by SEBI Category I Merchant Banker or an Investment Banker/Merchant Banker outside India Registered with Appropriate regulatory authority and in other cases by Chartered Accountant or Certified Public Accountant.

Also in case of Swap of shares, in all cases valuation is required from Merchant Banker as explained above.

5) Form ODI is filed by the Indian party to the AD and have submitted all the APR in respect of all its overseas investment.

6) There are various sources/methods out of which remittance maybe proposed by Indian party for investment outside India.

Investment can be made in combination of one or more of these sources/methods.

(a) Remittance in cash.

(b) By capitalisation of exports to Joint Venture (JV) or WOS.

(c) Out of the money raised through ECB.

(d) By swap of the shares of the Indian party or through ADR/GDR swap.

(e) By remittance from EEFC A/c. or

(f) By applying proceeds of the ADR or GDR issue for capitalising overseas entity.

Investment in Overseas Venture as per conditions of regulations 6(2) is also popularly known as "Automatic Route" of Investment Outside India.

Q.85 What is the procedure of making Overseas Investment?

A.85 Procedure of investment

The Indian party proposing to invest abroad has to

(1) File Form ODI with the authorised dealer if the method of investment is any one of the five methods as described under Automatic route.

The prescribed Form ODI requires various information to be submitted viz., the information on details of Joint Venture Partner, past financials of Indian party, cost of the overseas project, declaration of Indian party whether it is caution listed.

Indian party is also required to submit

(2) Board Resolution authorising such an investment,

(3) Last three years financial statements in case where Indian Party is engaged in financial sector,

(4) Networth certificate in the prescribed format, now attached as a part of the application in form ODI

Q.86 What are the conditions of making investment outside India in financial services sector

A.86 As provided in Regulation 7 of the Notification No. FEMA 120/2000-RB dated 7-7-2004, only an Indian party engaged in financial services activities can invest and participate in the overseas investment in the financial services sector, subject to following additional conditions.

1) a) Indian party has earned profit from financial services during three preceding financial years

b) Has registered itself with regulatory authorities in India for conducting financial service activities

c) Have obtained approval from regulatory authorities in India & abroad, for investment in financial sector activities abroad

d) Have fulfilled the prudential norms relating to capital adequacy

2) A step down subsidiary of JV/WOS investing in a Financial Service sector is also required to comply with above conditions. Unregulated financial service entities in India, can invest abroad in non financial sectors under Automatic route. However regulated entities engaged in financial services sector in India will require to comply with these norms even when overseas investment is in non-financial sector abroad. Trading in Commodities Exchanges overseas and setting up of JV/WOS for trading in Overseas Commodities Exchanges will be reckoned as financial services activity and will require clearance from Securities and Exchange Board of India (SEBI) on account of merger of Forward Markets Commission with SEBI.

Q.87 What are conditions of making Investment outside India by Takeover/ Tender process?

A.87 Indian party can acquire/takeover the overseas entity by bidding and tender process also. However if bid of Indian party is accepted, then it may have two options, either it can make investment of the amount of bid and file Form ODI, if such amount (quantum) is in accordance with

the criteria (ceilings specified) of automatic route or if the bid amount exceeds quantum the ceiling of the Indian party, then in such cases it will have to apply for prior approval of RBI before making further remittance. The remittance of tender deposit amount or issue of bid bond guarantee for offer of bid by the Indian party is permitted by the Authorised dealer. [Regulation 14]

Q.88 Can Indian party make overseas investment when it cannot observe the criteria of Automatic route of investment?

A.88 It is possible for Indian party to participate in Overseas Venture even if it does not fulfil any of the criteria discussed in earlier paragraph such as :

(a) Holding an EEFC A/c.

(b) Issue of ADRs or GDRs, to overseas entity

(c) Sufficient Networth

The Indian party willing to participate in overseas venture will have to apply to Reserve Bank of India. Reserve Bank of India may permit such investment after considering various factors such as external trade potential, financial strength, track record, orientation to international trade of the Indian party and economic viability of the project overseas.

[Regulation 9 of Notification No.120]

Q.89 What are post-approval conditions that are to be observed by Indian party making investment in an overseas venture?

A.89 i. Indian party shall receive share certificates or any other documentary evidence of investment in the foreign JV/WOS as an evidence of investment and submit the same to the designated AD within 6 months;

ii. Indian Party shall repatriate to India, all dues receivable from the foreign JV/WOS, like dividend, royalty, technical fees etc. within 60 days of its falling due;

iii. Indian Party shall submit to the Reserve Bank through the designated Authorized Dealer, every year on or before December 31, an Annual Performance Report in Part II of Form ODI in respect of each JV or WOS outside India set up or acquired by the Indian party. The APR has to be based on the audited annual accounts of the JV/WOS for the preceding year.

Where the law of the host country does not mandatorily require auditing of the books of account of JV/WOS, the Annual Performance

Report (APR) may be submitted by the Indian party based on the unaudited annual accounts of the JV/WOS provided:

(a) The Statutory Auditors of the Indian party certify that the law of the host country does not mandatorily require auditing of the books of account of JV/WOS and the figures in the APR are as per the un-audited accounts of the overseas JV/WOS.

(b) That the unaudited annual accounts of the JV/WOS has been adopted and ratified by the Board of the Indian party.

(c) 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 Reserve Bank of India.

iv. Indian Party shall report the details of the decisions taken by a JV/WOS regarding diversification of its activities/setting up of step down subsidiaries/alteration in its share holding pattern within 30 days of the approval of those decisions by the competent authority concerned of such JV/WOS in terms of the local laws of the host country. These are also to be included in the relevant Annual Performance Report; and

v. In case of disinvestment, sale proceeds of shares/securities shall be repatriated by Indian Party to India immediately on receipt thereof and in any case not later than 90 days from the date of sale of the shares/securities and documentary evidence to this effect shall be submitted to the Reserve Bank through the designated Authorised Dealer.

vi. An annual return on Foreign Liabilities and Assets (FLA) is required to be submitted directly by all the Indian companies which have received FDI and/or made FDI abroad (i.e., overseas investment) in the previous year(s) including the current year, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India. Such FLA is required to be sent by e-mail by July 15, every year.

[Regulation 15]

Q.90 What is unique identification No. issued by Reserve Bank of India to Indian party?

A.90 RBI issues a unique identification number if it finds that documents submitted by Indian party are in accordance with the regulations in respect of overseas investment. This unique identification No. is required to be quoted in all correspondences. It is found in practice that no further remittance is permitted by the AD, if unique identification number is not received by the Indian party. The allotment of UIN does not constitute an approval from the Reserve Bank for the investment made/to be made in the JV/WOS. The issue of UIN only signifies taking on record of the investment for maintaining the database. The onus of complying with the provisions of FEMA regulations rests with the AD bank and/or the Indian party.

Further, with effect from June 1, 2012 an auto generated e-mail, giving the details of UIN allotted to the JV/WOS under the automatic route, is forwarded to the AD/Indian party as confirmation of allotment of UIN, and no separate letter is issued by the Reserve Bank to the Indian party and AD Category-I bank confirming the allotment of UIN.

Q.91 What are the regulations relating to investment by individual in an overseas venture by way of direct investment?

A.91 As stipulated in Regulation 20A of FEMA Ntf. 120, a resident individual (single or in association with another resident individual or with an 'Indian Party') may make overseas direct investment in accordance with the criteria as per Schedule V of the Notification which are as under:

A. Overseas Investment

1. JV or WOS abroad should not be engaged in the real estate business or banking business or in the business of financial services activity.

2. The JV or WOS abroad shall be engaged in *bona fide* business activity.

3. JV/WOS should not be located in the countries identified by the Financial Action Task Force (FATF) as "non co-operative countries and territories" as available on FATF website www.fatf-gafi.org or as notified by the Reserve Bank.

4. The resident individual shall not be on the Reserve Bank's Exporters Caution List or List of defaulters to the banking system or under investigation by any investigation/enforcement agency or regulatory body.

5. At the time of investments, the permissible ceiling shall be within the overall ceiling prescribed for the resident individual under

Liberalised Remittance Scheme as prescribed by the Reserve Bank from time-to-time. It should be noted that the investment made out of the balances held in EEFC/RFC account shall also be restricted to the limit prescribed under LRS.

6. The overseas JV or WOS, to be acquired/set up, shall be an operating entity only and no step down subsidiary is allowed to be acquired or set up by the JV or WOS.

7. The valuation shall be as in same manner as applicable to overseas investment by Indian Party as per Regulation 6(6)(a) of the Notification.

8. The financial commitment by a resident individual to/on behalf of the JV or WOS, shall be only in form of equity shares and compulsorily convertible preference shares. Thus, financial commitment by way of loans & guarantees is prohibited.

B. Post Investment Changes

Any alteration in shareholding pattern of the JV or WOS may be reported to the designated AD within 30 days including reporting in the Annual Performance Report as required to be submitted in terms of Regulation 15 of the Notification.

C. Disinvestment by Resident Individuals

1. Disinvestment may be partial or full by way of transfer/sale or by way of liquidation/merger of the JV or WOS.

2. Disinvestment shall be allowed after one year from the date of making first remittance for setting up or acquiring the JV or WOS abroad.

3. The disinvestment proceeds shall be repatriated to India immediately and in any case not later than 60 days from the date of disinvestment and the same may be reported to the designated AD.

4. No write off shall be allowed in case of disinvestments by the resident individuals.

D. Reporting Requirements

1. Part I of the Form ODI, duly completed, should be submitted to the designated authorised dealer, within 30 days of making the remittance.

2. The investment shall be reported by the designated authorised dealer to the Reserve Bank in Form ODI Parts I and II within 30 days of making the remittance.

3. The obligations as required in terms of Regulation 15 of the Notification shall also apply to the resident individuals who have set up or acquired a JV or WOS under the provisions of this Schedule.

4. The disinvestment by the resident individual may be reported by the designated AD to the Reserve Bank in Form ODI Part III within 30 days of receipt of disinvestment proceeds.

The LRS Scheme is a parallel code to FEMA Ntf. 120 and hence no further recourse to provisions of FEMA Ntf. 120 is required or necessary. It may be noted that portfolio investment is outside the Ntf. 263 and therefore unutilized limit of LRS may be used for other than direct investments e.g. portfolio investment.

Q.92 Is there any possibility of making investment by individual in an overseas venture other than by way of direct investment?

A.92 1) Indian Residents who are individuals can acquire the shares of foreign company (under General permission of RBI) by way of:

(a) Gift from Person Resident outside India

(b) Cashless Employees Stock Option Scheme issued by company outside India.

(c) Inheritance from any person Resident in India or outside India

(d) Subscription of shares of such foreign parent company offered under its ESOP Schemes, irrespective of the percentage of the direct or indirect equity stake in the Indian company. Subscription of such shares is permitted to an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle. The consideration payable by resident Indian maybe borne either by foreign company issuing shares or its Indian branch or office or subsidiary or the company in India in which foreign equity holding is not less than 51%.

(e) Out of the funds of Resident Foreign Currency account (RFC), all restrictions regarding utilisation of foreign currency balances including any restrictions on investment in any form outside India shall not apply to RFC account.

2) Indian Resident can acquire the shares of foreign company under general permission,

(a) As minimum qualification shares of a foreign company for holding the post of a director in that company to the extent prescribed as per the law of the host country where the company is located provided it does not exceed the limit prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

(b) By way of right shares issued by a foreign company provided they were held by virtue of holding shares in accordance with FEMA.

(c) By way of purchase by the employees/directors of an Indian promoter company of shares of an overseas – JV or WOS in the field of software, provided the consideration does not exceed the ceiling as stipulated by Reserve Bank from time to time and the shares so acquired do not exceed 5% of the paid-up capital of the overseas JV/WOS. The percentage shareholding of the Indian promoter company inclusive of the shares allotted to its employees is not less than the percentage of shares held by it earlier.

(d) By way of purchase, by resident employees and working directors of Indian company in Knowledge based sector, of foreign securities under ADR/GDR linked stock option schemes up to the ceiling as stipulated by the Reserve Bank from time-to-time.

In all above case of acquisition of shares by individual, there is a general permission to sale such shares.

Q.93 Can Mutual Fund in India acquire the overseas/foreign security?

A.93 A mutual fund can invest in foreign securities such as ADR/GDR of Indian companies, rated debt equity instruments, etc., within on overall cap of US $ 7 billion. Mutual funds desirous of availing of this facility can do so in accordance with SEBI guidelines for making such investment, [Regulation 26]

Q.94 What are the different modes of disinvestments from the JV/WOS abroad

A.94 Disinvestment by the Indian party from its JV/WOS abroad may be by way of transfer/sale of equity shares to a non-resident/resident or by way of liquidation/merger/amalgamation of the JV/WOS abroad.

A. Divestment not involving write-off:

The Indian Party may disinvest without write off under the automatic route subject to the following:

i. The sale is effected through a stock exchange where the shares of the overseas JV/WOS are listed;

ii. If the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant/ Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV/WOS;

iii. The Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and/or export proceeds from the JV or WOS;

iv. The overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;

v. The Indian party is not under investigation by CBI/DoE/SEBI/ IRDA or any other regulatory authority in India; and

vi. Other terms and conditions prescribed under Regulation 16 of the Notification

B. Divestment under automatic route involving write-off:

An Indian Party may disinvest, under the automatic route, involving write off in the under noted cases:

a. Where the JV/WOS is listed in the overseas stock exchange;

b. Where the Indian Party is listed on a stock exchange in India and has a net worth of not less than ₹ 100 crore;

c. Where the Indian Party is an unlisted company and the investment in the overseas JV/WOS does not exceed USD 10 million; and

d. Where the Indian Party is a listed company with net worth of less than ₹ 100 crore but investment in an overseas JV/WOS does not exceed USD 10 million

e. All compliances as required under item (i) to (vi) under part (A) of this question

3) Hedging of Risk

Indian party is permitted to hedge the exchange risk arising out of their investment in overseas venture upto the market value/fair value of shares.

4) Disinvestment will also include liquidation or winding up of foreign venture.

Q.95 What are the regulations relating to pledge of foreign shares and creation of charge on assets?

A.95 In all, pledge of assets and shares of Indian party as well overseas company are allowed in favour of overseas lender as well as Resident lender.

Pledging of shares is permitted with A.Ds or Indian financial institutions or with overseas lender (which is regulated and supervised as a bank) as a security for fund or non-fund based facilities for itself (i.e. the Indian Party) or for its JV/WOS/SDS whose shares have been pledged, or for any other JV/WOS/SDS of the Indian Party subject to the value of such facility being reckoned as financial commitment and total financial commitment remains within the limit of 400% of net worth of the Indian Party [Regulation 18].

Charge on assets:

(1) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on its assets [including the assets of its group company, sister concern or associate company in India, promoter and/or director] in favour of an overseas lender (which is regulated and supervised as a bank as per law of host country) as security for availing of the fund based and/or non-fund based facility for its JV or WOS or Step Down Subsidiary (SDS) outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification viz., the value of such facility being reckoned as financial commitment and total financial commitment remains within the limit of 400% of net worth of the Indian Party and a 'No Objection' is obtained from the domestic lender in whose favour charge is already created on the domestic assets.

(2) An Indian Party may create charge (by way of mortgage, pledge, hypothecation or otherwise) on the assets of its overseas JV or WOS or SDS in favour of an AD bank in India as security for availing of the fund based and/or non-fund based facility for itself or its JV or WOS or SDS outside India subject to the terms and conditions prescribed under Regulation 18A of the Notification viz. the value of such facility being reckoned as financial commitment and total

financial commitment remains within the limit of 400% of net worth of the Indian Party and a 'No Objection' is obtained from the overseas lender or domestic AD bank in whose favour charge is already created on the overseas assets

Q.96 Is there any penalties for violations of provisions of FEMA?

A.96 Section 13 of FEMA provides for penalty upon adjudication in case of violations of any provisions of the Act, rules or directions thereunder. Quantum of the penalty provided is thrice the amount involved in the contravention, if amount is quantifiable and ₹ 2 lakh if not quantifiable. A further sum of ₹ 5000 per day of the default in case contravention is continuing one.

Q.97 How can immovable property be acquired outside India by a resident?

A.97 Immovable property can be acquired outside India:

a. Under section 6(4) of FEMA which provides that 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..

b. As an inheritance/gift from a person (i) referred to in Sec. 6(4) of FEMA; or (ii) who has acquired it prior to July 8, 1947 in accordance with the foreign exchange provisions in force at the time of such acquisition.

c. Purchased with balances in the Resident Foreign Currency (RFC) account of the resident.

d. As a gift from persons at (b) & (c) above, provided he is a relative of such persons.

e. Purchased with remittances made under the Liberalised Remittance Scheme (LRS). In case members of a family pool their remittances to purchase a property, then the said property should be in the name of all the members who make the remittances.

f. Jointly with a relative provided there are no outflow of funds from India.

g. By an Indian company having overseas offices, for housing its business or for residence of staff.

6 Chapter
Imports by Person Resident in India

Persons Resident in India can import goods by complying with the regulation laid down by RBI under FEMA & other procedures under EXIM Policy & Customs Act. This chapter mainly highlights compliances to be made under FEMA relating to documents to be submitted to RBI or Authorised Dealer, time limit for payment of import dues & loan and credit facilities which can be availed by importer. NRI can consider these provisions to explore possibilities of doing business in India by employing their global resources for markets in India.

Q.98 What are the permitted imports? What is IDPMS? What documents are to be submitted to authorized dealer for import of the goods & to make remittances for the payment?

A.98 Import of goods can be freely made unless they are included in the negative list requiring licence under the Foreign Trade Policy in force. In cases where licences are marked 'For Exchange Control purposes', licences should be called for and special conditions, if any, attached to such licences should be adhered to.

Where foreign exchange acquired has been utilised for import of goods into India, the AD Category-I bank is required to ensure that the importer furnishes evidence of import in Import Data Processing and Monitoring System ('IDPMS'), Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself that goods equivalent to the value of remittance have been imported. AD bank is required to ensure that all import remittances outstanding on the notified date of IDPMS are uploaded in IDPMS.

RBI has framed a comprehensive IT system to facilitate efficient processing of all import transactions and effective monitoring thereof called the Import Data Processing and Monitoring System ('IDPMS').

Key functionalities of IDPMS

- Paperless secure transmission of data relating to imports/exports through from customs, IDPMS to authorized dealers and *vice versa*
- Import Bill of Entry (BoE) management by bank settlement, extension and adjust/closure

- Outward remittance management (ORM) by bank, Outward Remittance Notification and adjust/closure
- Multiple ORMs against single BoE and *vice versa*
- Banks have direct access to download/upload BoE issued by customs or customers

Steps involved

- Based on the AD code declared by the importer, the banks shall download the Bill of Entry (BOE) issued by EDI ports from "BOE Master" in IDPMS. For non-EDI ports, AD banks of the importer shall upload the BoE data in IDPMS as per message format "Manual BoE reporting" on daily basis on receipt of BoE from the customer/ customs office. BoE Exchange Control copy has been discontinued with effect from December 1, 2016 as the same is available in IDPMS
- AD banks will enter BOE details and mark off ORMs as per the message format "BOE Settlement"
- In case of payment after receipt of BoE, the AD bank shall generate ORM for import payments made by the importer customer as per the message format "BOE Settlement"
- Multiple ORMs can be settled against single BoE and also multiple BoEs can be settled against one ORM
- On settlement of ORM with evidence of import AD Category-I bank shall in all cases issue an acknowledgment slip to the importer containing the following particulars:
  a. Importer's full name and address with code number;
  b. Number and date of BoE and the amount of import; and
  c. A recap advice on number and amount of BoE and ORM not settled for the importer.
- The importer needs to preserve the printed 'Importer copy' of BoE as evidence of import and acknowledgment slip for future use.

Accordingly, the documents required to be submitted to Authorised Dealer are:

1. Evidence of Import.
2. Import Bills/Documents.
3. Remittance Instruction for making the payment for imports made.

Q.99 What can be submitted as Evidence of Import for import of various categories of goods?

A.99 Documents which can be submitted as evidence of import are as follows:

1. In case of all imports, irrespective of the value of foreign exchange remitted/paid for import into India, it is obligatory on the part of the AD Category-I bank through which the relative remittance was made, to ensure that the importer submits:-

   (a) BoE number, port code and date for marking evidence of import under IDPMS

   (b) Customs Assessment Certificate or Postal Appraisal Form, as declared by the importer to the Customs Authorities, where import has been made by post, or Courier Bill of Entry as declared by the courier companies to the Customs Authorities in cases where goods have been imported through couriers, as evidence that the goods for which the payment was made have actually been imported into India, or

   (c) For goods imported and stored in Free Trade Warehousing Zone (FTWZ) or SEZ Unit warehouses or Customs bonded warehouses, etc., the Exchange Control Copy of the Ex-Bond Bill of Entry or Bill of Entry issued by Customs Authorities by any other similar nomenclature the importer shall submit applicable BoE number, port code and date for marking evidence of import under IDPMS

2. Where imports are made in non-physical form, i.e., software or data through internet/datacom channels and drawings and designs through e-mail/fax, a certificate from a Chartered Accountant that the software/data/drawing/design has been received by the importer.

3. In the following cases, a certificate from the Chief Executive Officer (CEO) or auditor of the company to the effect that the goods for which remittance was made have actually been imported into India, can be submitted provided:

   i. The amount of foreign exchange remitted is less than USD 1,000,000 (USD one million) or its equivalent, and

   ii. The importer is a company listed on a stock exchange in India and whose net worth is not less than ₹ 100 crores as on the date of its last audited balance sheet,

iii. The importer is a public sector company or an undertaking of the Government of India or its departments.

iv. The importers are autonomous bodies like scientific bodies/ academic institutions, such as Indian Institute of Science/Indian Institute of Technology etc. whose accounts are audited by the Comptroller and Auditor General of India (CAG). Authorised Dealers may insist on a declaration from the auditor/CEO of such institutions that their accounts are audited by CAG.

v. Outward Remittance Message has to be created & BoE has to be downloaded from "BoE Master "in IDPMS (in case of EDI ports). In case of Non-EDI ports duplicate copy/customs certified copy have to be submitted or BoE waiver obtained from RBI.

4. Time limit for submission of evidence of import

In respect of imports on D/A basis, AD Category-I bank shall verify the evidence of import from IDPMS at the time of effecting remittance of import bill. However, if importers fail to produce documentary evidence due to genuine reasons such as non-arrival of consignment, delay in delivery/customs clearance of consignment, etc., Authorised Dealers may, if satisfied with the genuineness of request, allow reasonable time, not exceeding three months from the date of remittance, to the importer to submit the evidence of import.

Q.100 What are the ways in which the payments for the imports can be made?

A.100 (I) A payment in foreign exchange by an authorised dealer, whether by way of remittance from India or by way of reimbursement to his branch or correspondent outside India against payment for import into India, or against any other payment, shall be as mentioned below:

Group		***Manner of payment***	
(A)	Members of the Asian Clearing Union		
(i)	Bangladesh, Myanmar, Pakistan, Sri Lanka & Republic of Maldives	(a)	Payment for import of eligible goods and services by credit to Asian Clearing Dollar account and/or Asian Clearing Union Euro account in India of a

Group		*Manner of payment*	
			bank of the member country in which the other party to the transaction is resident or by debit to the Asian Clearing Union Dollar account and/or Asian Clearing Union Euro account of the authorized dealer maintained with the correspondent bank in that member country;
		(b)	Payment may also be made in any freely convertible currency in all other cases.
		(c)	In respect of imports to India from Myanmar, payment may be made in any freely convertible currency or through ACU mechanism from Myanmar.
(ii)	Nepal & Bhutan	Payment may be in Rupees	
(iii)	Islamic Republic of Iran	(a)	Payment for import of eligible goods and services, in any freely convertible currency and/or in accordance with the directions issued by the Reserve Bank to the authorized dealers from time-to-time.
		(b)	Payment in any freely convertible currency and/or in accordance with the directions issued by the Reserve Bank to the authorized dealers from time-to-time in all other cases.
(B)	All countries other than those mentioned in (A) above	(i)	Payment in rupees from the account of a bank situated in any country other than a member country of the Asian Clearing Union
		(ii)	Payment in any freely convertible currency.

(II) Where the goods are shipped from a member country of the Asian Clearing Union (other than Nepal and Bhutan) but the supplier is resident of a country other than a member country of the Asian Clearing Union, payment may be made in a manner specified for countries in Group (B) above. In all other cases, payment shall be made in a currency appropriate to the country of shipment of goods. Payment may be made by any other mode in accordance with the directions issued by the Reserve Bank of India to authorized dealers from time to time;

(III) A person resident in India may make payment for import of goods in foreign exchange through an international card held by him/in rupees from international credit card/debit card through the credit/debit card servicing bank in India against the charge slip signed by the importer/as prescribed by Reserve Bank from time to time provided that the import is in conformity with the provisions of the Foreign Trade Policy for the time being in force.

(IV) A payment can also be made by way of credit to non-resident account of the overseas exporter maintained with a bank in India

(V) In cases where payment for import of goods or software is sought to be made through Online Payment Gateway Service Providers (OPGSPs), AD-Banks are permitted to offer the facility up to value not exceeding US$ 2,000. Transactions for purchases from international e-Commerce websites such as Amazon.com is an example of this method of payment for imports.

Q.101 What is the time limit for settlement of import dues? Can advance remittance be made? What are the conditions to be complied with in order to make advance remittance?

A.101 1. Time limit for settlement of Import dues

Remittances against imports should be completed within six months from the date of shipment except in cases where amounts are withheld towards guarantee of performance etc.

2. Deferred payment arrangements including suppliers and buyers credit providing for payments beyond a period of six months from date of shipment upto a period of less than five years can be made. Suppliers' credit relates to credit for imports in to India extended by the overseas supplier, while buyers' credit refers to loans for payment of imports in to India arranged by the importer from a bank or financial institution outside India for maturity of less than three years.

3. Trade credits for imports into India up to USD 20 million per import transaction for import of all items (permissible under the Foreign Trade Policy) with a maturity period (from the date of shipment) up to one year (in case of non-capital goods or operating cycle whichever is less) and up to three years (in case of import of capital goods) are to be approved by ADs under Automatic route.

   The all-in-cost ceiling for raising Trade Credit is 350 basis points over 6 months LIBOR (for the respective currency of credit or applicable benchmark). The all-in-cost include arranger fee, upfront fee, management fee, handling/processing charges, out of pocket and legal expenses, if any.

   Guarantee for Trade Credits: AD Category I banks are permitted to issue bank guarantees/ in favour of overseas supplier, bank or financial institution up to USD 20 million per import transaction for a maximum period up to one year in case of import of non-capital goods (except gold, palladium, platinum, rhodium, silver, etc). For import of capital goods, the period of such guarantees can be for a maximum period up to three years. The period is reckoned from the date of shipment and the guarantee period should be co-terminus with the period of credit. Further, issuance of such guarantees will be subject to compliance with the provisions contained in Department of Banking Regulation Master Circular No.DBR.No.Dir. BC.11/13.03.00/2015-16 dated July 1, 2015 on "Guarantees and Co-acceptances", as amended from time-to-time.

4. Advance remittances

   Advance remittance for import of goods can be made without any ceiling subject to the following conditions:

   (a) Submission of bank guarantee/standby Letter of Credit

      I) If the amount of advance remittance exceeds USD 200,000 or its equivalent,

         i) An unconditional, irrevocable standby Letter of Credit or

         ii) A guarantee from an international bank of repute situated outside India or

         iii) A guarantee of an Authorised Dealer in India, if such a guarantee is issued against the counter-guarantee of an international bank of repute situated outside India,

      is obtained.

II) Importer (other than a Public Sector Company or a Department/Undertaking of the Government of India/State Governments) may make advance remittances up to USD 5,000,000 (US dollar five million) without bank guarantee from overseas suppliers, if he is not in a position to obtain a bank guarantee/standby Letter of Credit & the Authorised Dealer is satisfied about the track record and *bona fides* of the importer. AD Category-I banks may frame their own internal guidelines to deal with such cases as per a suitable policy framed by the bank's Board of Directors.

III) A Public Sector Company or a Department/Undertaking of the Central/State Government/s has to obtain a specific waiver for the bank guarantee from the Ministry of Finance, Government of India if not in a position to obtain a guarantee from an international bank of repute against an advance payment exceeding USD 100,000.

(b) Physical receipt of goods

Physical import of goods into India is made within six months (three years in case of capital goods) from the date of remittance and the importer gives an undertaking to furnish documentary evidence of import within fifteen days from the close of the relevant period.

(c) Repatriation or utilization of advance remittance in case of non-import

In the event of non-import of goods, Authorised Dealer should ensure that the amount of advance remittance is repatriated to India or is utilised for any other purposes for which release of exchange is permissible under the Act, Rules or Regulations made thereunder.

(d) Advance payment of any amount without any guarantees or standby letter of credit for import of rough diamonds by an importer (other than PSU and Government Undertaking) in cases where payment is made to overseas diamond mining companies having recommendation of Gem Jewellery Export Promotion Council (GJEPC). Due caution is required to be exercised to ensure that remittance is not permitted for import of conflict diamonds (Kimberly Certification).

Q.102 How the Import Bills should be received by Importer?

A.102 Import bills and documents should be received by the banker of the importer in India from the banker of the supplier. AD Category-I bank should not, therefore, make remittances where import bills have been received directly by the importers from the overseas supplier. However, in the following cases the importers may receive import bills directly from the overseas supplier where

a. The value of import bill does not exceed USD 300,000.

b. Import bills received by wholly-owned Indian subsidiaries of foreign companies from their principals.

c. Import bills received by Status Holder Exporters as defined in the Foreign Trade Policy, 100% Export Oriented Units/Units in Free Trade Zones, Public Sector Undertakings and Limited Companies.

d. Import bills received by all limited companies viz., public limited, deemed public limited and private limited companies.

e. As a sector specific measure, AD Category-I banks are permitted to allow remittance for imports by non-status holder importers up to USD 300,000 where the importer of rough diamonds, rough precious and semi-precious stones has received the import bills/documents directly from the overseas supplier and the documentary evidence for import is submitted by the importer at the time of remittance. AD Category-I banks should do the KYC and due diligence exercise and should be fully satisfied about the financial standing/status and track record of the importer customer & it obtains a report on each individual overseas supplier from the overseas banker or reputed overseas credit rating agency.

Q.103 What are the ways and conditions in which Nominated Banks/Agencies can import Gold into India?

A.103 Nominated banks and nominated agencies, as notified by DGFT, are permitted to import gold on consignment basis. All sale of gold domestically will, however, be against upfront payment. Nominated banks are free to grant gold metal loans.

Star and Premier Trading Houses (STH/PTH) can import gold on Document against Payment (DP) basis as per entitlement without any end use restrictions.

The import of gold coins and medallions is permitted. However, prohibition on sale of gold coins and medallions by banks continues pending further review.

The 20:80 scheme of import of gold which was introduced *vide* A.P.(DIR) Circular No. 25 dated 14-8-2013 was withdrawn on November 28, 2014. However, the obligation to export under the 20:80 scheme would apply to the unutilised gold imported before November 28, 2014.

Suppliers' and Buyers' credit (trade credit) including the usance period of Letters of Credit opened for import of gold in any form, including jewellery made of gold/precious metals or/and studded with diamonds/semi-precious/ precious stones, should not exceed 90 days from the date of shipment.

Q.104 What do you mean by Merchanting Trade? What are the procedures required to be followed for undertaking Merchanting Trade?

A.104 The merchanting trade is the transaction which satisfies the following conditions:

a. Goods acquired should not enter the Domestic Tariff Area, and

b. The state of the goods should not undergo any transformation

Merchanting Traders have to be genuine traders of goods and not mere financial intermediaries. Confirmed orders have to be received by them from the overseas buyers. AD banks should satisfy themselves about the capabilities of the Merchanting Trader to perform the obligations under the order. The overall Merchanting Trade should result in reasonable profits to the Merchanting Trader.

AD Category-I banks handling *bona fide* Merchanting transactions are required to ensure the following:

(a) Goods involved in the transactions are permitted for export/import under the prevailing Foreign Trade Policy (FTP) of India as on the date of shipment and all the rules, regulations and directions applicable to export (except Export Declaration Form) and import (except Bill of Entry) are complied with for the export leg and import leg, respectively,

(b) Both the legs of a Merchanting Trade Transaction are routed through the same AD bank. The bank should verify the documents like invoice, packing list, transport documents and insurance documents (if originals are not available, non-negotiable copies duly authenticated by the bank handling documents may be taken) and satisfy itself about the genuineness of the trade.

(c) The entire Merchanting Trade Transactions should be completed within an overall period of nine months and there should not be any outlay of foreign exchange beyond four months.

(d) The commencement of Merchanting Trade would be the date of shipment/export leg receipt or import leg payment, whichever is first. The completion date would be the date of shipment/export leg receipt or import leg payment, whichever is the last;

(e) Short-term credit either by way of suppliers' credit or buyers' credit will be available for Merchanting Trade Transactions, to the extent not backed by advance remittance for the export leg, including the discounting of export leg LC by an AD bank, as in the case of import transactions;

(f) In case advance against the export leg is received by the Merchanting Trader, AD bank should ensure that the same is earmarked for making payment for the respective import leg. However, AD bank may allow short-term deployment of such funds for the intervening period in an interest bearing account;

(g) Merchanting Traders may be allowed to make advance payment for the import leg on demand made by the overseas seller. In case where inward remittance from the overseas buyer is not received before the outward remittance to the overseas supplier, AD bank may handle such transactions by providing facility based on commercial judgment. It may, however, be ensured that any such advance payment for the import leg beyond USD 200,000/- per transaction, should be made against Bank Guarantee/LC from an international bank of repute, except in cases and to the extent where payment for export leg has been received in advance;

(h) Letter of Credit to the supplier is permitted against confirmed export order keeping in view the outlay and completion of the transaction within nine months;

(i) Payment for import leg may also be allowed to be made out of the balances in Exchange Earners Foreign Currency Account (EEFC) of the Merchant Trader.

(j) AD bank should ensure one-to-one matching in case of each Merchanting Trade transaction and report defaults in any leg by the traders to the concerned Regional Office of RBI, on half yearly basis within 15 days from the close of each half year, i.e., June and December.

(k) Defaulting Merchanting Traders, whose outstandings reach 5% of their annual export earnings, would be caution-listed.

(l) The KYC and AML guidelines should be observed by the AD bank while handling such transactions.

Q.105 How can import related payments be made online through Online Payment Gateway Service Providers (OPGSPs)? Are there any limits applicable to such online payments?

A.105 AD Category-l banks have been permitted to offer facility of payment for imports of goods and software of value not exceeding USD 2,000 by entering into standing arrangements with the OPGSPs subject to the following:-

(a) The balances held in the Import Collection account shall be remitted to the respective overseas exporter's account immediately on receipt of funds from the importer and, in no case, later than two days from the date of credit to the collection account.

(b) The AD Category-I bank will obtain a copy of invoice and airway bill from the OPGSP containing the name and address of the beneficiary as evidence of import and report the transaction in R-Return under the foreign currency payment head.

(c) The permitted credits in the OPGSP Import Collection account will be:

(i) Collection from Indian importers for online purchases from overseas exporters electronically through credit card, debit card and net banking and

(ii) Charge back from the overseas exporters.

(d) The permitted debits in the OPGSP Import Collection account will be:

(i) Payment to overseas exporters in permitted foreign currency;

(ii) Payment to Indian importers for returns and refunds;

(iii) Payment of commission at rates/frequencies as defined under the contract to the current account of the OPGSP; and

(iv) Bank charges

Q.106 What is the Asian Clearing Union or ACU? Can you explain its role and functions in Asian trade?

A.106 The Asian Clearing Union (ACU) was established in 1974 at the initiative of the United Nations Economic and Social Commission for Asia and Pacific (ESCAP), for promoting regional co-operation. The main objective of the clearing union is to facilitate payments among member countries for

eligible transactions on a multilateral basis, thereby economizing on the use of foreign exchange reserves and transfer costs, as well as promoting trade among the participating countries.

The Central Banks and the Monetary Authorities of Bangladesh, Bhutan, India, Iran, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka are currently the members of the ACU. All transactions to be settled through the ACU are handled by AD Category-I banks in the same manner as other normal foreign exchange transactions, through correspondent arrangements.

Transactions which are eligible to be settled through the ACU: The following payments are eligible to be settled through ACU:- Export/import transaction between ACU member countries on deferred payment terms; and not declared ineligible as mentioned hereunder

Trade transaction with Myanmar may be settled in any freely convertible currency, in addition to the ACU mechanism.

Transactions which are ineligible to be settled through the ACU: The following payments are not eligible to be settled through ACU:-

i) Payments between Nepal and India and Bhutan and India, exception being made in the case of goods imported from India by an importer resident in Nepal who has been permitted by the Nepal Rastra Bank to make payments in foreign exchange. Such payments may be settled outside ACU mechanism; and

ii) Payments that are not on account of export/import transactions between ACU members countries except to the extent mutually agreed upon between the Reserve Bank and the other participants; and

iii) All eligible current account transactions including trade transactions with Iran should be settled in any permitted currency outside the ACU mechanism until further notice.

Procedure for settlement of ACU transactions

i) Majority of transactions, as possible, should be settled directly through the accounts maintained by AD Category-I banks with banks in the other participating countries and *vice versa*; only the spill-overs in either direction are required to be settled by the Central Banks in the countries concerned through the Clearing Union. At all times, the balances maintained in the ACU Dollar and ACU Euro

accounts should be commensurate with requirements of the normal business.

ii) AD Category-I banks are permitted to settle commercial and other eligible transactions in much the same manner as other normal foreign exchange transactions.

7 Chapter Exports under FEMA

This chapter highlights the provisions relating to exports by the person resident in India, realization & repatriation of export proceeds, and consequences when exporter is unable to realise the export price. Returning Indians would like to understand whether his global business can be considered to be based in India through provisions of Exports and Imports procedure and Law in India under various statutes.

Q.107 What is the meaning of Export under FEMA 1999?

A.107 Export u/s. 2(1) of FEMA 1999 means, with its grammatical variations and cognate expressions, the

i) Taking out of India to place outside India any goods,

ii) Provisions of services from India to any person outside India.

Broadly stated, the supply of goods & services outside India shall be treated as Exports. However it is pertinent to note the definition of services. It has been defined u/s. 2(zb) of FEMA as under:

"Service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Notification No. FEMA 23(R)/2015-RB dated 12th January, 2016 also defines "Export' under its regulation No.2(iv) as including the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire purchase, or under any other arrangement by whatever name called and in the case of software, also includes transmission through electronic media.

Q.108 What is the procedure an exporter is required to observe in carrying out the export of goods & services, with obligations, if any, after an export is made?

A.108 The exporter has to comply with the pre-export procedure, documentation, realization and repatriation conditions and other conditions which can be summarized as under:

1. Pre-export procedure

   Exporter is required to make declaration with regard to goods and services in the prescribed format depending upon the mode of export. The declaration requires the exporter to disclose:

   i) Full export value of the goods

   ii) Estimated value of export, if full value is not ascertainable at the time of export.

   The authority to whom and the Form in which the declaration is required to be submitted are described as under:

Form	Manner	Authority to whom to furnish
Form EDF (Export Declaration Form) for exports from non-EDI ports	In duplicate	Commissioner of Customs.
Shipping Bill for exports from EDI ports	In duplicate	Commissioner of Customs
Form EDF (Export by post)	In duplicate	Authorised dealer with the counter signature of authorized dealer original form to be submitted to postal authority through which goods dispatched.
Form SOFTEX (Software exports through data – communication Links and receipts on the software packages/products exported)	In duplicate	Designated official of the Department of Electronics, Govt of India at Software Technology Parks STP's) or Free Trade Zone (FTZ's) or Export Processing Zones (EPZs) who in turn will directly submit it to the nearest office of RBI.

2. Documentation:

   a. *Export order:* This may be required for various purposes such as submission to bankers for export finance, custom for pre-shipment clearance.

   b. *Transfer documents:* These documents are termed differently depending on the mode of transport.

2.1 ***Mode of transport*** ***Receipts***

	Mode of transport	Receipts
a.	Ocean	Bill of Lading.
b.	Air	Airway Bill/Air Consignment Note.
c.	Rail/Road	Railway Receipt/Consignment Note.
d.	Post	Post Parcel Receipt

2.2 *Insurance policy:* This is required to insure the goods against various risks when they are ready for the purpose of export.

2.3 *Certificate of origin:* This may be obtained from the Merchants Chamber and is required for various purposes such as by the country operating quota system for Indian goods or for anti dumping purposes.

2.4 *Manufacturer's certificate:* This may be required, normally by the importer in the overseas country.

2.5 Packing list.

2.6 Certificate of inspection of goods.

2.7 Invoices of the exporter addressed to the buyer in foreign country.

2.8 *Shipping advice and shipping bill:* Advice is normally forwarded by the exporter to his overseas customer, while shipping bill is forwarded to the customs authorities containing details of the goods sought to be shipped under approval of customs authority.

2.9 Bank's certificate from the banker of the exporter containing certain information.

2.10 The nature and conditions of goods, under which they are exported, may be different. Therefore, there may be some other documents, like a letter of credit or certificate of measurement etc that may be required on a case to case basis. The exporter may be required to produce evidence in support of his declaration as referred earlier in respective forms.

3 Export of services:

None of the forms specified above, such as EDF/SOFTEX applies to the service exports. An exporter of service can, therefore, export them without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export and to repatriate the same to India.

4. Remittance of payments of the value of exports:

Mode of payment to be received by the exporter is prescribed in Notification No. FEMA 14(R)/2016 RB dated 2nd May 2016. The Notification indicates the currency in which remittance is required, the mode of transfer such as TT, MT, credit card, convertible rupee payments, Asian Clearing Union payments & other aspects of the payments.

5. Period of repatriation of export payments:

The period of realization and repatriation of export proceeds of goods/software/services shall be nine months from the date of export for all exporters including Units in Special Economic Zones (SEZs), Status Holder Exporters, Export Oriented Units (EOUs), Units in Electronic Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) & Bio-Technology Parks (BTPs) until further notice.

For goods exported to a warehouse established outside India, the proceeds shall be realized within fifteen months from the date of shipment of goods.

6. Submission of documents to authorised dealer after exports being made.

The declaration form along with the prescribed export documents are to be submitted to an authorized dealer within 21 days from the date of export or within such extended time as is permitted by the authorised dealer.

Authorised dealer requires the documents for various purposes, *inter alia*, for monitoring the receipt of payment of the full value of goods exported. After the documents have been negotiated/sent for collection, the AD shall report the transaction through Export Data Processing and Monitoring System (EDPMS) to the Reserve Bank and retain the documents at their end.

With operationalization of EDPMS on March 1, 2014, realization of all export transaction for shipping documents after February 28, 2014 is required to be reported in EDPMS.

AD Category-I banks are required to update the EDPMS with data of export proceeds on "as and when realised basis" and, with effect from October 16, 2017, they are required to generate Electronic Bank Realisation Certificate (eBRC) only from the data available in EDPMS, to ensure consistency of data in EDPMS and consolidated eBRC.

7. Import/exporter code number:

The importer/exporter code number allotted by the Director General of Foreign Trade under section 7 of the Foreign Trade (Development & Regulation) Act, 1992 is required to be indicated on all copies of the declaration form submitted by the exporter to the specified authority and in all correspondence with authorized dealer or the RBI.

Q.109 What are the transactions of exports where prior approval of RBI is required?

A.109 Prior approval of the RBI is requested by the exporter in respect of the following types of transactions:

i) Exports of goods on lease and hire & ultimate re-import

ii) Export on elongated credit

iii) Exports under bilateral trade agreements/rupee credit etc.

iv) Counter trade arrangements.

v) Project exports on deferred payment terms

Q.110 Is there any exemption available to exporter to dispense away with the procedural aspects as explained?

A.110 Yes, in certain situations, the prescribed declarations are dispensed with. These are the transactions like:

a) Trade samples of goods & publicity material supplied free of payment

b) Personal effects of travellers whether accompanied or unaccompanied

c) Ship stores, transshipment cargo goods supplied under order of Central Government or offices of Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements

d) Goods valuing not more than ₹ 5,00,000/- intended as gifts

e) Goods imported free of cost or on re-export basis

f) Goods permitted by Development Commissioner of SEZ, STP, EPZ or FTZ to be re-exported namely:

   i) Defective imported goods to be exported for replacement.

   ii) Export of goods imported on loan basis.

   iii) Surplus goods imported at supplier cost found surplus after production operations.

g) Replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

h) Goods sent for testing abroad subject to re-import.

i) Defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

j) Export of goods not involving any foreign exchange transactions directly or indirectly requires the waiver of GR/PP procedure from RBI.

Q.111 What is manner in which export proceeds should be realized and repatriated to India?

A.111 Manner of receipt of export value:

1 Regulation 8 of notification 23(R) of FEMA specifies that the manner of payment of export value of goods shall be as laid down in Notification No. 14(R) (Manner and receipt and payment) Regulation, 2016.

2 Regulation 3 of Notification No. 14(R) specifies the manner as under:

2.1 Every receipt in foreign exchange by an authorised dealer, whether by way of remittance from a foreign country or by way of reimbursement from his branch or correspondent outside India against payment for export from India, or against any other payment, shall be as mentioned below:

Group		Manner of payment	
(A)	Members of the Asian Clearing Union		
(i)	Bangladesh, Myanmar, Pakistan, Sri Lanka & Republic of Maldives	(a)	Receipt for export of eligible goods and services by debit to the Asian Clearing Union Dollar account and/or Asian Clearing Union Euro account in India of a bank of the member country in which the other party to the transaction is resident or by credit to the Asian Clearing Union Dollar account and/or Asian Clearing Union Euro Account of the authorized dealer maintained with the correspondent bank in that member country;
		(b)	Receipt may also be made in any freely convertible currency in all other cases.
		(c)	In respect of exports from India to Myanmar, payment may be received in any freely convertible currency or through ACU mechanism from Myanmar.
(ii)	Nepal & Bhutan	(a)	Receipt may be in Rupees
		(b)	Receipts for export of goods to Nepal may be made in free foreign exchange, provided the importer resident in Nepal has been permitted by the Nepal Rashtra Bank to make payment in free foreign exchange. However such receipts shall not be routed through the ACU mechanism.

Group		Manner of payment	
(iii)	Islamic Republic of Iran	(a)	Receipt for export of eligible goods and services, in any freely convertible currency and/or in accordance with the directions issued by the Reserve Bank to the authorized dealers from time to time.
		(b)	Receipt in any freely convertible currency and/or in accordance with the directions issued by the Reserve Bank to the authorized dealers from time-to-time in all other cases.
(B)	All countries other than those mentioned in (A) above	(i)	Receipt in rupees from the account of a bank situated in any country other than a member country of the Asian Clearing Union
		(ii)	Receipt in any freely convertible currency.

2.2 In respect of an export from India, payment shall be received in a currency appropriate to the place of final destination as mentioned in the declaration form irrespective of the country of residence of the buyer.

2.3 Authorised dealers have been permitted to allow receipts for export of goods/software to be received from a Third party (a party other than the buyer) as per the guidelines issued by the Reserve Bank

3. Payment for export in certain cases:-

Notwithstanding anything contained in Regulation 3, payment for export may also be received by the exporter as under, namely:

i) In the form of a bank draft, cheque, pay order, foreign currency notes/travellers cheque from a buyer during his visit to India, provided the foreign currency so received is surrendered within the specified period to the authorised Dealer of which the exporter is a customer;

ii) By debit to FCNR/NRE account maintained by the buyer with an authorised dealer or an authorised bank in India;

iii) In rupees from the credit card servicing bank in India against the charge slip signed by the buyer where such payment is made by the buyer through credit card;

iv) From a rupee account held in the name of an Exchange House with an authorised dealer if the amount does not exceed fifteen lakh rupees per export transaction or an amount prescribed by RBI:

v) In accordance with the directions issued by the Reserve Bank to authorised dealers, where the export is covered by the arrangement between the Central Government and the Government of a foreign country or by the credit arrangement entered into by the Exim Bank with a financial institution in a foreign state.

vi) In the form of precious metals i.e., gold/ silver/ platinum equivalent to value of jewellery exported by Gem & Jewellery units in Special Economic Zones and Export Oriented Units on the condition that the sale contract provides for the same and the value is declared in the relevant EDF.

vii) By means of postal order issued by a post office outside India or by a postal money order issued by such post office.

Further to above it is provided that in receiving the payments, exporter shall not do or refrain from doing anything or take or refrain from taking any action which has the effect of securing

i) That payment is not made in the specified manner or

ii) That the payment delayed beyond the specified period or software exported subject to permitted deductions.

4. Processing of export related receipts through Online Payment Gateway Service Providers (OPGSPs):-

AD-Banks are allowed to offer the facility of repatriation of export related remittances through Online Payment Gateway Service Providers (OPGSPs) for export of goods and services of value not exceeding USD 10,000.

AD Category-I banks providing such facilities are required to open a NOSTRO collection account for receipt of the export related payments facilitated through such arrangements. The balances held in the NOSTRO collection account shall be repatriated and credited to the respective exporter's account with a bank in India immediately

on receipt of the confirmation from the importer and, in no case, later than seven days from the date of credit to the NOSTRO collection account.

Under this arrangement, the permissible debits to the NOSTRO collection account are for repatriation of funds representing export proceeds to India for credit to the exporters' account, payment of fee/ commission to the OPGSP as per the predetermined rates/frequency/ arrangement; and charge back to the importer where the exporter has failed in discharging his obligations under the sale contract

Q.112 Can advance payments be received against exports? What are the regulations relating to same?

A.112 An exporter is permitted to receive advance payment from a buyer/third party named in the export declaration made by the exporter, outside India subject to the following conditions:

i) The shipment of goods is made within one year from the date of receipt of advance payment; however, where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment an exporter may receive advance payment.

ii) The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points;

iii) The documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

iv) In the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

Q.113 What are the other methods of Exports from India?

A.113 Following are the various methods for exports from India

a) Participating in trade fairs abroad.

b) Consignment exports.

c) Exporting to exporter's own warehouse abroad.

d) Projects abroad.

Each of the above exports method is governed by special conditions as provided in Notification No. FEMA 23(R) of FEMA.

Q.114 Can an exporter pay commission on exports and what is the procedure for the same?

A.114 Agency Commission on Exports:

i. Authorised dealers may allow payment of commission, either by remittance or by deduction from invoice value, on application submitted by the exporter. The remittance on agency commission may be allowed subject to the following conditions:

   a. Amount of commission has been declared on EDF/SOFTEX form and accepted by Customs authorities or Ministry of Information Technology, Government of India/EPZ authorities as the case may be. In cases where the commission has not been declared on EDF/SOFTEX form, remittance thereof may be allowed after satisfying about the reasons adduced by the exporter for not declaring commission on Export Declaration Form provided a valid agreement/written understanding between the exporter and/or beneficiary for payment of commission exists.

   b. The relative shipment has already been made.

ii. Authorised dealers may allow payment of commission by Indian exporters, in respect of their exports covered under counter trade arrangement through Escrow Accounts designated in U.S. dollar, subject to the following conditions:-

   a. The payment of commission satisfies the conditions as at (a) and (b) stipulated in paragraph above.

b. The commission is not payable to Escrow Account holders themselves.

c. The commission should not be allowed by deduction from the invoice value.

Note: Payment of commission is prohibited on exports made by Indian partners towards equity participation in an overseas joint venture/ wholly owned subsidiary as also exports under Rupee credit route except commission up to 10 per cent of invoice value of exports of tea & tobacco.

Q.115 What are important provisions of WTO affecting the export business from India?

A.115 The Government of India has signed various agreements with WTO which have among other things, the effect of:-

a) Removing the direct tax benefits given to the exporters by 2005.

b) Removing the various schemes of export subsidy other than the indirect taxation.

c) Removing the cascading effect of indirect taxation.

d) Committing to create free trade regime as per the GATT agreement and setting guidelines for implementation and settlement of disputes.

e) Stricter IPR regime thereby reducing the scope of reverse engineering.

f) Patents to be given for processes as well as for products.

8 Chapter — Compounding of Offences, Penalties, Adjudication and Appeals under FEMA, 1999

This chapter highlights the provisions of compounding of violations of provisions of rules, regulations and directions under FEMA and adjudication of any contravention and the relevant appeal provision for residents and non-residents.

Q.116 Whether the contraventions under FEMA can be compounded? What are the provisions relating to the compounding?

A.116 Contravention is a breach of the provisions of the Foreign Exchange Management Act (FEMA), 1999 and rules/regulations/notification/orders/directions/circulars issued there under. Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal in form of compounding.

Section 15 of FEMA permit compounding of contraventions as defined under section 13 of FEMA except the contravention under section 3(a) of FEMA for a specified sum after offering an opportunity of personal hearing to the contravener. For this purpose, an application is required to be made by the person committing such contravention, either before or after the institution of Adjudication Proceedings. The Government of India has notified Foreign Exchange (Compounding Proceedings) Rules, 2000 for guiding on compounding of contravention. The detailed process for compounding is laid down in FED Master Direction No. 4/2015-16 dated 1-1-2016 as amended from time to time.

Wilful, *malafide* and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank. Further, in terms of the proviso to rule 8 (2) of Foreign Exchange (Compounding Proceedings) Rules, 2000 inserted *vide* GOI notification dated February 20, 2017, if the Enforcement Directorate is of the view that the compounding proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, such cases will not be compounded by the Reserve Bank.

Thus RBI is entrusted with compounding of contraventions on all the matters:

a) which are not arising out of the provisions of Section 3(a) of FEMA;

b) where it appears to RBI that transactions are wilful, *malafide* and fraudulent which are viewed seriously and referred to Enforcement Directorate.

Compounding of contravention can also be done by the Director of Enforcement as provided under Section 15 of FEMA read with Foreign Exchange (Compounding Proceedings) Rules, 2000 dt. May 3, 2000 as amended from time-to-time.

Q.117 Who is the Compounding Authority? Explain briefly the procedure of Compounding Authority?

A.117 RBI has been empowered to compound all the contraventions under FEMA except clause (a) of section 3 of FEMA (dealing essentially with Hawala transactions). Application with the supporting documents along with demand draft of ₹ 5,000 should be submitted to The Compounding Authority, Cell for Effective Implementation of FEMA, Foreign Exchange Department, 5th Floor, Amar Building, Sir P. M. Road, Fort, Mumbai-400 001.

The Reserve Bank makes a scrutiny of the application to verify whether the required details and documents furnished by the applicant are *prima-facie* in order. Applications with incomplete details or where the contravention is not admitted will be returned to the applicant. On the admission of applications, the Reserve Bank will examine and decide if the contravention is technical, material or sensitive in nature. If technical and/or minor in nature, the applicant will be issued an administrative/ cautionary advice. If the contravention is material, it will be compounded by imposing an appropriate amount of penalty after giving an opportunity to the contravener to appear before the compounding authority for a personal hearing. If the contravention is sensitive in nature requiring further investigations, the same would be referred to the Directorate of Enforcement (DoE) for further investigation/action.

Compounding authority should pass the order within 180 days from the date of receipt of the application for compounding.

The sum specified as a penalty for compounding is required to be paid within fifteen days from the date of the order of compounding of contravention. If the compounding sum is not paid within the specified time, it would be construed that no application had been made for compounding of the said contravention and the other provisions of FEMA, 1999 regarding contraventions will apply. Such cases will be referred to the Directorate of Enforcement for necessary action.

No appeal can be instituted against the order of compounding as compounding is based on voluntary admissions and disclosures. Similarly,

there is no provision for a request for reduction of amount compounded or extension of period for payment of the amount imposed.

Cases of contravention, such as, those having serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation are sensitive contraventions and is dealt with independently by the adjudicating officer appointed under FEMA.

Proviso to Section 37A(4) enables the contravenor to compound the contravention which is being investigated by the directorate of enforcement or which is under the adjudication process with the adjudication officer but before the conclusion of the adjudication process.

Q.118 Can an application for compounding be sent to the Reserve Bank pending fulfilment of certain obligations?

A.118 All requisite approvals should be obtained and compliances should be completed before seeking compounding of contravention. Compounding can be done only after rectifying the records by way of obtaining post-facto approvals or unwinding the transactions in cases where such transactions are not permissible under FEMA, 1999. Copies of approvals and other compliances should be enclosed along with the application. Also application cannot be made for the similar matter/violations for compounding within three years and hence while making compounding application all the matters relating to irregularity on the transaction/s must be declared for the consideration of the compounding Authority.

Q.119 What is the criteria for calculation of compounding amount RBI?

A.119 The guidance structure for calculating the amount to be imposed on compounding is as below:

<table>
<tr><th colspan="2">Type of contravention</th><th>Formula</th></tr>
<tr><td>1]</td><td>Reporting Contraventions</td><td></td></tr>
<tr><td>A)</td><td>FEMA 20-Foreign Direct Investment

Para 9(1)(A), 9(1)(B), FCTRS (Reg. 10) and taking on record FCTRS (Reg. 4), in respect of issue or transfer of shares by an Indian Company or of the Indian Company as the case may be.</td><td rowspan="2">Fixed amount : ₹ 10000/- (applied once for each contravention in a compounding application) + Variable amount as under:
Up to 10 lakhs: 1000 per year
₹ 10-40 lakhs: 2500 per year
₹ 40-100 lakhs: 7000 per year
₹ 1-10 crore : 50000 per year
₹ 10 -100 Crore : 100000 per year
Above ₹ 100 Crore : 200000 per year</td></tr>
<tr><td>B)</td><td>FEMA 3-External Commercial Borrowings.

Non-submission of ECB statements</td></tr>
</table>

Type of contravention		***Formula***
C)	FEMA 120-Overseas Investment	
	Second/subsequent remittance without obtaining of UIN will be covered under Item 5 below). Non reporting/delay in reporting of acquisition/setup of subsidiaries/step down subsidiaries/changes in the shareholding pattern	
D)	Any other reporting contraventions (except those in Item 2 below)	
E)	Reporting contraventions by LO/BO/ PO i.e. Liasion/Branch/Project office of a Foreign Company	As above, subject to ceiling of ₹ 2 lakhs. In case of Project Office, the amount of contravention shall be @10% of total project cost.
2]	*AAC/APR/Share certificate delays* In case of non-submission/delayed submission of APR/share certificates of Overseas Company (FEMA 120) or AAC Annual Activity Certificate for Foreign co (FEMA 22) or FCGPR (B) Returns (FEMA 20) or FLA Returns (FEMA 20 (R))	₹ 10000/- per AAC/APR/FCGPR (B) Return delayed. Delayed receipt of share certificate – ₹ 10000/- per year, the total amount being subject to ceiling of 300% of the amount invested.
3]	A] Allotment/Refunds Para 8 of FEMA 20/2000-RB (non-allotment of shares or allotment/ refund after the stipulated 180 days) B] LO/BO/PO (Other than reporting contraventions)	₹ 30000/- + given percentage: 1st year : 0.30% 1-2 years : 0.35% 2-3 years : 0.40% 3-4 years : 0.45% 4-5 years : 0.50% >5 years : 0.75% (For project offices the amount of contravention shall be deemed to be 10% of the cost of project).
4]	All other contraventions except Corporate Guarantees but including all contraventions of FEMA 20(R)/2017-RB dated November 07, 2017 other than FLA Returns	₹ 50000/- + given percentage: 1st year : 0.50% 1-2 years : 0.55% 2-3 years : 0.60%

Type of contravention		*Formula*
		3-4 years : 0.65% 4-5 years : 0.70% > 5 years : 0.75%
5]	Issue of Corporate Guarantees without UIN/without permission wherever required/open ended guarantees or any other contravention related to issue of Corporate Guarantees.	₹ 500000/- + given percentage: 1st year : 0.050% 1-2 years : 0.055% 2-3 years : 0.060% 3-4 years : 0.065% 4-5 years : 0.070% >5 years : 0.075% In case the contravention includes issue of guarantees for raising loans which are invested back into India, the amount imposed may be trebled.

It is important to note that the contraventions (except FLA Return) of erstwhile FEMA 20 which are existing and continuing as on November 07, 2017 (i.e. the starting date of contraventions prior to November 07, 2017) will be compounded as per 1(A) above.

The above amounts are presently subject to the following provisos, viz.

(i) The amount imposed should not exceed 300% of the amount of contravention

(ii) In case the amount of contravention is less than ₹ One lakh, the total amount imposed should not be more than amount of simple interest @5% p.a. calculated on the amount of contravention and for the period of the contravention in case of reporting contraventions and @10% p.a. in respect of all other contraventions.

(iii) In case of paragraph 8 of Schedule I to FEMA 20/2000 RB contraventions, the amount imposed will be further graded as under:

a. If the shares are allotted after 180 days without the prior approval of Reserve Bank, 1.25 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).

b. If the shares are not allotted and the amount is refunded after 180 days with the Bank's permission: 1.50 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).

c. If the shares are not allotted and the amount is refunded after 180 days without the Bank's permission: 1.75 times the amount calculated as per table above (subject to provisos at (i) & (ii) above).

(iv) In cases where it is established that the contravenor has made undue gains, the amount thereof may be neutralized to a reasonable extent by adding the same to the compounding amount calculated as per chart.

For calculating amount under para 1 above (Reporting contraventions) the period of contravention may be considered proportionately (approx. rounded off to next higher month/12 X amount for 1 year). The total no. of days does not exclude Sundays/holidays.

It may, however, be noted that the guidance structure as above is only for the purpose of broadly standardizing the amount imposed by the compounding authorities across offices and the actual amount imposed may vary, depending on the circumstances of the case

Q.120 What is Late Submission Fee payable to RBI? Is it an alternative to Compounding or is it in addition to Compounding?

A.120 As stipulated in Para 12 of Part IV.A. of FED Master Direction No.18/2015-16 on Reporting under Foreign Exchange Management Act, 1999, for delays in reporting of transactions relating to foreign investment in India which are undertaken on or after November 7, 2017, a Late Submission Fee (LSF) is payable. The payment of LSF is an option for regularising only reporting delays without undergoing the compounding procedure. However, contravention for non-issue/late issue of capital instruments or non-transfer/late transfer of capital instruments and other contraventions of the provisions FEMA 20(R) will be proceeded against as per the procedure laid down in sections 13 and 15 of FEMA, 1999 hence LSF is not in replacement of the Compounding penalties.

The amount of LSF will be as per the following Matrix:

Amount involved in reporting (in ₹)	*Late Submission Fee (LSF) as % of amount involved**	*Maximum amount of LSF applicable*
Up to 10 million	0.05 percent	₹ 1 million or 300% of the amount involved, whichever is lower
More than 10 million	0.15 percent	₹ 10 million or 300% of the amount involved, whichever is lower
* The % of LSF will be doubled every twelve months The floor (minimum applicable amount) for LSF will be ₹ 100		

For calculating the LSF amount, the period of contravention shall be considered proportionately {(approx. rounded off to next higher month ÷ 12) X amount for 1 year}.

For the purpose of calculation, "months" shall include Sundays/Holidays. The period shall begin from the day after the 30th day (from the date of receipt of funds/allotment or transfer of shares) and end on the day preceding the day on which the transaction report is received in the Reserve Bank The date of reporting to the AD bank shall be deemed to be the date of reporting to the Reserve Bank provided the prescribed documentation is complete in all respects.

In case the reporting form (whether in physical or electronic form) is incomplete then the delay will continue till such time the form is received complete in all respects.

The applicant cannot claim a refund in any manner for the amount already deposited as LSF. It is, therefore, in the applicant's own interest to ensure compliance with the reporting norms and timelines.

The LSF is payable by way of a demand draft drawn in favour of "Reserve Bank of India" and payable at the Regional Office concerned.

Q.121 What is the effect of compounding of contravention on the power of the adjudicating authority?

A.121 When any of the contravention is compounded after the complaint has been received by the adjudicating authority or when application for compounding is made by the contravener then person in relation to whom contravention has been compounded shall be discharged.

Q.122 On how many occasions contravention by a person maybe compounded?

A.122 The contravention committed after the period of three years from the earlier compounding of the contravention by the person shall be considered as fresh contravention for the purposes of the compounding of contravention. Thus if the contravention is committed within three years from earlier compounding of contravention then provisions of compounding does not apply to the latter and such contravention may be referred to Directorate of Enforcement.

Q.123 Can you tell us, who can and under what circumstances impose penalty/ies under FEMA, 1999?

A.123 Adjudicating authority appointed by the Central Govt. under section 16 of the FEMA, 1999 may impose penalty provided u/s. 13 of the FEMA, 1999 on the person who have committed contravention of any rules, regulations,

act or directions issued under FEMA, however before passing any order adjudicating authority shall ensure:

a) That a complaint is being made against the person who have been alleged to have contravened the provisions of the Act (mostly in cases where authorised officer under Sec 14 of FEMA has filed the complaint before the adjudicating officer within the office of the Enforcement Directorate).

b) The manner of the enquiry as it is provided under the rules.

c) That a reasonable opportunity is provided to the alleged.

In case of compounding by RBI, application is received from the contravener on a *suo motu* basis or as guided by the RBI after regularizing/ recording the transaction by the concerned RBI office subject to penalty as described elsewhere in this Chapter.

Q.124 Is there any time limit during which adjudicating officer has to pass the order imposing penalty?

A.124 As provided u/s. 16(6) of the FEMA, 1999 every adjudicating authority shall deal with the complaint as expeditiously as possible and dispose of the same within a period of one year from the date of receipt of the complaint. If adjudicating authority cannot dispose of the complaint within the said period of one year then he has to record reasons in writing for not disposing of such complaint.

In case of compounding by RBI, a period of 6 months is specified under section 15 on compounding.

Q.125 Does a person on whom an order of penalty is imposed has a right to appeal?

A.125 Yes, such facility is available under the Act as provided u/s. 17(2) of the Act. Any person who is aggrieved of the order of the adjudicating authority may prefer an appeal to the Special Director (Appeal) in Form I.

Q.126 Whether a person on whom an order of penalty is imposed by the adjudicating authority has a right to apply for compounding? Can a complainant appeal against the order of Adjudicating Authority to Special Director (Appeal)?

A.126 No, contravention cannot be compounded which has been finally adjudicated and disposed of by the Adjudicating Authority. Application may be filed for compounding any contravention either during the course of investigation or when the complaint is made including those which are under adjudication process, until they are not disposed of.

Certain matter on which authorized officer who are complainant are aggrieved by the order of the adjudicating Authority, can file the appeal to the Special Director (appeal). Since the provision is only applicable to complainant, party against whom the complaint is filed will be normally a respondent before the Special Director(Appeal)

Q.127 Whether aggrieved person has any right to compound contravention after an appeal has been preferred to Appellate Tribunal?

A.127 As per rule 11 of compounding proceedings, contravention cannot be compounded if appeal as aforesaid is filed before Appellate Tribunal.

Q.128 Is there any provision under FEMA, 1999 to appeal against the order of adjudicating authority and/or the order of the Special Director (Appeals)?

A.128 Central Government has provided the establishments of the Appellate Tribunal. Any person aggrieved by the order of the adjudicating authority or Special Director (Appeals) may prefer an appeal to the Appellate Tribunal (Sections 18 and 19 of the FEMA, 1999).

Q.129 What is the procedure for appeal to the Appellate Tribunal?

A.129 Every appeal to the Appellate Tribunal can be filed within 45 days from the date on which a copy of the order made by the adjudicating authority or Special Director (Appeals) is received by the aggrieved person or by the Central Government. Such appeal shall be presented to the Appellate Tribunal in Form II signed by the applicant with the filing fee of ₹ 10,000 payable in cash or Demand Draft in favour of Registrar, Appellate Tribunal for Foreign Exchange, New Delhi.

Appellate Tribunal shall normally be required to dispose of the appeal within 182 days from the date of receipt of the appeal. However if same is not disposed of within that period, Appellate Tribunal shall record its reasons in writing for not disposing of the appeal in time.

Q.130 Is penalty imposed is payable along with the appeal to Appellate Tribunal?

A.130 Penalty imposed by the adjudicating authority is payable, while preferring appeal to the Appellate Tribunal, unless Appellate Tribunal is of the opinion that it would cause hardship to the applicant and in that case it may dispense with deposit of the penalty.

Q.131 Can an appeal be preferred against the order of the Appellate Tribunal under FEMA, 1999?

A.131 As per section 35 of the FEMA, 1999, any person aggrieved by any decision of order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

Q.132 A resident Indian, who was earlier non-resident, is under the impression that in case of foreign assets which are not acquired in compliance with FEMA, it is in nature of civil offence not punishable by imprisonment. Is his impression correct?

A.132 His impression was correct until the recent amendments in FEMA *vide* Finance Act, 2015 w.e.f. 9-9-2015 where by new sub-sections 1A to 1D were added to Section 13 and new Section 37A was introduced. Accordingly, if any person is found to have acquired any assets (i.e. foreign exchange, foreign security or immovable property) outside India in contravention of Section 4, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to:

a) a penalty up to three times the sum involved in such contravention and confiscation of value equivalent, situated in India, of such Foreign exchange, foreign security or immovable property (Sec. 13(1A)), and

b) be punishable with imprisonment for a term which may extend to five years and with fine (Sec. 13(1C)).

It should also be noted that such an offense cannot be compounded under Section 15 (Sec. 37A(6)).

9 Chapter Custom Baggage Rules

This Chapter contains information on various provisions of Indian Customs Act, 1962 in relation to baggage of the person coming to India or going out from India. It provides for duty free allowance of baggage that may be permitted to different categories of travellers under various circumstances.

Q.133 Define Baggage. What are Custom Baggage rules? Whom shall these rules apply to?

A.133 "Baggage" in relation to the customs means possession or belongings of a person carried by or accompanied or unaccompanied with the person while arriving at a particular custom station either *via* air or sea or otherwise. The definition of Baggage as per section 2(3) of the Customs Act, 1962 is not exhaustive; it is an inclusive definition. It merely states that baggage includes unaccompanied baggage but does not include motor vehicles. Section 79 of the Customs Act, 1962 allows *bona fide* baggage of a person exempted from duty subject to conditions. The Central Government has notified Baggage Rules, 2016 [which have subsequently been amended by Baggage (Amendment) Rules, 2016 *vide* Notification 43/2016 -Customs (N.T.) dated 31st March 2016] ("the Baggage Rules") dealing with baggage. The Rules also provide for levy of custom duty, duty free allowance, exemptions etc. Certain baggage such as used personal effects, household goods as generally required by the passenger for satisfying daily necessities of life is treated as *bona fide* baggage.

The present baggage rules are applicable to all categories of passengers having different purposes like business, tourism and transfer of residence and whether he is Indian Resident or not. Under these rules duty free allowances are provided to different categories of passengers depending upon the purpose, duration of travel/stay at the destination, age, and/or place from where they are coming.

Q.134 Please explain important terms used under the Baggage Rules,?

A.134 Family - Rule 2(ii): "family" includes all persons who are residing in the same house and form part of the same domestic establishment.

Resident - Rule 2(iv): "resident" means a person holding a valid passport issued under the Passports Act, 1967 and normally residing in India.

Tourist - Rule 2(v): "tourist" means a person not normally resident in India, who enters India for a stay of not more than six months in the course of any twelve months period of legitimate non-immigrant purposes.

Personal effects - Rule 2(vi): "personal effects" means things required for satisfying daily necessities but does not include jewellery.

Q.135 What are the categories of passengers? What are the rules for clearance of their baggages?

A.135 Passengers for baggage rules can be broadly divided as Indian Residents/ Foreigners residing in India returning after visit abroad and Tourists of Indian origin/Foreign origin coming for visit to India. The applicable rules are as under:

Arrival from	***Duty Free Allowance***
Rule 3: Passengers arriving from countries other than Nepal, Bhutan, or Myanmar	Articles in his *bona fide* baggage i.e. used personal effects, travel souvenirs and articles other than those mentioned in Annexure I, up to the value of fifty thousand rupees if these are carried on the person or in the accompanied baggage of the passenger. In case of a tourist of foreign origin, used personal effects, travel souvenirs and articles other than those mentioned in Annexure I, up to the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger.
Rule 4: Passengers arriving from Nepal, Bhutan, Myanmar	Used personal effects, travel souvenirs and articles other than those mentioned in Annexure I up to the value of fifteen thousand rupees if these are carried on the person or in the accompanied baggage of the passenger:

	Provided further that where the passenger, is arriving by land, only used personal effects shall be allowed duty free

Notes:

i. In case the passenger is an infant (not more than two years old), only used personal effects shall be allowed duty free.

ii. Annexure-1 items include (1) Firearms, (2) Cartridges of fire arms exceeding 50, (3) Cigarettes exceeding 100 or cigars exceeding 25 or tobacco exceeding 125 grams, (4) Alcoholic liquor or wines in excess of 2 litres, (5) Gold or Silver in any form, other than ornaments, and (6) Flat panel (LCD, LED, Plasma) Television

Q.136 Is there any requirement of filing document for clearing the baggage? What are the consequences of mis-declaration/non-declaration?

A.136 The owner of the baggage is required under section 77 of the Customs Act, 1962, to make declaration of its contents to the proper officer of customs, for the purpose of clearing it. The Central Board of Excise & Customs, in exercise of the powers under section 81, has prescribed by way of Regulation, the manner of declaring the contents of the baggage in a prescribed form, known as Baggage Declaration Form.

If a passenger has nothing to declare to the Customs and is carrying dutiable goods within the prescribed duty free allowance, he/she can simply walk through the exit marked Green Channel with their baggage on the basis of their Oral Declaration/Declaration on their Disembarkation Card, without any other question being asked by Customs.

Non-declaration, mis-declaration and concealment of imported goods is an offence under the Customs Act, which may result in confiscation of goods imported, fines, penalties and even prosecution. In case of Non-declaration, the passenger cannot subsequently claim the benefit of temporary detention of the goods as available u/s. 80. Normally goods are detained for purposes of non payment of duty, shortage of exchange etc.

Q.137 Explain the concept of Transfer of residence (TR) under the Baggage Rules?

A.137 TR is a facility which allows the person or his family to import personal and household articles and certain other items up to certain limit duty free. This facility is available to every person coming in to India by transferring his/her residence after staying abroad for varying periods as

stipulated in the Rules. Such person can be an Indian or a foreign passport holder. Rule 6 of the Rules deal with TR. This allowance/facility is in addition to the allowances applicable to inbound passengers as discussed above. In case of husband and wife transferring the residence to India, both cannot individually claim the benefit of TR facility if both were staying in the same house abroad.

Q.138 What is the duty free allowance for person under TR?

A.138 Rule 6 of the Baggage Rules allows mentions the types of items allowed to be imported duty free (up to certain limit) in case of TR to India. It may be noted that this allowance is in addition to the Duty free allowances applicable to inbound passengers dealt with earlier in Q.135. Following table depicts the TR facility for inbound passengers who are transferring their residence to India from abroad:

Sr. No.	***Duration of stay abroad***	***Nature of articles allowed duty free***	***Conditions***
1.	From three months up to six months	Used personal and household articles (other than those covered under Annexure-I & II but including the articles covered under Annexure-III) up to an aggregate value of sixty thousand rupees.	Indian passenger
2.	From six months up to one year	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III, upto an aggregate value of one lakh rupees	Indian passenger
3.	Minimum stay of one year during the preceding two years.	Personal and household articles, other than those mentioned in Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of two lakh rupees.	Indian passenger (should not have availed the concession in preceding three years)
4.	Minimum stay of two years or more	Personal and house household articles, other than those listed at Annexure I or Annexure II but including articles mentioned in Annexure III upto an aggregate value of five lakh rupees	(i) Minimum stay of two years abroad, immediately preceding the date of his arrival on transfer of residence;

Sr. No.	Duration of stay abroad	Nature of articles allowed duty free	Conditions
			(ii) Total stay in India on short visit during the two preceding years should not exceed six months; and (iii) Passenger has not availed this concession in the preceding three years.

Notes:

1. (a) For condition 4(i), shortfall of up to two months in stay abroad can be condoned by Deputy Commissioner of Customs or Assistant Commissioner of Customs if the early return is on account of :-

   (i) Terminal leave or vacation being availed of by the passenger; or

   (ii) Any other special circumstances for reasons to be recorded in writing.

   (b) For condition 4(ii), the Principal Commissioner of Customs or Commissioner of Customs may condone short visits in excess of six months in special circumstances for reasons to be recorded in writing.

2. Annexure-II items are listed as under:

   1. Colour television
   2. Video Home Theatre system
   3. Dish washer
   4. Domestic refrigerators of capacity above 300 litres or its equivalent
   5. Deep freezer

6. Video camera or the combination of any such video camera with one or more of the following goods, namely:-
   - (a) Television receiver
   - (b) Sound recording or reproducing apparatus
   - (c) Video reproducing apparatus
7. Cinematographic film of 35 mm and above
8. Gold or silver in any form (other than ornaments)

3. Annexure-III items:

1. Video Cassette Recorder/Video Cassette Player/Video Television Receiver/Video Cassette Disk Player
2. Digital Video Disc player
3. Music system
4. Air-conditioner
5. Microwave oven
6. Word Processing Machine
7. Fax Machine
8. Portable Photocopying Machine
9. Washing Machine
10. Electrical or Liquefied Petroleum Gas Cooking Range
11. Personal Computer (Desktop Computer)
12. Laptop Computer (Notebook Computer)
13. Domestic Refrigerator of capacity up to 300 litres or its equivalent

Q.139 Can a resident bring laptop without payment of duty each time he returns to India from a place outside India?

A.139 Yes. A resident of age 18 years or more can bring one laptop without payment of duty each time he returns to India from a place outside India. However, member of the crew cannot bring laptop along with him without payment of duty.

Q.140 Can free allowance available to a Resident be pooled together with other Resident passengers for duty free clearance of the goods brought in?

A.140 No. Value of duty free clearance available to a Resident cannot be clubbed with other members of family or group travelling together.

Example : Say, for example, husband and wife are travelling together and each of them get ₹ 50,000 free allowance. Suppose, a TV worth ₹ 60,000 is being brought. The TV can be declared in the name of one passenger only – either the husband or wife but not both. The person who declares the item has to pay duty on ₹ 10,000, which is the excess value over his/her duty free allowance, although the husband and wife can bring a total of ₹ 100,000 worth goods free of duty separately.

So far as duty free allowance is considered, each passenger is considered to be travelling separately with his/her own baggage and his duty is assessed on an individual basis, not on the basis of a group or a family.

Q.141 Whether set off of the unutilised portion of the duty free allowance is available against the value of article/s chargeable to duty?

A.141 The amount of duty payable has to be determined on per passenger basis and not on per article basis. Therefore, the free allowance available to each Resident cannot be clubbed with other passenger, however, the unutilised amount of free allowance can be deducted from the value of article/s for the purpose of determining the value on which duty is to be paid and hence part of the amount may be exempt to the extent of such unutilized free allowance and on the balance duty may be paid.

Q.142 How much jewellery a person returning to India can clear free of duty?

A.142 A person of Indian origin who is returning to India as a non-tourist and who was residing abroad for more than one year is allowed to import (bring in) free of duty jewellery up to weight of 20 grams (with a value cap of ₹ 50,000/- in case of male passengers) and up to weight of 40 grams (with a value cap of ₹ 1,00,000/- in case of female passenger) respectively. However, in case the passenger had taken out the jewellery out of India and is now brining in the same, then such jewellery can be imported duty free on production of Jewellery Export Certificate and to the satisfaction of Assistant Commissioner of Customs.

Q.143 Who can import gold and silver on payment of duty? What are the conditions for their import and the rate of duty?

A.143 The gold and silver can be imported as baggage by following persons:

(a) Any passenger of Indian origin (even if a foreign national except Pakistani/Bangladeshi national), or

(b) Any passenger holding a valid passport issued under the Passport Act, 1967.

Conditions

(i) The weight of gold (including ornaments) should not exceed 1 kgs. and that of silver not exceeding 10 kgs. per passenger.

(ii) Such passenger is coming to India after a period of not less than six months of stay abroad. However, short visits during these six months shall be ignored if the total duration of such short visits does not exceed 30 days and the passenger has not availed of the exemption under this scheme, at the time of such short visits.

(iii) The rate of duty for gold and silver in any form as per Notification No. 12/2012- Cus dated 17-3-2012 is 10%. The customs duty in respect of the same should be paid in convertible foreign currency.

(iv) Ornaments studded with stones and pearls will not be allowed to be imported under the scheme mentioned above.

(v) The passenger can either bring the gold/silver himself at the time of arrival or import the same within fifteen days of his arrival in India as unaccompanied baggage. There is no restriction of the sale of the gold/silver in India.

(vi) The passenger can also obtain the permitted quantity of gold/silver from Customs bonded warehouse of State Bank of India and Metals and Minerals Trading Corporation subject to conditions (i) and (iii). He is required to file a declaration in the prescribed Form before the Customs Officer at the time of arrival in India stating his intention to obtain the gold/silver from the Customs bonded warehouse and pay the duty before clearance.

It may be noted that,

a) The jewellery, which is in addition to the jewellery otherwise allowed without payment of duty, only is liable to payment of duty under the above-mentioned scheme for import of gold/silver.

b) Import of gold/silver by concealment in baggage coupled with no declaration will lead to confiscation along with imposition of fine/ penalty and the offender may also be arrested.

Q.144 Can a passenger who is eligible to Import Gold/Silver at concessional duty, be asked to establish source of financing such purchase of gold?

A.144 As per Circular No. 06/2014-Customs dt. 6-3-2014, wherever possible, the field officer, may, *inter alia*, ascertain the antecedents of such passengers,

source for funding for gold as well as duty being paid in the foreign currency, person responsible for booking of tickets etc., so as to prevent the possibility of the misuse of the facility by unscrupulous elements who may hire such eligible passengers to carry gold for them.

Q.145 What is unaccompanied baggage? Within what time it can be brought into India? What are the duty free clearances available for unaccompanied baggage?

A.145 Unaccompanied baggage are articles of baggage which were used by the passenger abroad, which could not be brought with him and are brought into India and cleared at any of the international airports, Customs ports or land Customs stations.

Time limit for import of unaccompanied baggage

1. It should be dispatched within one month of arrival into India

2. If the baggage is to be sent before his arrival in India, it should be landed within two months prior to his arrival in India. The said period of two months may be extended up to a maximum of one year by Assistant Commissioner for reasons to be recorded, if he is satisfied that the passenger was prevented from arriving in India within the period of two months due to circumstances beyond his control, such as sudden illness of the passenger or a member of his family, or natural calamities or disturbed conditions or disruption of the transport or travel arrangements in the country or countries concerned or any other reasons, which necessitated a change in the travel schedule of the passenger.

Various rules as applicable to accompanied baggage also applies to unaccompanied baggage except concessions available under rules 3 & 4.

The excess baggage over the duty free value provided in the rules, if properly declared can be imported as baggage if not prohibited for imports, both as tourist and as Transfer of Residence [T/R]. Duty payable as tourist and as T/R are different, it is costlier in case of former.

The unaccompanied baggage from the custom station of arrival at Bombay, Delhi, Calcutta, Madras, Banglore, Trivandrum, Hyderabad or Cochin to any of the aforesaid custom station can be transited in accordance with the regulation made by the Central Board of Excise and Customs.

Q.146 What are the items prohibited for import?

A.146 Following items are prohibited for import into India:

1. Possession/trafficking in narcotic drugs like Heroin, Charas (Hashish), Cocaine or in psychotropic substances is prohibited and

is punishable with imprisonment. The quantum of punishment will be decided in accordance with the law of the country where the passenger is caught carrying such drugs. The punishment can even extend to death sentence.

2. Import of Firearms and cartridges exceeding 50 as baggage is prohibited, except under certain circumstances. Import of explosives are also prohibited.

3. Import of certain wildlife articles are prohibited. For any clarifications passenger should approach the Regional Deputy Director (Wildlife Preservation) Govt. of India or the Chief Wildlife Wardens of State Governments posted at Calcutta, Delhi, Mumbai and Chennai.

4. Import of Indian Currency is prohibited except by Indian Residents, who can take out/bring in Indian Currency below ₹ 25000/- (to/from countries other than Nepal or Bhutan). Bringing in Indian Currency notes above ₹ 100/- denomination is prohibited at the moment for persons entering India from Nepal.

5. Import of fictitious stamps and counterfeit coins are prohibited.

6. Import of books, CDs, DVDs, Cassettes etc., containing obscene or pornographic materials and contents encouraging violence or sabotage, and materials showing or questioning the frontiers of India by way of maps or articles etc. are prohibited.

Q.147 Is there any facility available for not clearing the dutiable goods while entering into India? What should be done if a person coming to India carries prohibited goods?

A.147 Yes. The facility is available u/s. 80 to keep the goods in the safe custody of Customs against a Detention Receipt provided a true declaration has been made under section 77, and will be returned to him on his leaving India.

Examples of some situations when goods may be kept in the custody of Customs:

1. Passenger does not have sufficient money to pay duty and/or other dues on the goods at that moment.

2. Passenger does not have sufficient foreign currency to pay duty on items on which duty is payable in convertible foreign exchange.

3. Passenger does not want to take the item along with him into India but intends to return with the goods when leaving India.

4. Passenger disputes the valuation/duty determined by Customs and intends to appeal against the decision to higher authorities.

5. The goods are prohibited goods and the passenger has declared the items to Customs authorities. However, not all prohibited items can be kept in the safe custody in this manner. Items like Narcotic Drugs, explosives etc. are liable to seizure/confiscation.

If, for any reason the passenger is not able to collect the article at the time of leaving India, the article may be returned to him/her through any other passenger authorised by him/her and leaving India or as cargo consigned in his/her name. Similarly, dutiable goods which passengers desire to clear subsequently, may also be detained temporarily for clearance on payment of duty and/or fine and other dues.

Q.148 In what manner the baggage rules apply to the members of the crew?

A.148 As per Rule 9 of the Baggage Rules, the members of the crew engaged in foreign going vessel are not considered as tourist or returning Indians and therefore duty free allowance available in various rules does not apply to them, every time when they return to India. However it applies to them only at the time of final pay off on termination of their engagement as they are no more engaged in as crew members on termination. They are also permitted to bring/import items like chocolates, cheese, cosmetics and other petty gifts not exceeding ₹ 1500 (One thousand five hundred only) every time on their return.

Q.149 Can members of the crew import laptop on their arrival into India?

A.149 The permission given to passengers of age 18 years or more to bring one laptop without payment of duty on arrival into India is not available to members of crew arriving in India.

Q.150 What important precaution one should take while travelling as tourist or for transfer of residence?

A.150 A tourist can be Indian Resident travelling abroad or a Foreign Resident travelling to India. Similarly a person may transfer his residence abroad as emigrating Indian or returning Indian or foreigner coming to India and transferring his/her residence. Depending upon status as explained, the rules are categorised as Import of Baggages and Export of Baggage. Baggage Import rules shall apply to Tourist, Returning Indian and Foreigners arriving in India. Amongst these rules one has to be careful to declare goods properly including one which is intended to be exported. Also refer reply to Question “Can you give some practical hints to International Travellers”.

Q.151 Whether one is entitled to import Indian Rupee and Foreign Currency as personal Baggage while returning home?

A.151 Yes. One can import Indian Currency and Foreign Currency as part of Baggage while returning to India in accordance with the provisions of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, and the notifications issued thereunder.

Accordingly, Indian Currency up to ₹ 25,000 by Resident Indian, Foreign Currency upto US$ 5,000 in cash with overall cap of US$ 10,000 can be imported as part of Baggage. The excess foreign exchange over this has to be declared in currency declaration form.

Further to above importer may be subjected to inquiry of the source of such acquisition by Revenue authority in India, particularly Income Tax Department. Income Tax is payable on the amount of Gain on Sale of Imported gold, as normal Income or Capital Gains depending upon the fact & circumstances of each case i.e., periodicity of such Import, Activity in nature of trade & adventure or import of such gold is once in a life time and intention to hold it as investments. In case of former it would be income, whereas it would be Capital Gains in later's case.

Q.152 Can you guide us on the various provisions of Currency and Coins in relation to its import, export, possession & retention by traveller?

A.152 The relevant Notifications are FEMA 6(R)/RB-2015 in respect of Export & Import of currency, notification FEMA 11(R)/RB-2015 in respect of possession and retention of Foreign Currency, and Notification No. 9(R)/RB-2015 in respect of surrender of foreign exchange among other things.

Regulations of Notification No. 6(R) deals with imports export of all the currencies while regulation of Notification No. 11(R) deals with only foreign currencies.

The provisions of these regulations may be summarised as under.

A Person Resident in India

(1) a) Can take foreign currency as per the provisions of the current account transactions provided in Schedule - III of Rule 5 based on the nature of visit of the traveller.

b) Can take currency notes of Government of India up to ₹ 25,000/- per person (to places other than Nepal & Bhutan)

c) Can send two commemorative coins (other than to Nepal and Bhutan)

And

(2) "Can import or bring with him on his Return"

a) Unspent Foreign Currency/Exchange out of what he has purchased while going abroad and

b) Any additional exchange he may have acquired during his visit abroad.

c) Currency notes of Government of India upto an amount not exceeding ₹ 25,000/- per person (from places other than Nepal & Bhutan).

Thus when person Resident in India returns from abroad he may have mixed source of currency/ies comprising of sources as aforesaid. He shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be. However as per Notification No.11(R) of FEMA on overall basis he can retain US $ 2000 without any time limit for use by him in future.

It may be noted that Indian currency can be imported or exported to Nepal and Bhutan without any limit if it is in denomination up to ₹ 100, else if the denomination is higher than Rs. 100, then the traveler from India to Nepal or Bhutan can carry currency notes up to a limit of ₹ 25,000.

Q.153 What precaution one should take as a foreigner when he/she is arriving in India for a period of more than six months?

A.153 It is very important for every tourist/passenger to generally know about the baggage concession available to them and duty leviable on their baggage. A true declaration of accompanied or unaccompanied baggage should always be made in order to avoid violation of various provisions of Customs Act, and consequential penal action including confiscation of baggage.

Secondly the goods brought and intended for export may be declared in advance before penalty etc. is levied. The items of negative list and banned items should not to be imported.

Thirdly proper declaration as regards availing of various facility if his/her stay is likely to be more than six months or a year in India, since as a tourist (not staying in India for more than six months) you do not enjoy liberal concession compared to other category/ies of traveller.

Q.154 (a) Kindly explain Export & Import control in India?

(b) Briefly describe the Baggage that one can carry while leaving India?

A.154 (a) Import Control: In order to administer the pricing pattern, protect Domestic Industry, Economic Balance and Competition, control is exercised by the Government through various means like a) import only against licence, b) under open General Licence with appropriate duty c) essential commodity, baggage of passengers etc. at concessional duty d) No import of banned goods.

Export control: It is exercised in the form of banned list of exportable items, essential items and to conserve the items of Historical and National Importance from being exported out of the country. Items of endangered nature during travelling are also banned to be exported.

In addition to the above, various exceptions are made in levying duty in the cases of real hardships and in matter of vital importance like for e.g.

(a) Replacement of Defective goods

[First Schedule to the Customs Tariff Act. 1975]

(b) Educational Video Cassettes, Tapes.

[Chapter 85 of the First Schedule to the Customs Tariff Act, 1975]

(c) Equipment, Apparatus and appliances of Hospitals.

(d) *Bona fide* personnel effects of deceased person.

(e) Extension benefits to foreign personnel in case of Extension of Visa and thereby Qualifying for further concession in baggage rules.

(f) Appliances for Handicapped persons.

[Under general exemptions of Customs Tariff Act, 1975]

Thus control is exercised on either side to protect the overall economy of the country.

(b) Export Baggage Rules are applicable to persons travelling abroad.

Similar to Import baggage rules, passengers or member of crew in any vessel or conveyance going out of India, can take all *bona fide* personal effects and new items of personnel effects along with him or unaccompanied within one year before or after the passenger's Departure from India.

However, items mentioned as restricted in the ITC (HS) Classifications of export and Import items will require a licence/certificate/permission.

Goods including edible items of value not exceeding ₹ 5,00,000 in a licencing year may be may be exported as a gift.

Q.155 Can you give some practical hints to International Traveller?

A.155 The following checklist of documents and procedure may provide useful hints.

(a) Documents:

1) A valid Passport.

2) Visa from the embassy of the country of visit. Some country provides visa on arrival of the passengers at Airport then in that case proper documents as regard identity and purpose of travel should be kept ready while arriving at the port.

3) Photographs: Some countries require photographs for the purpose of visa at the airport, in case of arrival visa.

4) Proper and true declaration before the Customs Authority, of baggage, currency, Jewellery and goods for re-export (taking back).

5) For T/R concession, the papers to establish the period of stay, should be kept ready.

6) Obtain prior permission of Customs wherever relaxation is possible. For example T/R benefits may be taken and thereafter short trip is planned, which may not be in accordance with the undertaking already given to the customs authority.

7) Returning Indian tourist should surrender their unutilised exchange as per the policy prevailing under FEMA 1999.

8) In case of outbound passengers ensure that Export certificate is obtained to import the said goods, as duty free baggage e.g. Jewellery and etc.

9) Motor Vehicle is not considered as baggage and therefore duty at the concessional rate is payable only by T/R passengers under certain circumstances.

10) Do not carry fire arms, plants, vegetables or fruits on visit or return to India. High Value Jewellery may be avoided. (Bond may be insisted by customs in such cases).

11) Avoid check-in at the last moment, particularly when you are travelling for the first time.

12) Ensure that

    (a) In a country where exchange control is prevalent, buy currency only from the authorised dealer. Preserve the currency purchase voucher until you leave the country.

    (b) Proper endorsement is made on passport either for currency and/or export of baggage.

    (c) Stamp on Passport (inward) on arrival of the port has proper date.

    (d) Departure: "check in" well in advance particularly if endorsement on passport or export certificate is required for exporting the baggage which was imported duty free, at the time of arrival.

    (e) You are not carrying parcel or goods belonging to some one else. Check the contents, if it is necessary to carry.

    (f) Proper Medical Insurance Policy is taken.

    (g) "Immigration check required" condition on passport is cleared/or documentation to that effect is prepared.

    (h) Proper Clearance from Tax Authority is obtained.

Chapter 10 PIO Card

The PIO Card Scheme which was introduced in 2002 was withdrawn *vide* Notification No. 26011/01/2014IC.I dated January 9, 2015 and all PIO Cards issued till January 9, 2015 are deemed to be OCI Cards. All PIO applications which were pending on such date were returned with a request to apply for OCI Card. Further, All PIO cards are valid until September 30, 2018. After September 30, 2018, PIO card will be considered as an invalid travel document. Therefore, all applicants, who have not yet converted their PIO cards to OCI card, are required to apply for OCI in lieu of PIO before September 30, 2018.

However, as this topic is still current & relevant, for academic purposes this chapter provides background information relating to the eligibility and benefits of holding PIO card. PIO Card Holder can visit India without obtaining visa. Can avail the same facilities as available to NRIs in the economic, financial and educational field. He is required to register only once when his stay in India exceeds 180 days.

Q.156 Who is a PIO Card Holder?

A.156 A person registered as PIO Card Holder under Ministry of Home Affairs, Government of India (MHA) scheme *vide* Notification No. 26011/4/98-F.I dated 19-8-2002. The PIO card was first implemented in 2002 as a benefit to foreign nationals who could establish at least a third generation tie to an Indian origin. The PIO card was valid for travel, work, and residence in India for a period of 15 years.

The OCI card was implemented in 2005, carried more expansive benefits than the PIO card, and was valid for the holder's lifetime.

Prime Minister Narendra Modi had announced in 2014 that the two types of cards would be merged and the Indian diaspora would be given the maximum possible benefits.

Q.157 Who was eligible to apply for PIO Card?

A.157 Any person who is a citizen of any country other than Bangladesh or Pakistan, if

(i) he at any time held Indian Passport; or

(ii) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

(iii) the person is a spouse of an Indian citizen or a person referred to in sub-clause (i) or (ii).

Q.158 Which country's nationals were eligible to obtain PIO Card?

A.158 PIOs of all countries except Afghanistan, Bangladesh, Bhutan, China, Nepal, Pakistan and Sri Lanka.

Q.159 What benefits accrued to a PIO Card Holder?

A.159 Benefits available to a PIO Card Holder were as under:

(i) No visa required for visiting India.

(ii) No separate "Student Visa" or "Employment Visa" required for admissions in Colleges/Institutions or for taking up employment respectively.

(iii) A PIO Card holder was exempt from the requirement of registration if his stay on any single visit in India did not exceed 180 days.

(iv) In the event of continuous stay in India of the PIO Card holder exceeding 180 days, he/she shall have to get himself/herself registered within 30 days of the expiry of 180 days with the concerned Foreigners Regional Registration Officer/Foreigners Registration Officer.

(v) Parity with non-resident Indians in respect of facilities available to the latter in economic, financial and educational field.

(vi) All PIOs including PIO Card holders enjoyed parity with NRIs in respect of all facilities in the matter of acquisition, holding, transfer and disposal of immovable properties in India except in matters relating to the acquisition of agricultural/plantation properties. No parity was allowed in the sphere of political rights.

(vii) Facilities available to children of NRIs for getting admission to educational institutions in India including medical colleges, engineering colleges, Institute of Technology, Institute of Management, etc., under the general categories.

(viii) Facilities available under the various housing scheme of LIC, State Government and other Government Agencies.

(ix) Special counters at the immigration check posts for speedy clearance.

Q.160 How can one acquire Indian citizenship?

A.160 As per sections 5(1)(a) & 5(1)(c) of the Citizenship Act, 1955 he/she has to reside in India for minimum 7 years before making application for granting Indian citizenship.

Q.161 What was the validity of the PIO Card?

A.161 A PIO Card shall be valid for a period of fifteen years from the date of issue subject to the validity of the passport of the applicant.

Q.162 Can the PIO Card be cancelled?

A.162 The Central Government may by order, cancel the PIO Card, if it is satisfied that:

(i) The PIO Card was obtained by means of fraud, false representation or the concealment of any material fact; or

(ii) The PIO Card holder has shown himself by act or speech to be disaffected towards the Constitution of India and other laws of India; or

(iii) The PIO Card holder is a citizen or subject of any country at war with, or committing external aggression against India; or of any other country assisting the country at war with, or committing such aggression against India; or

(iv) The PIO Card holder has been sentenced in India for indulging in acts of terrorism, smuggling of narcotics, arms, ammunitions etc., or has been sentenced for committing an offence punishable with imprisonment up to one year or fine up to rupees ten thousand; or

(v) It is not conducive to the public interest that the person should continue to hold a PIO Card.

No reasons shall be assigned for withdrawal of the Card.

11 Chapter Overseas Citizen of India (OCI)

The Constitution of India does not allow simultaneous holding of Indian citizenship and citizenship of a foreign country. Therefore in order to extend the benefits to Non-Resident Indians (NRIs), Person of Indian Origin (PIO) and to eligible persons, a new scheme was introduced w.e.f. 2nd December, 2005, an OCI, commonly known as "Dual Citizenship".

Q.163 Who is eligible to apply as Overseas Citizen of India?

A.163 Following categories of foreign nationals are eligible for registration as Overseas Citizen of India (OCI) Cardholder:-

(1) Who was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26-1-1950; or

(2) Who was eligible to become a citizen of India on 26-1-1950; or

(3) Who belonged to a territory that became part of India after 15-8-1947; or

(4) Who is a child or a grandchild or a great grandchild of such a citizen; or

(5) Who is a minor child of such persons mentioned above; or

(6) Who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or

(7) Spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.

Note: No person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder.

Nationals of Commonwealth countries are eligible for the OCI if they fulfil the eligibility criteria.

As it may be noted that a person will be eligible to apply for OCI as long as the local laws of the country of citizenship allows dual citizenship, person will not lose his foreign citizenship.

Q.164 Who was eligible to become Citizen of India on 26-1-1950?

A.164 Any person who, or whose parents or grand-parents were born in India as defined in the Government of India Act, 1935 (as originally enacted), and who was ordinarily residing in any country outside India was eligible to become citizen of India on 26-1-1950.

Q.165 Which territories became part of India after 15-8-1947 and from what date?

A.165 The territories which became part of India after 15-8-1947 are:

(i) Sikkim 26-4-1975

(ii) Pondicherry 16-8-1962

(iii) Dadra & Nagar Haveli 11-8-1961

(iv) Goa, Daman and Diu 20-12-1961

Q.166 How do you obtain an OCI and what documents are required?

A.166 Applications for registration as OCI Cardholder is to be submitted only on the online system at https://passport.gov.in/oci. A spouse of eligible person can apply if he/she is eligible in his/ her own capacity. Minor children of eligible person can also apply for registration as OCI Cardholder; however, if either of the child's parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, the child will not be eligible for registration as an Overseas Citizen of India Cardholder.

List of supporting documents to be uploaded along with the application are:-

(1) Proof of present citizenship - Copy of present valid passport (applicable in all cases), with validity of minimum 6 months at the time of submission of application.

(2) In case application is submitted in India, copy of any type of Visa (other than Missionary Visa and Mountaineering Visa)/ Residential Permit with 3 months validity as on the date of application.

(3) Evidence of self or parents or grandparents or great grandparents-

(a) Being a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26-1-1950; or

(b) Being eligible to become a citizen of India at the time of commencement of the Constitution i.e. 26-1-1950; or

(c) Belonging to a territory that became part of India after 15th August, 1947.

These could be:

(i) Copy of the Indian Passport; or

(ii) Copy of the Domicile Certificate issued by the Competent Authority; or

(iii) Copy of Nativity Certificate from the competent authority; or

(iv) OCI Card/ PIO card of parents/ spouse along with the base papers/ documents upon which the OCI/ PIO card was issued; or

(v) Any other proof substantiating the request. Usually applicants are able to submit a certificate of residence or place of birth of self/parents/grandparents from First Class Magistrate/District Magistrate (DM) of the concerned place.

(4) Evidence of relationship as parent/grandparent/ great grandparent, if their Indian origin is claimed as basis for registration as OCI Cardholder:

The document of relationship could be "Birth Certificate" issued from competent authority mentioning both parents' name. In case the birth certificate is issued by a foreign authority, it is to be Apostiled or endorsed by the concerned Indian Mission abroad.

(5) In case of minor child whose both parents are citizens of India or one of the parents is a citizen of India -

(i) Copy of child's birth certificate

(ii) Copy of Indian passport of the parents / one of the parents or copy of the Domicile Certificate or Nativity Certificate issued by the Competent Authority in respect of the parents/ one of the parents or any other proof substantiating the status of the parents/ one of the parents as being Indian citizen(s).

(iii) If the parents are divorced, court order of dissolution of marriage, which specifically mentions that the legal custody of the child is with the parent who is applying for the OCI card.

(6) Evidence as spouse of foreign origin of a citizen of India or spouse of foreign origin of an OCI Cardholder -

(i) Registered marriage certificate; and

(ii) In the case of spouse of an Indian citizen - copy of the Indian Passport of the spouse or copy of the Domicile Certificate or Nativity Certificate issued by the Competent Authority in respect of the Indian spouse or any other proof substantiating the status of the spouse as being an Indian citizen.

(iii) In the case of spouse of an OCI Cardholder - Copy of the present valid Passport of the spouse and copy of the OCI Card of the spouse and copies of the documents upon which the OCI Card was issued to the spouse

(7) In case of applications of Canadian nationals for registration as OCI cardholder, following documents should also be submitted:-

(a) Landing paper/Work Permit of applicant/sponsor

(b) If landing paper at Column 19 shows FC (Family Class), then-

(i) Letter from Canadian Immigration and Refugee Board

(ii) A notarized affidavit pleading that neither the applicant nor the sponsor has sought Refugee status in Canada

(c) Last Canadian address

(d) Last Canadian Visa copy

Q.167 What are the requirements to be fulfilled by erstwhile PIO cardholders for registration as OCI Cardholder?

A.167 In terms of the notification issued by the Ministry of Home Affairs on 9th January, 2015, all the existing PIO Card holders as on 9.1.2015 shall be deemed to be OCI Cardholders. However, all persons having valid PIO cards as on 9th January, 2015 are advised to apply for registration as OCI cardholder in view of the following advantages in possessing an OCI card:-

(a) OCI card is a smart card

(b) Possession of an OCI card will facilitate quicker immigration clearance at the Immigration Check Posts

(c) It will help in obtaining various Consular Services from the Indian Missions

(d) For those who are resident in India, it will facilitate in availing various services in India.

A separate online application form for submission of application for registration as OCI cardholder in lieu of PIO card is available in the website https://passport.gov.in/oci/. Further, All PIO cards are valid until September 30, 2018. After September 30, 2018, PIO card will be considered as an invalid travel document. Therefore, all applicants, who have not yet converted their PIO cards to OCI card, are required to apply for OCI in lieu of PIO before September 30, 2018.

The erstwhile PIO cardholder with a valid PIO card as on 9-1-2015 will have to upload only the following documents with his/ her application:-

(a) Copy of the valid Passport

(b) Copy of the PIO card

The applicants can submit the applications online from anywhere. The grant of OCI card in lieu of the PIO card will be on a *gratis* basis.

The OCI card shall be issued by the Indian Mission/ Post/ FRRO concerned within the jurisdiction of the applicant's place of residence. The applicant will have to approach the Indian Mission/ Post/ FRRO concerned only for collecting the OCI Card by surrendering the PIO card.

Q.168 What is the procedure for registration as an OCI?

A.168 All the applications will be subject to pre or post enquiry depending on whether any adverse information is voluntarily reported in the application or not.

In all cases, other than the application submitted as a spouse of foreign origin of a citizen of India or spouse of foreign origin of an OCI Cardholder, if there is no adverse information available against the applicant, the Indian Mission/Post/ FRRO concerned shall register a person as an OCI Cardholder within 30 days of the date of acknowledgment. If there is any adverse information against the applicant, final decision to grant registration as OCI cardholder or otherwise will be taken within 120 days.

In the case of application submitted as a spouse of foreign origin of a citizen of India or spouse of foreign origin of an OCI Cardholder, the person shall be registered as an OCI Cardholder only after prior clearance of the Ministry of Home Affairs (Foreigners Division) in terms of the

proviso to clause (d) of sub-section (1) of section 7A of the Citizenship Act, 1955 as incorporated by the Citizenship (Amendment) Act, 2015 notified on 10th March, 2015. In all such cases, it is expected that the final comments/ clearance of the Ministry of Home Affairs (Foreigners Division) shall be uploaded on the online system within 30 days of acknowledgment of the application.

After grant of registration, a registration certificate in the form of a booklet will be issued. This will serve as a life-long multiple entry visa to visit India. The OCI booklet can be collected by the person or by an authorized person. The condition is that the applicant should be physically present in the country of issuance of OCI cardholder registration booklet when it is collected through an authorized person. If a person is not in a position to travel to the country of issuance of the OCI cardholder registration booklet, he/she could procure it through the concerned Indian Mission/ FRRO of their present place of stay by making a formal request to the office issuing the OCI Cardholder registration booklet.

Q.169 What is the fee for application for registration as an OCI? If the registration as an OCI is not granted, what amount will be refunded?

A.169 In case of applications submitted to the Indian Mission/ Post abroad – US $ 275 or equivalent in local currency for each applicant. In case of application submitted in India, the fee is ₹ 15,000/-.

An amount of US $ 250 or equivalent in local currency shall be refunded, if registration is refused. US $ 25 is the processing fees, which is non-refundable. In case of application submitted in India, the processing fee is ₹ 1400/-, which is non-refundable.

Q.170 What are the benefits to an OCI?

A.170 Following benefits will be available to an OCI:

(i) Multi-purpose, multiple entry, lifelong visa for visiting India for any purpose. However OCI Cardholders will require a special permission to undertake research work in India for which they may submit the application to the Indian Mission/ Post/ FRRO concerned.

(ii) Exemption from registration with Foreigners Regional Registration Officer (FRRO) or Foreigners Registration Officer (FRO) for any length of stay in India.

(iii) Parity with NRIs in respect of economic, financial and education fields except in matters relating to the acquisition of agricultural/ plantation properties.

(iv) Registered Overseas Citizen of India Cardholder shall be treated at par with Non-Resident-Indians in the matter of inter-country adoption of Indian children.

(v) Registered Overseas Citizen of India Cardholder shall be treated at par with resident Indian nationals in the matter of tariffs in air fares in domestic sectors in India.

(vi) Registered Overseas Citizen of India Cardholder shall be charged the same entry fee as domestic Indian visitors to visit national parks and wildlife sanctuaries in India.

(vii) Parity with Non-Resident Indians (NRI) in respect of:-

(A) entry fees to be charged for visiting the national monuments, historical sites and museums in India;

(B) pursuing the following professions in India, in pursuance of the provisions contained in the relevant Acts, namely:-

(a) doctors, dentists, nurses and pharmacists;

(b) advocates;

(c) architects;

(d) chartered accountants;

(C) to appear for the All India Pre-Medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.

(viii) Any other benefits as may be notified by the Ministry of Overseas Indian Affairs (MOIA) under section 7B(1) of the Citizenship Act, 1955

(ix) Eligible to apply for Indian Citizenship after he is registered as an OCI for 5 years and is residing in India for 1 year out of the above 5 years [section 5(1)(g) of the Citizenship Act, 1955].

Q.171 What are the benefits to which an OCI is not entitled?

A.171 OCI shall not be entitled to the following benefits

(i) Right to vote; or

(ii) equality of opportunity in matters of public employment; or

(ii) election as President or Vice-President; or

(iv) being a member of the House of the People or of the Council of States or being a member of the Legislative Assembly or a Legislative Council of States; or

(v) appointment as a Judge of the Supreme Court or High Court; or

(vi) appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may by special order in that behalf specify; or

(vii) obtain Indian Passport, which are given only to Indian citizen.

(viii) cannot acquire agricultural or plantation properties in India

Q.172 Can a person renounce Overseas Citizenship of India?

A.172 Yes. He/she has to make a declaration renouncing the Card registering him/her as an OCI Cardholder to the Indian Mission/Post/ FRRO from where the registration as OCI Cardholder was granted. After receipt of the declaration, the Indian Mission/Post/FRRO shall issue an acknowledgment in the prescribed form. Upon such registration of the declaration, the person shall cease to be an OCI Cardholder. Where a person ceases to be an OCI Cardholder, the spouse of foreign origin of that person who has obtained OCI Card under clause (d) of sub-section (1) of section 7A and every minor child of that person registered as an OCI Cardholder shall thereupon cease to be an OCI Cardholder.

Q.173 What are the consequences of furnishing wrong information or suppressing material information?

A.173 If the Government comes to know that any false information was furnished or material information was suppressed, the registration as OCI already granted shall be cancelled by an order under section 7D of the Citizenship Act, 1955. The persons will also be blacklisted thereby banning his/her entry into India.

Q.174 Will the PIO card be honoured till the time it is valid even after acquisition of an OCI?

A.174 No. PIO card will have to be surrendered to the Indian Mission/Post/MHA for grant of OCI registration certificate. Instructions have been issued on 29th January, 2015 to all Indian Missions/Posts, FRROs etc., conveying the decision to dispense with the 'U' (Universal) visa sticker on the foreign passport of OCI cardholders with immediate effect. It has been advised that immigration authorities in ICPs should not insist on production of foreign passport containing the 'U' visa sticker in the case of OCI cardholders while they enter/ exit India.

Q.175 Who can avail the OCI Miscellaneous services and explain salient provisions of such services?

A.175 Only a registered OCI can avail the OCI Miscellaneous Services. Each person of a family has to individually apply online for availing the services.

(i) In case of issuance of new passport.

(ii) In case of change of personal particulars viz., nationality etc.,

(iii) In case of loss/damage of OCI registration certificate/visa.

(iv) In case of filling of wrong personal particulars while submitting online applications viz. name, father's name, date of birth etc.,

(v) In case of change of address/occupation

Application has to be submitted online only. After submission of the complete application online including documents, photograph and signature, the original of the supporting documents have to be submitted to the Indian Mission/ Post/ FRRO concerned for prior verification.

Fees: The fee is US $ 25 or equivalent in local currency for reissuance of OCI documents. In case of issuance of duplicate OCI documents (for loss/damage of old documents), the fee is US $ 100 or equivalent in local currency. In case of application filled in India, fee ₹ 1,400/- for reissuance of OCI & in case of issuance of duplicate OCI (for loss/damage of OCI) fee ₹ 5,500/- to be paid.

(a) In case of issuance of new passport:

Copy of registration certificate has to be enclosed. If the old passport is not returned by the concerned authorities while issuing new passport, they may not be enclosed. A copy of new passport also to be enclosed.

(b) In case of loss of OCI Registration Certificate and/or Visa:

Copy of the complaint lodged with Police authorities and copy of registration certificate to be enclosed. If a copy of the registration certificate was not taken prior to the loss, they may not be enclosed.

(c) In case of change of personal particulars (due to change by the applicant or wrong filling of particulars by the applicant or Indian Mission/Office), copy of the document (s) relevant for affecting the requisite changes viz. Nationality Certificate in case of change of nationality, etc. to be enclosed.

Q.176 Whether the fee would be refunded in case the requisite service(s) are not granted?

A.176 If registration is refused, an amount of US $ 250 or equivalent in local currency shall be refunded. US $ 25 is the processing fees, which is non-refundable. In case of application submitted in India, the processing fee is ₹ 1400/-, which is non-refundable.

Q.177 Whether documents as to OCI have to be re-issued each time a new passport is taken?

A.177 OCI registration certificate and visa have got to be re-issued each time a new passport is issued up to the completion of 20 years of age and once after completion of 50 years of age in view of biological changes in face of the applicant. Re-issuance of OCI registration certificate and visa is not mandatory, each time a new passport is issued between 21-50 years of age. However, if the applicant wishes to obtain new set of OCI documents, he/she can apply for the same. If the OCI card is issued at the age of 50 years, there is no need for re-issuance of OCI.

Comparative Chart on NRI/PIO/PIO Card Holders/OCI

		NRI	PIO	PIO Card Holder	OCI
1.	Who ?	An Indian citizen who is ordinarily residing outside India and holds an Indian Passport	A person who or whose any of ancestors was an Indian national and who is presently holding another country's citizenship/ nationality i.e. he/she is holding foreign passport	A person registered as PIO Card Holder under MHA's scheme *vide* Notification No. 26011/4/98 - F.I dated 19-8-2002.	A person registered as Overseas Citizen of India (OCI) under section 7A of the Citizenship Act, 1955
2.	Who is eligible?	–	–	Any person who at any time held an Indian Passport; or he or either of his parents or grand parents was born in or was	A foreign national, who was eligible to become citizen of India on 26-1-1950 or was a citizen of India on or

		NRI	PIO	PIO Card Holder	OCI
				permanently resident in India as defined in Government of India Act, 1935 and other territories that became part of India thereafter, provided neither was at any time a citizen of Afghanistan, Bhutan, China, Nepal, Pakistan and Sri Lanka; or who is a spouse of a citizen of India or a person of Indian origin as mentioned above.	at anytime after 26-1-1950 or belonged to a territory that became part of India after 15-8-1947 and his/her children and grand children, provided his/ her country of citizenship allows dual citizenship in some form or other under the local laws, is eligible for registration as Overseas Citizen of India (OCI). Minor children of such person are also eligible for OCI. However, if the applicant had ever been a citizen of Pakistan or Bangladesh, he/ she will not be eligible for OCI.
3.	How can one get ?	-	-	Eligible persons to apply in the prescribed form along with enclosures. Form available on MHA's website: www.mha.nic.in.	Eligible persons to apply on line/down load application form from MHA's website

		NRI	PIO	PIO Card Holder	OCI
4.	Where to apply?	-	-	To the Indian Mission/ Post in the country where the applicant is ordinarily resident; If in India on long term visa (more than one year), to the FRRO, Delhi, Mumbai, Kolkata, Amritsar, CHIO, Chennai or to the Joint Secretary (Foreigners), MHA	To the Indian Mission/Post of the country of applicant's citizenship or where he/ she is not in the country of citizenship, to the Indian Mission/Post of the country in which he/she is ordinarily resident. If the applicant is in India, he/ she can apply to the FRRO at Delhi, Mumbai, Kolkata, Amritsar, CHIO, Chennai or to the Under Secretary, OCI Cell, Citizenship Section, Foreigners Division, Ministry of Home Affairs, Jaisalmer House, 26 Mansingh Road, New Delhi110 011.
5.	Fees?	-	-	₹ 15,000/- or equivalent in local currency for adults. For the children up to the age of	US $ 275 or equivalent in local currency. In case of PIO card holders, it is US $ 25 or

		NRI	PIO	PIO Card Holder	OCI
				18 years, the fee is ₹ 7500/- or equivalent in local currency.	equivalent in local currency.
6.	Which nationals are eligible?	-	-	PIOs of all countries except Afghanistan, Bangladesh, Bhutan, China, Nepal, Pakistan and Sri Lanka	PIOs of all countries except Pakistan and Bangladesh provided the country of nationality allows dual citizenship in some form or other under the local laws.
7.	What benefits one is entitled to?	All benefits as available life long to Indian citizen subject to notifications for any issued by the Government from time to time	No specific benefits.	(i) Shall not require visa to visit India. (ii) Will be exempt from the requirements of registration if his/her stay on any single visit in India does not exceed 180 days. (iii) In the event of continuous stay in India exceeding 180 days, he/she shall have to get himself/herself registered within 30 days of the expiry of 180 days with the	(i) A multiple entry multi-purpose life long visa for visiting India. (ii) Exemption from registration with local police authority length of stay in India. (iii) Parity with Non-resident Indians (NRIs) in respect of economic, financial and educational fields except in relation to acquisition of agricultural or plantation properties.

		NRI	PIO	PIO Card Holder	OCI
				concerned FRRO/FRO. (iv) Parity with NRIs in respect of all facilities available to the later in the economic, financial and educational fields except in matters relating to the acquisition of agricultural/ plantation properties. No parity shall be allowed in the sphere of political rights.	No parity shall be allowed in the sphere of political rights. Any other benefits to OCIs will be notified by the Ministry of Overseas Indian Affairs (MOIA) under Section 7B(1) of the Citizenship Act, 1955.
8.	Does he/she require visa for visiting India?	No	Yes and of specific type depending on his/her purpose of visit.	Can visit India without visa for 15 years from the date of issue of PIO card.	Can visit India without visa for life long.
9.	Is he required to register with local police authorities in India?	No	Yes.	Yes, one time when the stay in India exceeds 180 days for the first time.	No
10.	What activities can be under taken in India?	All activities	Activity as specified in the visa	All activities except mountaineering, missionary and research work and existing	All activities except mountaineering, missionary and research work and existing

		NRI	PIO	PIO Card Holder	OCI
				PAP/RAP which require specific permit.	PAP/RAP which require specific permit.
11.	How can one acquire Indian citizenship	He/she is an Indian citizen	As per sections 5(1)(a) & 5(1)(c) of the Citizenship Act, he/she has to reside in India for minimum 7 years before making application for granting Indian citizenship	As per sections 5(1)(a) & 5(1)(c) of the Citizenship Act, he/she has to reside in India for minimum 7 years before making application for granting Indian citizenship	Registered OCI may be granted Indian citizenship after 5 years from date of registration provided he/she stays for one year in India before making application

Chapter 12

The Citizenship Act, 1955

This chapter highlights the provision of Citizenship Act, 1955 (as amended by the Citizenship (Amendment) Act, 2015), how one can be considered and/or become citizen of India. It also covers the circumstances under which the citizenship may be lost or terminated. It also covers the all the provisions like registration, cessation, benefits and related matters of Overseas Citizenship of India.

Q.178 What is the law of Citizenship in India?

A.178 The Citizenship Act, 1955 derived its origin from article 5 to 11 of the Constitution of India, "Citizen" is not defined in the Act or the Constitution of India, however according to various dictionaries, meaning inferred from literature on constitution, one can say generally that a citizen is one who has been guaranteed the fundamental rights and one who owes allegiance to the state. In the context of law of Citizenship article 5 and 11 of the constitution are relevant. Article 5 gives the basic criterion of a person to be a citizen of India. Whereas article 11 empowers the government to regulate the right of Citizenship by law.

Article 5 of the Constitution:

Every person who has its "domicile" in the territory of India and

a) Who has born in territory of India or

b) Either of whose parents was born in the territory of India or

c) Who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a Citizen of India.

The law relating to Citizenship in India enumerates who can be the citizen of India, how one can acquire the Citizenship in India, rules to administer the provisions and forms and schedules to make appropriate applications under various of its provisions.

Q.179 Who are considered to be Citizen of India? How one can become Citizen of India?

A.179 The persons under following four broad categories are considered as Citizen of India under the Citizenship Act, 1955. [Section 3, 4, 5 and 6 of the Citizenship Act, 1955]

(1) Sec. 3 - BIRTH: Every person born in India

(a) After 26th day of January 1950 but before commencement of Citizenship Amendment Act, 1986 i.e. 1st July 1987;

(b) On or after 1st July 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of his parents are citizen of India at the time of his birth,

(c) On or after commencement of Citizenship (Amendment) Act, 2003, where-

(i) Both of his parents are citizens of India; or

(ii) One of whose parents is Citizen of India and other is not an illegal migrant at the time of his Birth.

Except

(a) Children of an envoy of a Foreign Country who is not a citizen of India.

(b) Children, whose father or mother is an enemy alien and Birth occurs in a place under occupation of enemy.

"Illegal migrant" means a foreigner who has entered into India-

(i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;

(2) Sec. 4 - DESCENT: This category enumerates the Citizenship for the persons born outside India

(a) on or after 26th January 1950 but before 10th December 1992, if his/her father is Citizen of India at the time of his/her Birth; or

(b) on or after 10th December 1992, if either of his/her parents is Citizen of India at the time of his/her Birth.

In this category if father or either of his parents, as the case may be, is Citizen of India by Descent only, then the Birth has to be registered at an Indian Consulate in respective country within one year of its occurrence or the commencement of the respective amending acts, whichever is later (or after the expiry of said period with the permission of the Central Government) or at the time of his birth, his father or either of his parents, as the case may be, is in service under a Government in India.

After the commencement of the Citizenship (Amendment) Act, 2003; children of a person becoming citizen of India by descent, cannot become citizen of India under this category, by virtue of either of his parents being in service under a Government in India.

A minor who is a citizen of India by virtue of this section and is also a citizen of any other country shall cease to be a citizen of India if he does not renounce the citizenship or nationality of another country within six months of attaining full age.

(3) Sec. 5 - Citizenship by Registration:

One can acquire the Citizenship of India under the following categories, whether born in India or outside India, by registering himself as Citizen of India on complying with conditions as prescribed.

(a) a person of Indian origin who is ordinarily resident in India for seven years immediately before making an application for registration;

(b) a person of Indian origin who is ordinarily resident in any country or place outside undivided India;

(c) a person who is married to a citizen of India and is ordinarily resident in India for seven years immediately before making an application for registration;

(d) minor children of persons who are citizens of India;

(e) a person of full age and capacity whose parents are registered as citizens of India under (a) above or acquires citizenship by Naturalisation;

(f) a person of full age and capacity who, or either of his parents, was earlier citizen of independent India, and is ordinarily

resident in India for twelve months immediately before making an application for registration;

(g) a person of full age and capacity who has been registered as Overseas Citizen of India Cardholder for 5 years, and who is ordinarily resident in India for twelve months before making an application for registration.

Person shall be deemed to be Indian Origin if he or either of his parents were born in undivided India or such other territory which became part of India after 15th August 1947.

An applicant shall be deemed to be ordinarily resident in India if-

(i) he has resided in India throughout the period of twelve months immediately before making an application for registration; and

(ii) he has resided in India during the eight years immediately preceding the said period of twelve months for a period of not less than six years.

(4) Sec. 6 - Citizenship by Naturalisation:

In case of persons, not being "illegal migrants", Central Government, on application by applicant may grant Certificate of naturalisation on the basis of provisions of "Third Schedule". And thereafter on taking Oath of allegiance in the specified form, he/she becomes the Citizen of India, from the date of Naturalisation certificate granted to him/her, all the schedules mentioned above are reproduced as under. Thus Third Schedule prescribed the criterion for naturalisation under this category [Section 6 of the Act]

"THE SECOND SCHEDULE"
[See Section 5(2) and 6(2)]

Oath of Allegiance

I, A. B.…………………………………………… do solemnly affirm (or swear) that I will bear true faith and allegiance to the Constitution of India as by law established, and that I will faithfully observe the laws of India and fulfil my duties as a citizen of India.

"THE THIRD SCHEDULE"
[See Section 6(1)]

Qualifications for Naturalisation

The qualifications for naturalisation of a person are:-

(a) that he is not a subject or citizen of any country where citizens of India are prevented by law or practice of that country from becoming subject or citizens of that country by naturalisation;

(b) that, if he is a citizen of any country;

(c) that he has either resided in India or been in the service of a Government in India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application;

Provided that if the Central Government is satisfied that special circumstances exist, it may, after recording the circumstances in writing, relax the period of twelve months up to a maximum of thirty days which may be in different breaks

(d) that during the fourteen years immediately preceding the said period of twelve months, he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than eleven years;

(e) that he is of good character;

(f) that he has an adequate knowledge of a language specified in the Eighth Schedule to the Constitution; and

(g) that in the event of a certificate of naturalisation being granted to him, he intends to reside in India, or to enter into or continue in, service under a Government in India or under an international organisation of which India is a member or under a society, company or body of persons established in India.

However period mentioned at (c) & (d) above may be relaxed if Central Government thinks fit.

Also if in the opinion of the Central Government applicant is a person who has rendered distinguished service to the cause of Science, Philosophy, Art, Literature, World Peace or Human Progress generally it may waive all or any of the conditions specified in the Schedule above.

Q.180 Is there any other category where a person becomes Citizen of India Automatically?

A.180 a) As provided in Sec. 7, Central Government may by order, if particular territory becomes a part of India, specify the persons who shall be Citizens of India, by reason of their connection with that territory. Those persons shall be Citizens of India from the date specified in the order.

b) Also Central Government may by any other order consider and register the foreigner as Citizen of India.

Q.181 Under what circumstances Citizenship may be lost or terminated?

A.181 (1) Person ceases to be the Citizen of India if he/she renounces the same and makes a declaration in that respect. Such declaration shall be registered by the prescribed authority and on registration such person ceases to be the Citizen of India.

(2) Also if a person voluntarily acquires the Citizenship of any other country, he ceases to be the Citizen of India except under certain circumstances during war.

In either of the case (1) or (2) above, every minor child of that person shall cease to be the Citizen of India, however such minor Child can reacquire the Citizenship by declaration, within one year from attaining full age.

(3) Central Government may deprive a person from his Citizenship under following circumstances after giving reasonable opportunity of being heard to the deprived person, if it is satisfied that,

(a) The Registration or the Certificate of naturalisation was obtained fraudulently.

(b) He has proved his intention to be disloyal to the constitution of India.

(c) He has engaged himself unlawfully in trading or communicating with enemy country during period of war which has assisted enemy in the war.

(d) He has been imprisoned in any country for more than two years, within 5 years after naturalisation or registration as Citizen.

(e) Citizen has been continuously out of India for more than Seven years and was outside India not as a student or in service of Government of India/nor he presented himself to Indian

embassy of a Foreign country in the prescribed manner of his intention to retain his Citizenship of India.

Q.182 What do you mean by dual citizenship? Whether Constitution of India allows dual citizenship?

A.182 Dual citizenship means a person can hold citizenship of two countries at the same time. The Citizenship Act of India does not permit an Indian citizen to hold citizenship of any other country i.e. Constitution of India does not allow dual citizenship. However new scheme has been introduced w.e.f. 2nd December, 2005 granting Overseas Citizen of India to eligible persons.

13 Chapter Foreign Contribution Regulation Act, 2010 (FCRA)

This chapter highlights provisions pertaining to the contributions/donations from foreign sources, the formalities for receiving such contributions and restriction on acceptance of such contribution. The erstwhile FCRA, 1976 was repealed by FCRA, 2010.

Q.183 What is desired to be observed by the Foreign contribution (Regulation)

A.183 The prime objective of the statute is to regulate the acceptance and utilisation of foreign contribution (FC) or foreign hospitability by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to national interest and for matters connected therewith or incidental thereto.

Q.184 What is intended to be prohibited under FCRA?

A.184 (1) Any foreign contribution received by

(a) A candidate of Election in India.

(b) Correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper,

(c) Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government,

(d) Member of any Legislature,

(e) Political party or office-bearer thereof.

(f) Organization of a political nature as may be specified under sub-section (1) of Section 5 by the Central Government.

(g) Association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (i) of Section 2 of the Information Technology Act, 2000 or any other mode of mass communication;

(h) Correspondent or columnist, cartoonist, editor, owner of the association or company referred to in point (g).

(i) Individuals or associations who have been prohibited from receiving foreign contribution.

Q.185 What is the meaning of foreign contribution?

A.185 Foreign Contribution means the donation, delivery or transfer made by any foreign source

(1) Of any article not being an article given to a person as gift for his personal use, market value of which is not exceeding such sum as may be specified from time to time by the Central Government (currently twenty-five thousand Rupees);

(2) Of any currency whether Indian or foreign;

(3) Of any foreign security defined under Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined under FEMA '99 as foreign security.

Explanations:

a. A donation, delivery or transfer by a person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution

b. Any income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution

c. Any amount received, by an person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent or a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution

Q.186 What is meaning of foreign source?

A.186 Foreign Source includes

i) Government of foreign country or any agency of such Government

ii) International agencies, not being of

a) United Nations or its specialized agencies,

b) World Bank,

c) International Monetary Fund or

d) Such other agencies as so notified by the Central Government

iii) Foreign company or Corporation incorporated in foreign country or multi-national corporation referred to in Section 2(g) sub-clause (iv) of FCRA, 2010 (i.e. has a subsidiary/branch/place of business in two or more countries)

iv) Trade union in a foreign country

v) Foreign Trust or Foundation or Society or club formed or registered outside India or such trust or foundation mainly financed by a foreign country

vi) Company where more than half of shareholding held by foreign Govt., foreign citizens, foreign corporations; provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source

vii) Citizens of foreign countries

However, it must be noted that the citizens of India resident outside India will not be treated as Foreign Source.

Q.187 Whether donations/fees received from following persons are treated as 'foreign contribution'?

- **Non-Resident Indians (NRIs)**
- **PIO card holder/PIO holding foreign passport/OCI**
- **Multi-National Companies**
- **Foreign delegates/participants attending conference**

A.187 Contributions made by an NRI from his personal savings, through normal banking channels, is not treated as foreign contribution. However while accepting any donations from such NRI, it is advisable to obtain his passport details to ascertain that he/she is an Indian passport holder.

PIO card holder/PIO holding foreign passport/OCIs are foreign nationals and hold passports of the country of their nationality, therefore contributions made by them would be considered as foreign contribution.

Contribution by an Indian Company incorporated under the Companies' Act, 1956 will not be treated as foreign contribution. But if the ownership and control rights of the company are vested in a foreign source, it will be treated as foreign contribution.

"Delegate/participation Fees" for participation in a conference/seminar is utilized for the purpose of meeting the expenditure of hosting the conference/seminar, and is not treated as foreign contribution.

Q.188 Who are permitted to accept foreign contribution?

A.188 Any individual, HUF, association or a company registered under Section 25 of Companies Act 1956 (Now Section 8 of Companies Act, 2013) can receive foreign contribution subject to following conditions:-

a) It must have a definite cultural, economic, educational, religious or social programme.

b) It must obtain the FCRA registration/prior permission from the Central Government.

c) It must not be prohibited under Section 3 of FCRA, 2010.

Q.189 When permission is required to accept FC under FCRA? What are the Application forms to be filled up for obtaining the permission?

A.189 When a person is eligible under the Act to accept foreign contribution or foreign hospitability and he/it is willing to accept such a contribution or the hospitability as the case may be, it is required to be registered with Central Government for accepting donation after registration or it can obtain prior permission of Central Government for the specific donation.

No.	Types of Permission	Application form
(i)	Registration under section 11(1);	Form FC-3;
(ii)	Prior permission under section 11(2)	Form FC-3.

Q.190 When prior permission is required, what is the nature of such approval and what are the criteria for approval?

A.190 The association may require to obtain prior permission in following cases

a. Where the association is in formative stage and is not eligible to have a FCRA registration.

b. Where the association is placed under prior permission category.

c. Where registration is frozen.

d. Association is of the political nature, not being a political party.

The essentials of the prior permission are as follows:

i. It is donor specific;

ii. It is donee specific;

iii. It is amount specific i.e., within overall limits;

iv. It is purpose specific i.e., given for receipt for specified purpose.

Prior permission is granted for receipt of specific amount from specific donor for carrying out specific activities/projects. For this purpose, the association should:

(i) Be registered under the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act,1956;

(ii) Submit commitment letter from the donor indicating the amount of foreign contribution and the purpose for which it is proposed to be given; and

Liaison Office of a foreign company has to obtain prior permission under FCRA for receiving remittances from its Head Office abroad for conducting conferences or carrying out other activities/programmes, etc. in India.

Q.191 What are the eligibility criteria for registration?

A.191 The association should

(i) Be registered under the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956 (Now Section 8 of Companies Act, 2013);

(ii) Normally be in existence for at least three years and have made reasonable contribution in chosen area of activity for the benefit of the society. For this purpose, the association should have spent at least ₹ 10,00,000 over last three years on its activities, excluding administrative expenditure. Statement of Income & Expenditure duly audited by Chartered Accountant for last three years may be enclosed to substantiate financial parameter.

Q.192 What are the steps to be followed for Registration/approval to accept foreign contribution?

A.192 Person eligible to accept foreign contribution may accept after complying with the following conditions

a) Application for grant of registration/prior permission is to be submitted online in form FC-3 at the website fcraonline.nic.in

b) The applicant should be ready with the scanned copies of the following documents before filing the application online:

   i. In case of application for grant of registration

      (i) jpg file of signature of the chief functionary

      (ii) Self-certified copy of registration certificate/Trust deed etc., of the association

      (iii) Self-certified copy of relevant pages of Memorandum of Association/Article of Association showing aim and objects of the association.

      (iv) Activity Report indicating details of activities during the last three years;

      (v) Copies of relevant audited statement of accounts for the past three years (Assets and Liabilities, Receipt and Payment, Income and Expenditure) clearly reflecting expenditure incurred on aims and objects of the association and on administrative expenditure;

      (vi) Fee of ₹ 2000/- is to be paid online through payment gateway

   ii. In case of application for grant of prior permission

      (i) jpg file of signature of the chief functionary

      (ii) Self-certified copy of registration certificate/Trust deed etc., of the association

      (iii) Duly signed Commitment Letter from Donor.

      (iv) If functioning as editor, owner, printer or publisher of a publication registered under the Press and Registration of Books Act, 1867, a certificate from the Registrar of Newspapers for India that the publication is not a newspaper in terms of section 1(1) of the said Act.

      (v) Fee of ₹ 1000/- is to be paid online through payment gateway

c) Open a separate bank a/c for receipt & utilization of foreign contribution.

d) Submit an intimation to the Central Government, giving the details of the contribution.

e) Maintain separate accounts showing receipt & utilization of contribution received.

f) In case of Registered Association, submit annual returns in FC-4 form.

g) In case of change in members, home, address, objectives of the association, it shall be reported to the Central Government within 30 days of the change.

After the violation committed by an association has been condoned, the association can apply for prior permission (PP) only by submitting an application in form FC-3. Once the PP has been granted and foreign contribution received for specific purpose has been fully/partially utilized and organisation has submitted annual FC-4 returns and accounts in prescribed format pertaining to the PP, it becomes eligible for consideration of registration under FCRA. Registration would be granted under FCRA, if other parameters are fulfilled by the association.

Status of pending applications for grant of registration or prior permission may be checked on-line from the Ministry of Home Affairs' web-site – http://fcraonline.nic.in.

Q.193 Whether recommendation of District Collector, etc., is mandatory along with the application for Registration?

A.193 No. Submission of verification certificate from the District Collector, etc., is not mandatory.

Q.194 What shall be included in the intimation to Central Government?

A.194 An intimation may be submitted in the prescribed form, if any, to the Secretary to the Government of India in Ministry of Home Affairs, New Delhi & shall include among other things the following details:

a) The fact relating to the receipt of the amount,

b) The source from which the amount is received,

c) The manner of the receipt, and

d) The purpose & utilization of the amount.

Q.195 What are the grounds for rejection of the application by Central Government?

A.195 Certain Guidelines are laid down for considering applications for grant of prior permission/registration under the Act. Some of the grounds for rejection of applications are listed below:

- If the association is not registered under the Societies Registration Act, 1860 or the Indian Trusts Act, 1882 or section 25 of the Companies Act, 1956.
- If any of the office bearers/trustees, including the chief functionary, is a foreign national, other than of Indian origin.
- If the association has a single office bearer/member.
- If the association is found to have been formed for personal gain or for diversion of the funds for undesirable purposes.
- If the association is found to be fictitious or 'benami' in nature.
- If the credibility of any member of the governing body is in doubt.
- If the association has close links with another association which has been refused registration under FCRA or prohibited under FCRA or violated the provisions of FCRA.
- If the association has links with any banned organizations.
- If the principal office bearers of the association have been convicted by any court of law under any act or if a prosecution for any offence is pending against them.
- If the principal office bearers of the association have been found guilty of diversion or misutilisation of funds of the said association or any other association in the past.
- If the activities of the association are found to be aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another.
- If the association is found to propagate sedition or to advocate violent methods to achieve its ends.
- If the association is found to be creating communal tensions or disharmony.
- If the office bearers of the association are also office bearers of another association and one of these associations has come to adverse notice.
- If the association's Printed work is not certified by the Press registrar of India not to be a newspaper in terms of section 1(1) of the Press Registration of Books Act, 1867.
- If the source of foreign contribution is found to be adverse to the interests of the country.

- If the acceptance of foreign contribution by the association is likely to be prejudicial to (a) the sovereignty and integrity of India; (b) free and fair elections to any Legislature or House of Parliament; (c) public interest; (d) friendly relations with a foreign state; or (e) harmony between any religious, social, linguistic, regional groups, caste or community.
- If the association has not field its annual FC-6 returns, of receipt and utilization of foreign contribution received with prior permission, within the stipulated period.
- If the association has violated any provisions of the Act or Rules in the preceding three years and the said violation has not been remedied or rectified.

1. Additional grounds for rejection of applications for Registration are:
    - If the association is not in existence for three years at least.
    - If the association has not carried on any activity in its chosen field during the last three years.
    - If the association has not received foreign contribution, with prior permission, during the preceding three years.
    - If the association has not made any substantial contribution, excluding expenditure on administration, (₹ 10,00,000 over a period of three years) in its field of interest.
2. Additional grounds for rejection of applications for prior Permission are:
    - If the application is not accompanied by the 'commitment letter' of the donor indicating the amount of foreign contribution and the purpose for which it is proposed to be given.

Q.196 Kindly throw some light on day-to-day issues arising in conduct of the associations or NGOs receiving foreign contribution.

A.196 a) All foreign contribution should be received in an exclusive single FC Bank Account (also called designated FC Account) mentioned in the order for registration or prior permission granted by Ministry of Home Affairs (MHA). This account number is same as has been intimated by the organisation in their application for registration/prior permission.

However, one or more accounts (called Utilization Account) in one or more banks may be opened by the association for 'utilising' the

foreign contribution after it has been received in the designated FCRA bank account, provided that no funds other than that foreign contribution shall be received or deposited in such account or accounts and in all such cases, intimation in FC-6 is to be given online within 15 days of opening of such account.

b) Foreign contribution should not be mixed with local funds handled by the organisation.

c) The interest earned out of foreign contribution deposit should be shown as fresh foreign contribution received.

d) As stipulated in Section 7 of FCRA, Foreign contribution cannot be transferred from an association having registration or prior permission under FCRA to another association unless the latter has also obtained either registration or prior permission under FCRA except as provided under Rule 24.

e) The foreign contributions received by NGOs after prior permission/ grant of registration under the Act are to be utilized for the purpose for which they have been received and they are not to be invested in Mutual Funds or any speculative investments. They should utilize the funds for the welfare purpose or related activities for which it is received.

f) Every assets acquired out of foreign contributions should be acquired and possessed in the name of the association since association is a separate legal entity distinct from its members.

Q.197 What is the Procedure for transferring foreign contribution to any unregistered person?

A.197 Rule 24 of FCRR, 2011, as amended *vide* the Foreign Contribution (Regulation) Amendment Rules, 2012 [G.S.R. 292 (E) dated 12th April, 2012] prescribes the procedure for transferring foreign contribution as under:

(1) A person who has been granted a certificate of registration or prior permission under section 11 and intends to transfer part of the foreign contribution received by him to a person who has not been granted a certificate of registration or prior permission under the Act, may transfer such foreign contribution to an extent not exceeding ten per cent of the total value thereof and for this purpose, make an application to the Central Government in Form FC-5.

(2) Every application made under sub-rule (1) shall be accompanied by a declaration to the effect that-

(a) The amount proposed to be transferred during the financial year is less than ten per cent of the total value of the foreign contribution received by him during the financial year;

(b) The transferor shall not transfer any amount of foreign contribution until the Central Government approves such transfer.

(3) A person who has been granted a certificate of registration or prior permission under section 11 shall not be required to seek the prior approval of the Central Government for transferring the foreign contribution received by him to another person who has been granted a certificate of registration or prior permission under the Act provided that the recipient has not been proceeded against under any of the provisions of the Act.

(4) Both the transferor and the recipient shall be responsible for ensuring proper utilisation of the foreign contribution so transferred and such transfer of foreign contribution shall be reflected in the returns in Form FC-4 to be submitted by both the transferor and the recipient.

Q.198 What is the Procedure for change of designated Bank Account?

A.198 For change of the bank account, an online application in prescribed form FC 6 mentioning the details of the old bank account and the proposed new bank account alongwith justification for change may be submitted to MHA alongwith copy of resolution of the executive committee for such change. This form is available on website http://fcraonline.nic.in. The new account may be made operational only after seeking MHA's approval.

Q.199 Which forms are required to be filed & purpose of filing the form?

A.199 Various forms are prescribed by The Foreign Contribution (Regulation) Rules, 1976 to be filed with the Central Government for carrying out the purposes of the Act

Forms	Description
FC-1	Intimation of receipt of foreign contribution by way of gift/as Articles/Securities/by candidate for Election.
FC-2	Application for seeking Prior Permission of the Central Government to accept foreign hospitality
FC-3	Application for FCRA Registration, FCRA prior permission and for Renewal of FCRA registration
FC-4	Intimation - Annual Returns

Forms	Description
FC-5	Application for seeking permission for transfer of foreign contribution to other unregistered persons.
FC-6	Intimation for Change of Association Name/Address/FC Recipient Bank/Utilisation Bank Accounts/Key members

Q.200 What is the procedure for filing of FC-4 returns?

A.200 An association permitted to accept foreign contribution is required under law to maintain separate set of accounts and records exclusively for the foreign contribution received and utilised and submit an annual return, duly certified by a Chartered Accountant, giving details of the receipt and purpose-wise utilisation of the foreign contribution. The return is to be filed for every financial year (1st April to 31st March) within a period of nine months from the closure of the year i.e., by 31st December of each year. Submission of even a 'Nil' return if there is no receipt/utilization of foreign contribution during the year, is mandatory, under law. The return is to be submitted, in prescribed Form FC-4, duly accompanied with the balance sheet and statement of receipt and payment, which is certified by a Chartered Accountant. Submission of a 'NIL' return, even if there is no receipt/utilization of foreign contribution during the year, is mandatory. However, in such case, certificate from Chartered Accountant, audited statement of accounts is not required to be uploaded.

The association should submit online the mandatory return in FC-4 form for receipt and utilization of the foreign contribution on a yearly basis, till the amount of foreign contribution is fully utilized. Even if no transaction takes place during a year, a NIL return should be submitted.

An association not filing annual return on time may face the following consequences:

(1) Imposition of penalty for of late submission of return.

(2) Cancellation of registration

Q.201 Whether persons like, election candidate etc., who are prohibited to accept foreign contribution, can accept payments in any other form?

A.201 Yes, such contribution may be accepted by those persons if it is

(a) By way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or

(b) By way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or

(c) As an agent of a foreign source in relation to any transaction made by such foreign source with Government; or

(d) By way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the regulations made by the Central Government with regard to the acceptance or retention of such gift or presentation; or

(e) From his relative; or

(f) By way of remittance received, in the ordinary course of business, through any official channel, post office, or any authorised dealer in foreign exchange under the Foreign Exchange Management Act, 1999

(g) By way of any scholarship, stipend or any payment of like nature

Explanation - In this Act, the expression 'relative' has the meaning assigned to it in the Companies Act, 1956 (1 of 1956).

Q.202 What is meaning of foreign hospitality?

A.202 'Foreign hospitality' means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the cost of travel to any foreign country or territory or with free board, lodging, transport or medical treatment.

Q.203 Who cannot accept foreign hospitality without prior approval of MHA?

A.203 Following person shall not accept any foreign hospitality, without the prior permission of the Central Government while visiting any country or territory outside India

a) The member of a Legislature

b) Office-bearer of a political party,

c) Judge, Government servant or employee of any corporation or any other body owned or controlled by the Government.

Exception

They may receive the same without prior permission if the receipt is for an emergent medical aid needed on account of sudden illness during the visit outside India & intimation of the same is given to the Central Government within one month from the date of receipt of such hospitality.

Q.204 How one can seek permission of the Government for receiving foreign hospitality?

A.204 The applicant should submit application in Form FC-2 online. The application for grant of permission to accept foreign hospitality should be filed online ordinarily two weeks before the proposed date of onward journey.

Following documents are to be uploaded with FC-2 form (as mentioned under Rule 7 of FCRR, 2011):-

(i) Signature of the applicant (maximum 50 KB allowed in JPG/JPEG format)

(ii) An invitation letter from the host or the host country, as the case may be (maximum 1 MB allowed in PDF format)

(iii) Administrative clearance of the Ministry or department concerned in case of visits sponsored by a Ministry or department of the Government (maximum 1 MB allowed in PDF format).

Q.205 What are the penalties for violations under the FCRA?

A.205 Section 33 to Section 39 of the FCRA, 2010 provides for the following varying penalties in case of contravention of different provisions of the Act

a) Prohibition of acceptance of foreign contribution for a period of three years

b) Power to the Central Government to place the association in prior permission category

c) Imprisonment up to 5 years

d) Fine

e) Seizure/confiscation of the foreign contribution

14 Chapter
Taxation of Non-Resident Indians

The non-residents have the sources of income in India as well as in the countries where they are residents. Also they may have certain income from other countries. This chapter highlights how the income of non-residents is taxed in India. It also covers various special provisions applicable to non-residents including the provisions of Double Tax Avoidance Agreement, which India has signed with their respective Countries of Residence.

Q.206 What is broadly the scheme of Income-tax in India?

A.206 Section 4 of the Income-tax Act, 1961 ("I.T. Act") is a charging section. Under this section, the Income-tax is charged for any assessment year at the rates prescribed for that year in accordance with the provisions of the I.T. Act in respect of total income of the previous year of any person.

(1) **PREVIOUS YEAR:** The previous year for the purpose of I.T Act has been defined u/s. 3 of the Act to mean a financial year; i.e., from April to March, immediately preceding the assessment year. In case of a newly set up business or profession, the previous year will end on 31st March, whether or not the period of 12 months or the previous year is complete or not. For e.g., if a business is commenced from, say 1st October, the first previous year will be 1st October to 31st March and thereafter from 1st April to 31st March every year.

(2) **PERSON**: The person has been defined u/s. 2(31) of the Act and it includes:

i) An individual,

ii) A Hindu undivided family,

iii) A company,

iv) A firm,

v) An association of persons or a body of individuals, whether incorporated or not,

vi) A local authority, and

vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

Q.207 What is the scope of Income-tax particularly with reference to Non-Resident Indians?

A.207 **SCOPE OF INCOME** : Section 5 of the I.T Act defines the scope of income liable to tax.

(1) **RESIDENT** : Under this section, the resident is charged to tax on all the incomes:

i) Which is received or is deemed to be received in India;

ii) Which accrues or arises or is deemed to accrue or arise in India; and

iii) Which accrues and arises outside India.

In other words, the world income is taxable in case of a Resident.

(2) **RESIDENT BUT NOT ORDINARY RESIDENT**: Person who is a resident but not ordinarily resident is liable to tax in the same way as that of resident except that the income which accrues or arises outside India is not taxable in India unless it is derived from a business controlled in or a profession set up in India.

(3) A person having been a Non-Resident for a continuous period of 9 out of 10 years, on his return, will remain "Not Ordinary Resident" for 2 years. Therefore, a Not Ordinary Resident person will have the advantage of both for 2 years: 1) he will be liable to pay income tax on his Indian income only and (2) his foreign income will be free from Indian income tax.

(4) **NON–RESIDENT** : In case of a Non-Resident, the income received or deemed to be received in India or income accrues or arises or is deemed to accrue or arise in India only is taxable in India. In other words, the income accruing or arising outside India is not taxable in India even though it is remitted to India.

However, it is important to note here that the following income which might have been payable outside India are deemed to arise in India:

i) Income from a business connection in India or through or from any property or capital asset or source of income or transfer of capital asset situated in India (refer section 9(1)(i));

ii) Salaries for services rendered in India (refer section 9(1)(ii));

iii) Salaries by Govt. to Indian citizen for services outside India (refer section 9(1)(iii));

iv) Dividend paid by an Indian company to a non-resident (refer section 9(1)(iv));

v) Interest payable on moneys borrowed and brought into India (refer section 9(1)v)); and

vi) Royalty and technical service fees, where the royalty is payable in respect of any right or fees for technical services used for business or profession in India. Royalty and technical service fees will be exempt, if it is payable:

1) Through an agreement made before 01-04-1976 which is approved by the Central Government; and

2) In respect of computer software supplied by a non-resident manufacturer along with a computer or computer based equipment under approved specified scheme of the Government of India. (refer section 9(1)(vi and vii)).

Section 9(1)(i) provides that irrespective of the residential status, all income accruing or arising, whether directly or indirectly, through or from i) any business connection in India; or ii) any property in India; or iii) any assets or source of income in India; or iv) the transfer of a capital asset situated in India, shall be deemed to accrue or arise in India and chargeable to tax in India. However, if the resident pays for using the services or the loan for earning income from a source outside India, it will not be taxed in India. It was held in the case of *Ishikawaji-Harima Heavy Industries Ltd. v. Director of Income Tax (2007) 288 ITR 408 (SC)* that for any such deemed income to be taxable in India, there must be sufficient territorial nexus between such income and the territory of India. Where any sum is payable by resident to a Non-Resident the aforesaid deeming provisions cannot be applied and the income cannot be taxed which is received by a Non-Resident outside India from an Indian concern for services rendered outside India. It was further held that the technical fees to be taxable in India, the services have not only to be utilised in a business in India, but also have to be rendered in India.

An explanation is inserted by the Finance Act, 2007 at the end of section 9 with effect from 1st June, 1976 to overcome the aforesaid decisions of the Supreme Court and it is provided that if any income is deemed to accrue or arise to a non-resident in India on account of interest, royalty and fees for technical services, it shall be included

in the total income of non-resident irrespective of the fact that non-resident has a residence or a place of business or a business connection in India. However, it is doubtful, whether the explanation will solve the purpose.

Q.208 Who can be regarded as Resident and Non-resident under the Income-tax Act and FEMA?

A.208 **(A) RESIDENT**

The residential status of a person is decided under two different Acts: one under the Indian Income-tax Act, 1961 ("I.T. Act") and another under the Foreign Exchange Management Act, 1999 ("FEMA").

Residential status under I.T. Act is determined u/s. 6 as under:

i) Resident in India and ii) Non-Resident in India

In case of individual and HUF, the Resident is further divided into 2 classifications viz. ia) Resident and Ordinary Resident and (ib) Resident but not Ordinarily Resident.

(1) **An individual** will be treated as resident in India in any previous year if he fulfils any one of the following two conditions:

(a) He is in India in that year for a period or periods amounting in all to 182 days or more; or

(b) Having within the four years preceding that year he has been in India for a period or periods amounting in all to 365 days or more AND has been in India for 60 days or more in that year.

(2) Under Explanation to section 6(1) of the Income-tax Act, the residential status of an individual who is rendering service outside India and who visits India during leave or vacation in any previous year or an individual who is outside India and who comes on a visit to India in any previous year will be determined as under:

(a) An Indian citizen who leaves India in any previous year for the purpose of employment outside India or as a crew member of an Indian ship would be treated as resident in India if he stays in India in that year for 182 days or more (instead of 60 days as stated in 1(b) above). Conversely, if he stays in India for less than 182 days, he will be treated as Non-Resident for that year and his

foreign income would not be liable to income tax in India.

The Circular No. 586 dated 28-11-1990 ([1990]186 ITR (St) 167) clarify that w.e.f. 1-4-1990, a crew member will be treated as Non-Resident in India if he is on board of such ship outside the territorial waters of India for 182 days or more during any year.

For purpose of Explanation (a) to section 6(1)(c), 'employment' includes self-employment like business or profession taken up by assessee abroad. *CIT v. O. Abdul Razak [2011] 337 ITR 350 (Kerala High Court).*

(b) An Indian citizen or a person of Indian origin who resides outside India and who comes on a visit to India in any previous year will be treated as resident in India if he stays in India in that year for 182 days or more (instead of 60 days as stated in 1(b) above). Conversely, he will be treated as non-resident if he stays in India in that year for less than 182 days.

In the case of *Adll. CIT v. Sudhir Choudrie [2017] 88 taxmann.com 570*, the Delhi Tribunal held that where the assessee was having a special visa allowing him to work in the UK and the fact that he was working abroad in the UK as a retainer-cum-incentive basis in the year under consideration and he has come to India on a visit, was sufficient for fulfilling the criteria laid down u/s. 6(1)(b). Other factors like economic presence, legal presence etc are irrelevant as same are not recognized under provisions of section 6.

(3) An individual (whether Indian citizen or not) who is outside India and who comes on a visit to India in any previous year will be treated as "non-resident" in India if he stays in India in that previous year for less than 182 days provided that during the preceding four previous years, his stay in India does not amount to 365 days or more.

An Individual who fulfils any of the conditions mentioned in section 6(1) is treated as resident in India. But in order to become an "ordinarily resident", he must satisfy other two conditions as laid down under section 6(6)(a) of the Income-tax Act, 1961. Explained in (B) below.

(4) **A HUF, AOP or a Partnership Firm** shall be resident in India in any previous year in every case except where during that year the control and management of its affairs is situated wholly outside India.

(5) **A Company** is said to be a resident in India in any previous year if

i) It is an Indian Company; or

ii) Its place of effective management in that year is in India.

"Place Of Effective Management" (PoEM) means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

This amendment has been brought about by the Finance Act, 2015 w.e.f. 1-4-2016 and would align the provisions of the Act with the Double Taxation Avoidance Agreements (DTAAs) entered into by India with other countries and would also be in line with international standards. It would also be a measure to deal with cases of creation of shell companies outside India but being controlled and managed from India.

Prior to the amendment, a company was said to be a resident in India in any previous year if it was an Indian Company or during that year, control and management of its affairs was situated wholly in India.

Concept of Control and management is different from the Place of Effective Management as Place of Control and management is normally a unique one whereas there could be various places of management. However, place of effective management cannot be at various places it will again be a only place.

(B) NOT ORDINARILY RESIDENT

Up to assessment year 2003-04, the provisions are:

(i) He should have been resident in India in nine out of the ten previous years preceding the previous year in which he is resident within the meaning of section 6(1); and

(ii) He should have been in India for a period or periods amounting in all to 730 days (i.e., 2 years) or more during the seven years preceding that previous year.

If he does not fulfil any of the above conditions, he will be treated as "not ordinarily resident".

The controversy raised by the judgment in the case of *Pradip J. Mehta v. CIT (2002) 256 ITR 647 (Guj)* has found its place in the statute book as an amendment to section 6(6) of the Act.

Consequently, section 6(6) has been amended with effect from assessment year 2004-05.

Under the amended section 6(6), an individual will be treated as "Not Ordinarily Resident" (NOR) in India in any previous year if he has been a non-resident in India in 9 out of 10 previous years preceding that year or has, during the 7 previous years preceding that year, been in India for a period or a periods amounting, in aggregate, to less than 730 days – in other words 729 days or less.

The HUF will be treated as "Not Ordinarily Resident" in India if the Karta/Manager of HUF has been a non-resident in India in 9 out 10 previous years preceding that year or has, during the 7 years preceding that year, been in India for a period of or periods amounting in aggregate to 729 days or less.

Thus, the individual as well as the HUF will have to comply with additional conditions to be treated as "Not Ordinarily Resident" in India. If he complies the said conditions, he will be NOR for next two years.

(C) NON-RESIDENT

(1) An individual who does not satisfy both the conditions as laid down in section 6(1) and as narrated hereinabove will be treated as "non-resident" in that previous year.

While determining the residential status, the following needs to be kept in mind;

- Date of Travel
- Purpose of travel
- Previous travel record
- Stay period in the year of arrival/departure

Further, for the purpose of counting the number of days for an individual to be in India or outside India, complete reliance is placed on the passport of the individual.

It is important to note here that while calculating the number of days, both the days; viz., the date of departure from and date of arrival in India are to be counted.

However, there are different views taken as under;

- One must include both, the day of entry in India as well as day of exit from India. {Petition No. 7 of 1995 225 ITR 462 (AAR)}
- Both days should be counted as "in India" {AAR 233 ITR 462}
- Day of arrival is to be excluded {*Fausta C. Corderio [2012] 53 SOT 522 (Mum ITAT). Manoj Kumar Reddy v. ITO [2009] 34 SOT 180 (Bang.)* wherein reference was made to section 9 of General Clauses Act, the first day in series of days had to be excluded.
- Only day of departure has to be considered as "in India" {*ITO v. Dr. R. K. Sharma* (Jaipur Tribunal No. 1230 dated 22-8-1986)}

But a conservative view is to include both the day of entry as well as exit.

It may be noted that assessment as a resident in a year does not preclude contention in subsequent year that he was not a resident. *CIT v. PL.M.TT Firm (1973) 87 ITR 260 (Mad).* It was also held that the question of resident or a non-resident is a question of fact. *Raja Bahadur Seth Teomal v. CIT (1963) 48 ITR 170 (Cal.)*

(2) A Hindu Undivided Family, firm or other association of persons will be treated as "non-resident" in India in any previous year if the control and management of its affairs is situated wholly outside India during that year. In other words, if the control and management is even partly situated in India, it will be treated as resident.

In case of *Erin Estate v. CIT Madras, (1958) 34 ITR 1* and *CIT v. Nandlal Gandalal (1960) 40 ITR 1*, the Supreme Court has held that the Control and Management means "*de facto*" Control and management and not merely the "*de jure*" or the right to control and manage. Control and Management refers to the central controlling and directing power and management, often described as the "head and brain" – and not the carrying on of

day-to-day business by servants, employees or agents. It was also held that where the management of the firm is carried on through instructions from partners who resided in India, firm must be treated as resident.

However, in the case of *Talipatigala Estate v. CIT (1950) 18 ITR 320 (Mad)* it was held that mere fact that a partner in British India keeps himself in touch with his other partners conducting business in a foreign country does not amount to exercise of control in British India over affairs of the firm.

(3) A company will be treated as "Non-Resident" in India in any previous year if it is not an Indian company or if its place of effective management in that year is not in India.

It may be noted that under the Income-tax Act, the status of "Not Ordinarily Resident" is accorded only to "Individuals" and "Hindu Undivided Families" and not to any other categories of assessees. Accordingly, remaining categories of assessees are classified either as "Resident" (which means "Ordinarily Resident") or "Non-Resident", as the case may be.

(D) Please refer to Question No. 3 for meaning of Resident and Non-Resident under FEMA.

Q.209 What is the territorial limits of India?

A.209 Section 2(25A) defines : "India" means the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and subsoil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), and the air space above its territory and territorial waters.

A decision under the old Act may also be referred in the case of *CIT v. Atwood Oceanics International S.A. (2003) 264 ITR 761 (Uttaranchal)* that a Non-Resident working on an Oil Rig located beyond 12 nautical miles could not be treated as residing in India so that his status would be that of a Non-Resident. Skies over Indian Territories would be treated as India as per the amendment brought in by the Finance Act, 2007.

Q.210 Can the provisions of being Resident in India (section 6 of ITA) be explained with the help of some examples?

A.210 The aforesaid provisions of section 6 can be explained with the help of the following examples:

1. Mr. X returns to India on 1-7-2017 and again leaves India on 10-2-2018. Thus, his stay in India is 225 days which is more than 182 days and hence will be regarded as a Resident for the Assessment Year 2018-2019 under section 6(1)(a) of the Act.

2. Mr. Y, an Indian Citizen, goes abroad on 25-9-2017 for taking up an employment outside India or as a crew member of Indian ship and returns to India on a visit anytime after 1-4-2018. He was in India for more than 365 days during the four years preceding the previous years; viz., 2013-2014 to 2016-2017. In this case, as per explanation to section 6(1), he will be treated as a Non-Resident for the previous year 2017-2018 (Assessment Year 2018-2019) although he was in India for a period of more than 365 days in the four years preceding the previous years and was in India for more than 60 days but less than 182 days during the previous year 2017-2018.

   If Mr. Y, an Indian Citizen & Managing Director of XYZ Pharma Co. Pvt Ltd., visits various countries for aggregate of 190 days during the F.Y. 2017-2018, in connection with his export business from India, even though his stay in India is less than 182 days, the provision of explanation 1(a) to section 6(1) will not apply since he has not gone abroad for the purpose of employment outside India.

   If in the given case, Mr. Y is a US Citizen but an Indian Resident, goes abroad for the purpose of employment, then in that case also the provisions of explanation 1(a) to section 6(1) of the Act will not apply since he is not an Indian Citizen.

3. Mr. Z, a citizen of India and Mr. P, a person of Indian origin, both came to India on a visit on 1-7-2017 and left on 25-12-2017. Thus, their stay in India is 178 days. They were in India for more than 365 days during the four years preceding the previous years; i.e., 2013-2014 to 2016-2017. Under explanation to section 6(1), they will be treated as Non-Resident Indians for the previous year 2017-2018 (Assessment Year 2018-2019).

4. Mr. P, an Indian citizen and Mrs. P, a person of Indian origin comes on a visit to India on 1-7-2017 and left on 10-1-2018. This amounts to their stay of 194 days in India. They were in India for more than 365 days during the four years preceding the previous years; i.e., 2013-2014 to 2016-2017. They will be regarded as Residents for the Assessment Year 2018-2019 under explanation to section 6(1) since their stay during the previous year 2017-2018 is 182 days and more.

5. Mr. A, leaves India on 23-9-2016 for the purpose of studying in the USA. His stay in India during the F.Y 2016-2017 is 176 days (less than 182 days). However, since he has stayed in India for more than 60 days in F.Y. 2016-2017 and assuming he was always in India in the preceding 4 years, he shall be treated as a Resident of India for F.Y. 2016-2017. The condition of explanation 1 to section 6(1) shall not apply since he is leaving India for the purpose of studies and not employment. Now, if Mr. A comes on a visit to India in F.Y 2017-2018 for a total of 76 days (i.e., more than 60 and less than 182 days), as per Explanation 2 to section 6(1) i.e. an Indian citizen who is outside India and comes on a visit to India, 60 days will be replaced with 182 days and hence, Mr. A will be treated as a Non-Resident for F.Y. 2017-2018. It may be noted that Explanation 1 and Explanation 2 to section 6(1) are not conditional upon each other. Therefore, a person leaving India for the purpose of studies may not be covered in explanation 1 but it may be covered in explanation 2 and hence will be treated as a person outside India. Person outside India does not necessarily mean a Person who is a Non-Resident only.

6. Mrs. S, an Indian Citizen, leaves India on 15-4-2017 for the purpose of employment in China. However, she resigns from her job on 20-9-2017 and comes to India on 22-11-2017. The total no. of days she has stayed in India is 145 days. Whether the benefit of explanation 1 to section 6(1) can be taken? In this case, since she leaves India for the purpose of employment but comes back to India in the same year after resigning from her job abroad, thus she has gone abroad for the purposes of employment, but it cannot be said that she has come to India on a "visit". Hence, extension of 60 days to 182 days is available under explanation 1 but she does not qualify as person outside India for the purpose of Explanation 2 and hence benefit of Explanation 1 although available, she has returned to India and has stayed for more than 60 days instead of a visit to India and hence benefit of 182 days stay cannot be availed in such cases. As a result, she will be regarded as a Resident. See: *Mrs. Smita Anand [2014] 42 taxmann.com 366 (AAR).* It may be noted here that this a classic case of Explanation 1 and Explanation 2 where both operate in a different direction in so much that even if person qualifies as Non-Resident under Explanation 1 may not remain Non-Resident due to Explanation 2 as both are to be tested independently on the same person.

Q.211 Can the residential status of a person be different under I.T. Act and FEMA?

A.211 Yes. There is a possibility that a person may be a Resident under one Act and a Non-Resident under the other.

For eg. Mr. S, a research scholar of USA arrives in India for permanent settlement on 10-10-2015. He has never visited India in last five years before his arrival. In this case, under the I.T. Act, though he has stayed in India for more than 60 days in F.Y. 2015-2016, and has never stayed in India in preceding 4 years, hence stayed for less than 365 days in preceding 4 years, he shall be a Non-Resident under the I.T. Act. However, under FEMA, since he has come to India permanently, he is a Person Resident in India.

It may be noted that under the I.T. Act, main purpose of computing residential status is to determine the tax liability of the assessee. Whereas under FEMA the main purpose is to determine whether a person can undertake a particular transaction or not. Under I.T. Act, the residential status can be determined only at the end of the year whereas under FEMA residential status technically can be determined any time during the year. If a person is Non-Resident under FEMA, irrespective of his tax liability, he is able to retain his earnings outside India but at the same time if Resident under ITA he pays Tax in India and disclose his Foreign Assets and Accounts in his tax return. If he is non Resident under ITA, he is not required to pay his Tax in India and even not disclose his foreign Assets and other Accounts in the Tax Return.

Q.212 What is Place of Effective Management ("PoEM")?

A.212 In determining the residential status of a Company, it is important to determine its place of effective management as provided at explanation to Section 6(3) of the I.T. Act.

"Place Of Effective Management" (POEM) means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

Therefore, the tests required in this case is as under;

Key words of the definition	***Test required***	***Interpretation***
Key management and commercial decisions	Decision Test	*Key Person* Key persons who actually manage the company is to be considered.

Key words of the definition	***Test required***	***Interpretation***
		Place from where key managerial persons actually conduct their management functions to be considered as PoEM. *Management Decision* Place from where important management decisions are taken is to be considered. Place from where decisions about day-to-day operations and business transactions are taken shall not be considered as POEM in isolation. *Commercial Decision* The company having an office who may be doing the secretarial function of complying with the regulations not considered as PoEM. Place where the Key Management takes important commercial decisions is the place where POEM is situated
That are necessary for conduct of business	Necessity Test	The management and commercial decisions which are necessary for carrying out the business activity
Of an entity as a whole	Pervasiveness Test	Different offices of an entity taking commercial and operational decisions restricted to its own area of work will not determine PoEM. No piecemeal intra-unit/branch/ division decisions – only those decisions that impact the entity as a whole
Are in substance made	Substance Test	Where is the real decision making happening? Correct criteria is where decisions are, in substance made (i.e. actually implemented)

Key words of the definition	*Test required*	*Interpretation*
		Mere formality of deciding by the BOD in another country will not be 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. Since "residence" is to be determined for each year, PoEM will also be required to be determined on year to year basis.

The aforesaid provisions can be explained with the help of the following examples:

1. An Indian company I. Co. floated a company in USA known as F. Co. It appointed a manager in the foreign jurisdiction for managing the day-to-day business operations of F. Co. The Manager had to obtain permission from the I. Co before taking any decision. Controlling and directing power was with I. Co during the year. Whether PoEM of F. Co considered to be in India?

   Yes. PoEM of F. Co. will be considered in India since controlling and directing power vested with I. Co during the year. Mere appointment of manager for day-to-day operations does not create an adequate safeguard from constituting PoEM in India.

2. An Indian Company I. Co. floated a company in USA known as F. Co. The director (Indian Resident) of I. Co was neither a shareholder nor a director of F. Co. However, he was responsible for taking significant decisions for F. Co during the year. Whether PoEM of F. Co considered to be in India?

   Yes. PoEM of F. Co. will be considered in India since significant decisions were taken by Indian Director.

3. A F.Co1 floated a company in another country, known as F. Co2. For F. Co2, F. Co1 appointed 1 Indian Director and 2 Foreign Directors who were given controlling and management powers. Whether PoEM of FCo2 considered to be in India?

   No. PoEM of F. Co.2 will not be considered in India since significant controlling and directing power did not vest with the sole Indian Director.

4. A F. Co appointed a group of professionals on retainer basis in India.

All the important decisions of F. Co were taken after considering recommendations given by the Indian Professionals. All Directors of F. Co are Foreign Residents. Whether PoEM of F.Co considered to be in India?

No. PoEM of F. Co. will not be considered in India since mere consideration of recommendation does not result into decision making in India.

CBDT has described various circumstances of the decision making parameters and provided guidance to the taxpayers as to what is relevant in each such circumstances (active business, multiple locations, location of key personal, their Residences, location of head office etc) to arrive at a conclusion as to what will constitute PoEM as described in foregoing paragraphs

Q.213 In continuation to the definition of Place of Effective Management ("PoEM"), what would constitute 'management decision' and 'commercial decision'?

A.213 The following are some examples which will help you understand the meaning of the terms 'management decision' and 'commercial decision'.

Illustrations of management decisions:

- Approving business plans and business strategy
- Appointment/Termination of key management personnel and their remuneration;
- Organizational reporting structure and key organization/management policy decisions;
- Code of Conduct, Group ethos and Ethics;
- Global IT systems policy and MIS reporting;
- M&A and company restructuring decisions, including divestment;
- Common procurement or sourcing for the group, including master agreements.

Illustrations of commercial decisions:

- Sourcing of Raw Materials, selection of distributors and its quality control;
- Procedure and manner in relation to negotiations/execution of contracts;

- Borrowings, Debt Financing, Capital Sourcing;
- Product portfolio, methods of manufacture;
- Pricing of products and services;
- Expansion and modernization;
- Accounting policies, R&D, Brand/patents registration (licenses).

Q.214 What are the consequences of the foreign company becoming Indian Resident due to the new definition of Residential Status brought about by the Finance Act 2015?

A.214 In the erstwhile scenario, a Company would be treated as a Resident in India if the 'control and management' was wholly situated in India. In the present scenario, w.e.f. 1st April, 2017, a company would be treated as a Resident if its place of effective management in that year is in India.

Thus, if the Foreign Company has its PoEM situated in India, it will be treated as a Resident in India in that year and its global income shall be liable to tax in India. However, if the PoEM is outside India, it will be treated as a Non-Resident.

If it becomes a Resident it will be liable to;

a. Obtain PAN No. in India and file its income tax return in India;

b. Maintain books of account and get them audited;

c. Conduct tax audit/transfer pricing audit;

d. Comply with the TDS requirement, pay advance tax/self assessment tax etc.

Q.215 What are the principles to be followed for determination of PoEM?

A.215 Various guiding principles to be followed for determination of PoEM. are provided by the CBDT and they have issued Circular No. 6/2017 dated 24-1-2017.

A. A Company shall be said to be engaged in "active business outside India" if;

(i) Passive income of the Company is not more than 50% of its total income;

Passive Income means income from transactions where both purchase and sale of goods is from/to its associated enterprises and income by way of royalty, dividend, capital gain, interest or rental income.

Total Income shall be computed as per provisions prevailing in the country otherwise as per books of account.

(ii) Assets situated in India is less than 50% of its total assets;

Value of Assets (individually depreciable or block of assets) shall be average of its opening and closing as per provisions laid down according to prevailing local laws of the country otherwise if not available then value as per books of accounts should be considered.

(iii) Employees in India or who are residents in India are less than 50% of total number of employees;

No. of Employees means average of the number of employees at the beginning and end of the year and shall include persons who were not directly employed by the company but perform all the tasks as those performed by employees.

(iv) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.

Payroll expense means wages, salary, bonus and such other kind of benefits/compensations borne by employer.

The above 4 conditions are cumulative conditions to be satisfied.

The PoEM 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.

For determination of PoEM for Company having active business outside India, consider the data for 3 years including the previous year or shorter period in case of company in existence for less than 3 years. The year may be financial or calendar as per laws of prevailing country. If majority of the Board of Directors (BOD) meeting is held outside India, PoEM will be outside India. If BOD is standing aside and not exercising the powers of management and are directed by any other company or person resident in India, then PoEM will be in India.

(Circular No. 25/2017 dated 23-10-2017 has clarified that so long as the regional headquarter operates for subsidiaries/ group companies in a region within the general and objective principles of global policy of the group laid down by the parent entity in the field of payroll functions, accounting,

HR, IT infrastructure and network platforms, supply chain functions, routing banking operational procedures, and not being specific to any entity or group of entities per se, it would, in itself, not constitute a case of BOD of companies standing aside and such activities of regional headquarter in India alone will not be a basis for establishment of PoEM for such subsidiaries/group companies.)

For determination of PoEM for Company with no active business outside India, identify the person/s taking commercial or key managerial decision for the conduct of business as a whole (place where the decisions are taken is more important than the place of implementation), identify the place where main/substantial activities of the company are carried out and the place where the accounting records are kept.

B. Location Criteria

(i) "Head Office" of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company's head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets.

(ii) "Senior Management" in respect of a company means the person generally responsible for developing and formulating key strategies and policies and ensuring the execution and implementation of the same. Eg. (i) Managing Director or Chief Executive Officer; (ii) Financial Director or Chief Financial Officer; (iii) Chief Operating Officer; and (iv) The heads of various divisions or departments.

The location of a company's head office will be a very important factor in the determination of the company's place of effective management because it often represents the place where key company decisions are made. If the company's senior management and their support staff are based in a single location and that location is known to the public as the company's principal place of business or headquarters then that location is the place where head office is located. If the company is more decentralized then the company's head office would be the location where these senior managers,- (i) are primarily or predominantly based; or (ii) normally return to following travel to other locations; or (iii) meet

when formulating or deciding key strategies and policies for the company as a whole. Members of the senior management may operate from different locations and participate in various meetings *via* telephone or video conferencing rather than by being physically present then in such situation the head office would normally be the location where the highest level of management and their direct support staff are located.

Press Release dated 24-1-2017 and CBDT Circular No. 8/2017 dated 23-2-2017 has clarified that PoEM shall not apply to companies having turnover or gross receipts of ₹ 50 crores or less in a financial year.

Q.216 Can the above principle of "Active Business outside India" and its PoEM be explained with the help of an example?

A.216 The following examples will help you understand the concept of active business outside India (ABOI) better;

(i) XYZ is a Swiss based Company. XYZ has an Indian subsidiary named PQR that owns a factory in India. XYZ and PQR collectively have 55 employees. PQR employs 50 employees at the factory in India. XYZ has 5 employees, all in Switzerland. The monthly payroll of Indian employees is about ₹ 1.5 million. Monthly payroll of XYZ in Switzerland is CHF 50,000. Profit before tax of XYZ in a financial year was CHF 200,000 out of which CHF 50,000 comes from dividend from its Indian subsidiary. Value of shares of PQR held by XYZ is estimated as ₹ 1 million. Total assets of XYZ estimated at CHF 1 million. Whether XYZ is a ABOI or a Non-ABOI company?

In the given case,

1. Passive Income of XYZ is Dividend Income (CHF 50,000). This is less than 50% of total Income.

2. Value of shares of PQR is the value of assets held by XYZ in India.

   This is ₹ 1 million = CHF 15,000 approx, which is less than half of total assets of XYZ.

3. XYZ has no employees in India.

4. XYZ has no payroll in India

Therefore, XYZ is a ABOI company.

(ii) Mr. Parag Ahuja, a citizen and resident of India, forms a private company (say, PAL) in Singapore. PAL is wholly owned by Mr. Parag. PAL is involved in future trading and dealing in commodity derivatives. The Company has no associated enterprises. He and one Mr. Sheron Wang, a citizen of Singapore are directors of the company. Mr. Parag has been designated as Managing Director of PAL. As MD, Mr. Parag draws a salary from PAL. The company owns no assets in India. Whether PAL is a ABOI or a Non-ABOI company?

In the given case,

1. PAL does not have any passive income.

2. PAL has no assets in India.

3. It may be argued that MD is not an employee. If this view is taken the company has no employees.

4. PAL's only payroll is salary paid to MD. So 100% of PAL's payroll is in India.

PAL fulfils 3 out of 4 tests. It fails the payroll test and hence, PAL will be classified as Non-ABOI.

(iii) A European company has its headquarter in Frankfurt. All the directors of the company are European. In a particular financial year, the directors of the European company took fancy to beaches of Indian Ocean and decided to hold one meeting in Goa, the other in Kerala and one more in Port Blair. The company held only one meeting in Frankfurt. The company has no other connection whatsoever with India. It has no assets in India. It derives no business from India. It has no employees in India. What shall be its place of effective management?

In the given case, the European Company is a ABOI Company. The European company will be considered to be having PoEM in India since it has held majority of board meetings in India. Due to the POEM being in India, Indian tax authorities may tax the company's global income as per Indian income tax law.

(iv) One Mr. Patel (resident of Mumbai) has set up a holding company in Switzerland with three Swiss resident citizens as directors. Mr. Patel is not a Director of the company. However, all decisions are taken by Mr. Patel in Mumbai and sent by email to the Swiss Directors who dutifully sign on all documents received from Mr. Patel. What shall be the place of effective management of the Swiss Company?

The Swiss company is an ABOI Company. Key decisions are NOT taken by the Board but are taken by Mr. Patel in India. PoEM of the SWISS company is in India since key decisions of the company are taken by person resident in India.

(v) An Indian entrepreneur nominates his twenty year old son studying in a university in Australia as one of the directors of an Australian Company owned by him. The Australian company has only the entrepreneur and his son as directors. The Australian company is Non-ABOI. Where will the PoEM be?

In the given case, the young man likely to be treated as dummy based on assumption that all decisions are taken by Indian entrepreneur. PoEM of the Australian Company is in India.

(vi) In a particular year Board of Directors of a Swiss Holding Company, say ABC, have two meetings in Mumbai, one in Zurich, one in Sydney and one in New York. ABC's only income is dividends received from subsidiaries in various countries. ABC is Non-ABOI since passive income is 100% of total income. Where would the PoEM be?

In the given case, since maximum meetings of ABC are held in Mumbai, PoEM for ABC is Mumbai and not Zurich where the company is incorporated.

Q.217 How an Individual should plan his residential status so that he bears the minimum incidence of tax on his total income including world income?

A.217 1. As referred to in earlier answers, Indian Resident leaving India for the first time for good or for an uncertain period or for taking up an employment should not stay in India for 182 days or more in the first financial year; i.e., April-March. Thus, he must leave India latest on 28th September. A care must be taken to leave before 12.00 mid-night on 28th September. Many a times the securities check, customs and immigration formalities may take little time at airport which may result into his leaving India after 12.00 mid-night on 28th September. In that case he will be regarded as resident having stayed in India for 182 days or more and his world income will be liable to tax in India. The day of arrival into India and the day of departure from India are counted as one full day each, irrespective of the time of arrival and departure. The dates stamped on passport are normally considered as the proof of dates of arrival and departure.

2. A person leaving India may remain non-resident for continuously 9 years period in which case when he returns to India permanently he

may be resident but not ordinarily resident in the year in which he returns. In that case his income in India only will be taxed provided the income which accrues or arises outside India is not derived from a business controlled from or profession set up in India.

3. On final return to India, try always to come back on or after February 1st (or February 2nd in case of a leap year). Since return before this date will result in stay in India exceeding 59 days in any case, however, a person whose stay in India in past 4 previous years does not exceed 365 days, stay in the year of return can be for 181 days in India without loss of status. They may return after 28th September.

Q.218 What are the direct tax laws affecting NRIs?

A.218 The following are the direct tax laws which affect the NRIs:

1. Every Resident and Non-Resident shall be liable to pay tax under the Income-tax Act, 1961. Presently, i.e. for Assessment Year 2019-2020 relevant to F.Y. 2018-2019, the income tax slab rates for Non Residents is as under:

Sr. No	***Status***	***Income in Rs.***	***Tax Rates (%)***
1	For Non-Resident Individuals	Up to ₹ 2,50,000	Nil
		₹ 2,50,000 to ₹ 5,00,000	5%
		₹ 5,00,000 to ₹ 10,00,000	20%
		Above ₹ 10,00,000	30%
	Surcharge @ 10% of the Income Tax is further payable where the taxable income is more than ₹ 50 lakhs and up to ₹ 1 crore. Surcharge @ 15% of the Income Tax is payable where taxable income is more than ₹ 1 crore. (Marginal Relief on Surcharge available.) Further, health & education cess of 4% is payable on the income tax + surcharge amount.		
2	Non Resident Firm	30% of taxable income	
	Surcharge @ 12% of the Income-tax is further payable where taxable income is more than₹ 1 crore. (Marginal Relief on Surcharge available). Further, health & education cess of 4% is payable on the income tax + surcharge amount.		

Sr. No	***Status***	***Income in Rs.***	***Tax Rates (%)***
3	Foreign Company	40% of taxable income	
	Surcharge @ 2% of the Income-tax is further payable where taxable income is more than ₹ 1 crore. Surcharge @ 5% of the Income-tax is payable where taxable income is more than ₹ 10 crore. (Marginal Relief on Surcharge available). Further, health & education cess of 4% is payable on the income tax + surcharge amount.		
* Marginal Relief on Surcharge			

When an assessee's taxable income exceeds ₹ 50 lakhs/1 crore/10 crore, he is liable to pay surcharge at prescribed rates mentioned above on Income Tax payable by him. However, the amount of Income Tax and Surcharge shall not increase the amount of income tax payable on a taxable income of ₹ 50 lakhs/1 crore/10 crore by more than the amount of increase in taxable income respectively.

2. Wealth Tax Act, 1957 under which individuals, HUFs and Companies pay wealth tax. Individuals will include resident as well as non-resident. In the case of individuals, HUFs and certain companies, Wealth Tax is payable at 1% on the net wealth exceeding Rs.30 lacs as on valuation date (normally the last date of the previous year; i.e., 31st March). Net wealth is arrived at after various deductions, exemption and liabilities also as on the valuation date.

   Non-Residents are exempted from Wealth Tax on the assets acquired by them in India out of the foreign exchange resources when they were Non-Resident.

   However, it may be noted that w.e.f. 1-4-2016 i.e. A.Y. 2016-2017 onwards, the Wealth Tax Act has been abolished.

3. Gift Tax Act, 1958 under which the Gift Tax was payable by the donor up to 30th September, 1998. The Gift Tax Act has been repealed with effect from 1st October, 1998 and therefore the Gift Tax is not chargeable for the gifts made on or after 1st October, 1998. The gift, therefore, can be given without any gift tax.

   However, section 56(2)(vii), 56(2)(viia), 56(2)(viib) (up to 31-3-2017) and 56(2)(x) (w.e.f 1-4-2017) of the Income-tax Act, 1961 have been inserted which taxes the amounts received without consideration or with inadequate consideration, subject to conditions stated therein.

It is pertinent to note here a word of caution in the case of gifts by NRIs relatives to their respective residents that the gifts must be bona fide and genuine and by an NRI who has capacity to give such gifts. In case the income tax department on inquiry or investigation finds that the gift is not genuine but is out of hawala transactions or compensatory payments, the amount of gift will be treated as concealed income of the donee u/s. 68 of the Income-tax Act and tax and penalty would be levied and prosecution may also be initiated. The Enforcement Directorate may also initiate proceedings under FEMA and Black Money Act 2015 read with PMLA 2003.

4. Estate Duty Act under which estate duty (death duty) was leviable on the estate of a persons who have died on or before 15th March, 1985. The Estate Duty Act has been repealed and therefore no estate duty is payable from the said date.

Q.219 What is business connection in India?

A.219 Business income of a foreign company or other non-resident person is chargeable to tax to the extent it accrues or arises through a business connection in India or from any asset or source of income located in India, and to the extent such income is attributable to the operations carried out in India. [Section 9(1)(i) of ITA]

A business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in India which contributes to the earning of these profits or gains. A business connection can arise between a non-resident and a resident if both of them carry on business and if the non-resident earns income through such a connection. It basically predicates an element of continuity between the business of the non-resident and the activity in India. A stray or isolated transaction is not normally regarded as business connection.

Business connection can exist in a number of ways e.g., branch, agency, subsidiary, local assistance etc; there cannot be laid down an exhaustive list of the business arrangements between the entities giving rise to business connection.

The term business connection has been defined in Explanation 2(a) of section 9(1)(i) of the Act i.e. "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident and the contracts are (i) in the name of non-resident or (ii) for the transfer of the ownership of, or for the granting of the right to

use, property owned by that non-resident or that non-resident has the right to use or (iii) for the provision of services by the non-resident.

In the case of *CIT v. RD Aggarwal and Co. [1965] 56 ITR 20,* the Apex Court has explained the meaning of the term Business Connection as, *"A business connection in section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the non-resident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. In each case the question whether there is a business connection from or through which income, profits or gains arise or accrue to a non-resident must be determined upon the facts and circumstances of the case. A relation to be a "business connection" must be real and intimate, and through or from which income must accrue or arise whether directly or indirectly to the non-resident. The expression "business connection" postulates a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity. In this case such a relation was absent."*

Q.220 Please explain the provisions pertaining to Expatriates?

A.220 There is no definition of Expatriates (Expats) in Income-tax Act, 1961. Therefore, it is to be narrated as it is understood generally or in the commercial world i.e. a person who has migrated from his native country to another country. It is quite likely that he may have retained his original citizenship. In the changed circumstances of globalisation and liberalisation, expats are seen more often than ever before.

Taxation of expats will depend upon a number of factors e.g., Double Tax Avoidance Agreement between two countries, local tax laws of each of such country, residential status and source of Income of the expats etc.

Q.221 What is the short stay exemption available to expatriates?

A.221 The expatriate on secondment to India can claim exemption from tax liability on the income earned during the period of the assignment subject to conditions. The salary for services rendered in India is deemed to be

India-sourced income and, therefore, is taxable, irrespective of the place of receipt and the expatriate's residential status.

There are two types of "Short stay exemption":

Short Stay exemption under Income-tax Act, 1961 [Section 10(6)(vi)]

Remuneration for services rendered by a foreign national employed by a foreign enterprise during the individual's stay in India, is exempt from tax in India if:

* The total period of the stay in India does not exceed 90 days in a financial year;
* The foreign enterprise is not engaged in any trade or business in India;
* The remuneration is not liable to be deducted from employer's chargeable income

Short Stay exemption under tax treaties

Country of residence (and not India) has the exclusive right to tax salaries etc., derived in respect of employment exercised in India if all the three conditions are satisfied. Exemption is generally provided under 'Dependent Personal Services' clause in the tax treaties. Conditions to be satisfied to claim short stay exemption:

* Physical Presence Test - Stay of the individual in the other State should not exceed in the aggregate 183 days in a year;
* Resident Employer Test - the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
* PE Connect Test - the remuneration is not borne by a permanent establishment which the employer has in the other State.

Q.222 What are the income in the case of expats and how they are taxed ?

A.222 Generally following income/receipts arise in the cases of Expatriates:

1) Tax on the basis of Accrual of salary u/s. 9(1)(ii)

Section 9(1)(ii) of the I.T. Act reads as "income which falls under the head "Salaries", if it is **earned** in India"

Explanation to the said section reads as *"for the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for (a) service rendered in India and (b) the rest period or leave period which is preceded and succeeded by the*

services rendered in India and forms part of the service contract of employment shall be regarded as income earned in India."

a. Salary accrues where the services are rendered. This will also include the salary paid for leave period or rest period. In case this precedes or succeeds the services rendered in India, the same will be taxable in India. Again, services rendered in India may mean that the employee is physically present in India *and salary or right to receive* salary accrues or arises in India. The expatriate will have to substantiate the basis of allocating salary income which is attributable to the services rendered by him in India. If the identification of allocation is not possible, then the salary earned in India as well as salary earned abroad, both are taxable in India as was held in *Sedco Forex International Drilling Co. Ltd. 134 Taxman 109.*

   Salaries earned by employees on foreign going India Ships is not considered as salary earned in India as per the section 2(25A) defining India, as was held in the case of *Avtar Singh Wadhawan (2001) 247 ITR 260 (Bom.)* and *Indo Oceanic Shipping Co. Ltd. (2001) 247 ITR 247 (Bom.)*

   E.g. Mr. A was an employee of RIL and was deputed to Iran. During the year under review, he stayed in India for less than 182 days. He received salary in his Indian bank account for the purpose of employment in Iran. He claimed the same as not taxable in India. However, the AO was of the view that since the income is received in India it shall be taxed in India u/s. 5(2)(a). Whether the AO is correct?

b. Receipt and Accrual : The fact that the salary income has been received in India, i.e., it has been credited in the bank account of Mr. A in India and also TDS has been deducted by the employer, cannot be determinative of the taxability of resident or non-resident in terms of provisions of the Act. What is relevant is, whether the income can be said to be received or deemed to be received in India. Sub-section (2) of section 5 merely provides that total income of any previous year of a non-resident includes all income from whatever source received or deemed to be received in India in such year or accrues or arises or is deemed to accrue or arise to him in India during such year. This sub-section only provides that if the income of the non-resident has been received or accrued in India or deemed to be received or accrued in India, the same shall be treated as total income of that person of that previous year. The said section does not envisage that the income received by a non-resident for services

rendered outside India can be reckoned as part of total income in India. As the services are rendered outside India, it accrues at the place where the services are rendered i.e. in Iran. Since the income is earned outside India and it arises outside India, merely because it is received in India, it will not be liable to tax in India.

See*: Pramod Kumar Sapra v. ITO [2017] 87 taxmann.com 98 (Delhi Tribunal), Texas Instruments India Pvt. Ltd. [2018] 90 taxmann.com 353 (AAR), CBDT Circular No. 13/2017 dated April 11, 2017.*

Similarly, in case of *Smt. Sumana Bandyopadhyay v. DDIT [2017] GA 3745 of 2016* Mr. A was a Non-Resident, a marine engineer earning salary income for services rendered outside India. He had received such salary in his NRE A/c and the AO held that salary was taxable in India as per provisions of section 5(2)(a) of the Act since it was received in NRE A/c in India. The ITAT following above CBDT Circular stated that salary for services rendered outside India on a foreign ship shall not be included in total income merely because said salary has been credited in NRE A/c maintained with Indian bank.

In the case of *Avdesh Kumar v. DCIT [2018] 96 taxmann.com 340 (Delhi Tribunal)* held that where assessee was outside India for the purpose of employment for a period of more than 182 days, he had become a Non-Resident and, therefore, salary income of assessee received outside India could not be held to be taxable in India merely because his foreign employer had deducted TDS on such income.

The provisions of section 9(1) of the Act which deal with income deemed to accrue or arise in India overrides the provisions of section 5(2) of the Act, i.e., taxability of salary is examined as per provisions of section 9(1)(ii) of the Act, irrespective of receipt of salary in India.

2) Pension income

In case of a Non-Resident or Not Ordinary Resident, pension earned and received abroad will not be charged to tax in India. Pension received in India from abroad by a resident in India for past services rendered in foreign countries will be income accruing abroad and hence not liable to tax in India on the basis of accrual abroad. It should be received abroad and remitted to India thereafter. Refer CBDT circular No. 4 dated 20-2-1969.

In respect of social securities, the expatriate does not have any right to the application thereof, it is not part of income at all. It is

regarded as diversion of income by overriding title and hence not taxable in India as was held in the case of *Galotti Raoul (1997) 61 ITD 253 (Bom).* Also refer, *ITO v. Lukas Fole [2010] 35 SOT 8 (Pune) (URO)* wherein based on the decision of Galotti Raoul deduction on account of social security contribution was to be allowed.

In the case of Y*oshio Kubo v. CIT [2013] 36 taxmann.com 1 (Delhi HC)* a Japanese national employed by Sony Corporation of Japan was deputed to work in Sony India Ltd. Sony Corporation of Japan made contributions in compliance with legal requirements in Japan, towards social security benefits of Employee. It was held that Social security, pension and medical insurance contributions by foreign employer are not taxable as perquisites, as assessee (employee) does not get a vested right at time of contribution.

In the case of Authority for Advance Rulings (Income Tax), New *Delhi Royal Bank of Scotland [2014] 45 taxmann.com 283 (AAR - New Delhi)* it was held that applicant which is an Indian branch of a bank incorporated in Netherlands has established a superannuation scheme for purpose of providing pension to its eligible employees, since employees do not get a vested right at time of contribution to fund by employer, it cannot be regarded as taxable perquisite in their hands and, consequently, applicant is not required to deduct tax at source while making contribution to superannuation fund.

3) Reimbursement of expenditure and living allowance

Bombay High Court in the case of *CIT v. Tata Engineering and Locomotive Co. Ltd. (2000) 245 ITR 823* held affirming the decision of the Tribunal that the assessee was only required to provide the basics on which the technicians did not derive any benefit and, therefore, no part of expenses could be treated as payment in lieu of fees. In view of this the tax was not deductible.

In the case of *Abbey Business Services (India) (P.) Ltd. v. Deputy Commissioner of Income-tax, Circle 11(1), Bangalore [2012] 23 taxmann.com 346 (Bang.)* it was held that since payment made by assessee to Abbey UK was pure reimbursement of expenses without any profit element, it could not be regarded as income chargeable to tax in hands of Abbey UK. Further since agreement was for secondment of employees only, it could not tantamount to rendering of technical services and, therefore, reimbursement made could not be categorised as fees for technical services.

Similarly, Gujarat High Court in the case of *CIT v. S.G. Pgnatale 124 ITR 391* held that the reimbursement and living allowance paid

to foreign technicians as they are required to stay away from their homes and hence it necessitates the extra expenditure on lodging and boarding. It is wholly, necessarily and exclusively for the purpose of duty and is merely a reimbursement for actual expenditure incurred and hence not taxable in India.

However, rent free accommodation will be treated as perquisite and will be liable to tax u/s. 17(2)(i). Outstation allowance and hotel charges paid to the assessee for performance of his duties were treated as allowances not liable to tax as was held by Andhra Pradesh High Court in the case of *Zdzizlaw Shakuz v. CIT 158 ITR 420.* A plain reading of section 10(14) of the Act makes it clear that one of the preconditions for the claim of exemption is that allowance in question should have been specifically granted to meet expenses wholly incurred in the performances of duties of office and exemption is only to the extent such expenses were actually incurred *CIT v. Arthur Fuchs 202 ITR 656 (Patna HC).*

In the case of *Alessandro Constantini 226 ITR 883* pocket allowances paid to employee of foreign collaborator by its employer which was a foreign company was treated as wholly, necessarily and exclusively incurred in the performances of the duty and it was reimbursement of expenses and not by way of any personal advantage to the assessee. Living allowance of technicians of the employment during the assignment in India was in the nature of reimbursement of expenses for work outside their normal place of duty and therefore exempt u/s 10(14) – *CIT v. Gosnilo Mario 241 ITR 312 (SC)* Supreme Court in the case *Emile Webber 200 ITR 483* held expatriates were employed by foreign employer and the local expenses were paid by the Indian party. There was no employer and employee relationship between Indian party and expatriate employees. And therefore, entire expenditure from other party is income from other sources.

Also refer the case of *K.E. Hansen v. Assistant Commissioner of Income-tax [1996] 58 ITD 216 (Delhi)* it was held that the assessee, being a personnel of a foreign, company who had come to India for a limited purpose and for a limited duration of two years, India could not be his ordinary place of residence, nor a place where the duties of his office were ordinarily performed. The 'living allowance' received by the assessee, therefore, would be exempt under section 10(14).

In the case of *Sun Outsourcing Solutions Pvt. Ltd. v. CIT [2018] 92 taxmann.com 339 (Andhra Pradesh High Court)* it was held that where the assessee, a software developer in India, made payments for

allowances to employees deputed to its branch office in UK, however, no evidence was available for expenditure incurred by employees, thus the amount paid as allowance was not reimbursement but represented lumpsum payment which was a taxable perquisite u/s. 17(2).

4) Exchange compensation allowance

When salary and allowances of the employees posted abroad are fixed in Indian currency the exchange compensation allowance granted to cover the loss in exchange pertaining to salary shall be treated as item forming part of the salary and foreign allowance. Such an allowance will be exempt from tax to the extend of actually expended for the purpose for which the foreign allowance paid. It should be necessarily be incurred in performance of duty of office.

5) Applicability of Treaty Article "Dependent Personal Services"

Many countries have Double Taxation Avoidance Treaties which help the country to ensure its rights and jurisdiction for collection of tax and also ensure that there is no Double Taxation imposed on the assessee one by the country of source and another by country of residence. Of course primarily the country where the assessee is resident has right of taxation. However, depending upon the nature of income even the source country has a right of taxation for e.g., salary income of an assessee may be taxed in the source country where the services are rendered. Since the same income cannot be taxed by both the countries i.e., resident and source countries, the assessee may pay tax in source country for which he will get credit in resident country for the taxes paid in the source country. By and large, most of the treaties which India has entered into provide for exemption of income in source country but may be taxed in a country of residence if the following conditions are complied with:

a) Employee is present in the source country for 183 days or less during the relevant fiscal year; and

b) The remuneration is paid by or on behalf of employer who is not resident in source country; and

c) The remuneration is not born or deductible by a permanent establishment or a fixed base which the employer has in the source country

The article on dependent personal services normally provides that employment exercised aboard a ship or aircraft in international

traffic may be taxed in a country in which the place of effective management is set up.

There may be an issue of source taxation on income earned in third country if employee is also resident of the source country due to source state domestic Tax law. This may be resolved by a tie breaker test between source state and resident state of the employee concerned.

Q.223 Are there any special provisions relating to income of Non-Resident

A.223 Yes, there are special provisions in Income-tax Act comprising of sections 115C to 115-I under Chapter XIIA which are effective from 1st June, 1983. The said chapter has been introduced in the Income-tax Act with a view to encouraging and inviting non-resident Indians to invest their foreign exchange earnings in India. This Chapter contains special provisions relating to certain incomes of non-resident Indians which are aimed at providing certain reliefs in respect of such income.

Q.224 Please explain the scheme of Chapter XIIA in nutshell

A.224 In a nutshell, the scheme of the Chapter is that "investment income" derived from a foreign exchange asset, as defined therein and "long term capital gains" relating to foreign exchange assets, will be charged to income tax at concessional rate of 20% and 10% respectively. It has also been provided that long-term capital gains will qualify for certain exemptions if the sale proceeds are invested in certain specified assets and only the balance, if any, shall be charged at the said rate of 10%. The specified assets have been explained in the next question.

From A.Y. 2005-2006, long term capital gain from equity shares in a company or a unit of an equity-oriented fund is exempt from tax u/s. 10(38) of the Act if STT is paid on the transfer and hence attracts no tax.

In case of security other than unit, (Shares of the Indian Companies), if STT is not paid then tax payable is 10% of the Capital Gain (1st proviso to Sec. 112).

Consequently, provisions of the Act was favourable to the Tax payer as compared to the special provisions of Chapter XIIA which provided for tax at the rate of 10%.

However, the provision giving rise to exemption was amended from 1-4-2018 and stated that it shall not apply to any income arising from the transfer of a long-term capital asset, being an equity share in a company, if the transaction of acquisition, of such equity share is entered into on

or after 1-10-2004 and such transaction is not chargeable to STT. Thus, exemption from Long Term Capital Gain was restricted so much so that even if STT is paid on transfer but was not paid on acquisition, then exemption is not available.

Finance Act 2018 has withdrawn the exemption u/s. 10(38) of the Act w.e.f. A.Y. 2019-2020 and provided that long term capital gains arising from transfer of a long term capital asset being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust shall be taxed at 10% of such capital gains exceeding one lakh rupees. The said section, *inter alia*, provides that the provisions of the section shall apply to the capital gains arising from a transfer of long-term capital asset being an equity share in a company, only if securities transaction tax (STT) has been paid on acquisition and transfer of such capital asset. Consequently, provisions of the Act are now at par with the special provisions of the Chapter XIIA.

Q.225 What is the meaning of Foreign Exchange Assets and specified assets?

A.225 Section 115C(b) defines Foreign Exchange Asset to mean any specified asset, which the assessee acquired or purchased with, or subscribed to in, convertible foreign exchange. Section 115C(f) defines specified asset to mean any of the following assets namely:

i) Shares in an Indian company;

ii) Debenture issued by an Indian company which is not a private company as defined in the Companies Act, 1956 (1 of 1956);

iii) Deposits with an Indian company which is not a private company as defined in the Companies Act, 1956 (1 of 1956);

iv) Any security of the Central Government as defined in clause (2) of section 2 of the Public Debt Act, 1944 (18 of 1944);

v) Such other assets as the Central Government may specify in this behalf by notification in the Official Gazette.

It is important to note here that for an asset to be foreign exchange asset, it should be the assessee himself who should have acquired or purchased or subscribed to the asset in convertible foreign exchange. Therefore, if a non-resident Indian had inherited or been gifted certain assets which had been purchased by the original owner in convertible foreign exchange, so far as the assessee is concerned, the asset would not be foreign exchange asset.

Q.226 Whether Bonus Shares and Right Shares would amount to specified assets?

A.226 As regards bonus shares and right shares received by a non-resident Indian, the Reserve Bank of India has clarified the position *vide* its circular No. AD(MA) 4 dt.11-2-1987. The relevant extract is reproduced as under:

i) The bonus shares will be treated as foreign exchange assets if the shares on the basis of which the bonus shares have been issued are "Foreign Exchange Assets" as defined in Chapter XII A or section 10(38) of the Act.

[Refer *Shashi Parvatha Reddy v. DCIT [2017] 87 taxmann.com 227 (Hyderabad Tribunal)* wherein it was held that original shares having been purchased in foreign exchange, bonus shares are also foreign exchange assets under section 115E.]

ii) If the right shares are purchased or subscribed to in convertible foreign exchange, they would constitute "foreign exchange assets". However, the right to apply for new shares will not be treated as foreign exchange assets and therefore long-term capital gains arising from sale of the rights will not be covered under the provisions of Chapter XII A or section 10(38) of the Income-tax Act, 1961.

Q.227 Whether rights shares received on the basis of shares purchased in convertible foreign exchange can be treated as specified assets if the rights received are purchased with or subscribed to in convertible foreign exchange?

A.227 Yes

Q.228 Whether right shares received by non-resident Indians on the basis of shares held from non-repatriable (local) funds but subscribed to in convertible foreign exchange can be treated as foreign exchange assets ?

A.228 Yes

Q.229 Whether rights purchased from the market in convertible foreign exchange and subscribed to in convertible foreign exchange would be foreign exchange assets?

A.229 Purchase of such rights, if permitted by the Reserve Bank of India and subscribed to in convertible foreign exchange will be treated as foreign exchange assets.

Q.230 Whether sale proceeds of right sold in the open market constitute investment income?

A.230 The income arising from such sale is clearly not investment income. The asset sold was neither acquired nor purchased with, nor subscribed to in convertible foreign exchange and hence it was not a foreign exchange asset in the first place.

Q.231 What is the meaning of Investment Income?

A.231 This expression is defined by section 115C(c) to mean any income derived (other than dividends referred to in section 115-O) from a foreign exchange asset. Interest on debentures, or interest on deposits in Indian companies, if the debentures or deposits are foreign exchange assets, are examples of investment income. The word "derived" has special meaning; i.e., the income should have direct nexus to the foreign exchange assets.

Dividend u/s. 115-O means any amount declared, distributed or paid by a domestic company for any assessment year by way of dividends (interim or otherwise) on or after 1st April, 2003, whether out of current or accumulated profits, on which dividend distribution tax is paid (currently it is 15% plus surcharge & cess totalling to 20.36% approx. grossed up). This dividend is exempt from taxation u/s. 10(34).

W.e.f. A.Y 2017-2018, dividend in the hands of specified assessee who is Resident in India, shall be exempt u/s 10(34) up to ₹ 10 lakh and balance shall be taxable u/s. 115BBDA @ 10%. However, the said section 115BBDA does not apply to Non Residents and hence Non-Resident Individuals can still claim the entire dividend amount as tax free.

Q.232 Long Term Capital Gains are taxed @ 10% (other than LTGC from transfer of equity share and units of equity oriented funds which are fully exempt u/s. 10(38) of the Income-tax Act) and Investment Income is taxed at 20%. How the Short Term Capital Gains is taxed?

A.232 Short Term Capital Gains is taxed u/s. 111A at 15% (plus surcharge and cess) in the case of transfer of equity shares and/or units of equity oriented funds on which securities transaction tax is chargeable. Other assets will attract Income-tax at normal slab rates as applicable.

Q.233 What is the meaning of long-term capital gains under Chapter XIIA and how same is Taxed ?

A.233 "Long-term Capital Gains" means income chargeable under the head "Capital gains" relating to a capital asset, being a foreign exchange asset which is not a short-term capital asset. (Sec. 115C(d)).

Chapter XIIA provides for 10% tax on Long term Capital Gains on specified Asset being Shares of an Indian Company without taking benefit of proviso to Sec. 48.

Under normal Provisions of the Act, as per section 2(29A), a long term capital asset is one which is not a short term capital asset and as per amended section 2(42A) of the Act, a short term capital asset is one which is not held by an assessee for more than 36 months from the date of its acquisition.

In the case of listed shares and units of equity oriented mutual funds, units of Unit Trust of India, the period of holding is 12 months or less as against 36 months.

Also, in a case of a unlisted share of a company or an immovable property, being land or building or both, the period of holding shall be 24 months or less as against 36 months.

And in case of unlisted share of a company or a unit of a Mutual Fund specified under section 10(23D) the period of holding shall be 12 months or less as against 36 months. if it is transferred during the period 1st day of April, 2014 to 10th day of July, 2014,

Q.234 How to compute long-term Capital Gains ?

A.234 (1) Long Term Capital Gain in case of transfer of equity shares in a company or units of an equity-oriented fund on which STT is paid is fully exempt from taxation u/s 10(38) up to A.Y. 2018-2019. From A.Y 2019-2020, long term capital gain up to ₹ 1 lakh is exempt and balance is taxable @ 10% u/s. 112A.

In case of other taxable long term capital gains, the long term capital gain tax is worked out as under:

Under proviso 1 to section 48, the capital gains arising to non-resident from transfer of shares or debentures of Indian companies shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and full value of consideration received or accruing as a result of the transfer of shares and/or debentures into the same foreign currency as was initially utilized in the purchase of shares and/or debentures. The capital gains so computed in such foreign currency shall be re-converted into Indian currency and capital gain tax shall be charged on the so converted capital gain into Indian currency. This proviso was added with effect from 1st April, 1990 to redress the genuine grievance of the non-residents that they are not protected against depreciation of rupee value. The computation of capital gains in

the aforesaid manner shall be applicable in respect of capital gain accruing or arising from every reinvestment thereafter and sale of shares and debentures.

Rule 115A of IT Rules provides for conversions at the rate prescribed and adopted by State Bank of India on the following basis:

(i) Cost of Acquisition – Average of T.T. Buying and Selling Rate as on the date of Acquisition.

(ii) Expenses for Transfer – Average of T.T. Buying and Selling Rate as on the date of transfer (not on the date of making the expenditure).

(iii) Sale Consideration – Same as in (ii) above.

(iv) Reconversion of Capital Gains – T.T. Buying rate as on the date of transfer.

Rule 115A refers only to a 'non-resident Indian'. Hence an extreme but possible view could be that the benefit of this provision may not be available to other non-residents such as OCBs. However, proviso 1 to section 48 refers to non-resident assessees. Therefore, the conversion method as provided under Rule 115A can be followed as such or at least the same can be taken as guideline. In any case, it seems to be merely unintended lapse.

Following example will clarify the above.

	In ₹	***In $***
Sale (US $1= ₹ 70/-) in 2018	70,00,000	1,00,000
Purchase (US $= ₹ 66/-) in 2015	66,00,000	1,00,000
Long-term Capital Gains	4,00,000	NIL

It can be observed from the above that though the Capital Gains amounts to ₹ 4,00,000/-, in terms of US$, it is NIL. The Non-Resident, under this circumstances, is not liable to any Capital Gains tax.

(2) The 2nd proviso to Section 48 provides protection from inflation in India. This enables the assessee to compute gains after increasing the costs by prescribed indexation factors. The loss on account of inflation is offset to a limited extent in this manner.

At the same time, 2nd proviso to section 48 seeks to provide that an assessee who has been granted the benefits of the 1st proviso will not be granted the benefits of indexation. It may be noted that the

1st proviso applies to only shares and/or debentures of an Indian company, whether the gain is short term or long term.

Provisions of 'indexation benefit' and 'foreign exchange fluctuation adjustment' are mutually exclusive. Therefore, indexation benefit applies to non-residents only for long term capital assets other than those for which foreign exchange fluctuation adjustment applies. CBDT has been clear in its view that as protection is already provided for forex fluctuation under the 1st proviso to Section 48, which takes into account inflation, further relief under the 2nd proviso will not be available. Indexation benefit is available for both residents and non-residents. However, unlike the first proviso, the benefit is restricted only to long-term capital gains, and not short-term capital gain.

(3) A question arises as to whether the said first proviso to section 48 is mandatory or optional. In other words, whether the non-resident has a right to opt for the conversion method or indexation method on transfer of shares and/or debentures in Indian company. It appears that when NRIs have invested in foreign currency the option of indexation method will not be available, however, if investment is made in INR, benefit of indexation may be available while working out long-term capital gains.

In case of *Caylon Bank v. DCIT [2013] 31 taxmann.com 231 (Mumbai Tribunal)*, on transfer of equity shares of a company the assessee had taken indexation benefit and computed tax on long term capital gain, the AO had denied the indexation benefit stating it was a transfer by a foreign company and hence 2nd proviso will not be applicable. The Tribunal held that under 2nd proviso to section 48, benefit of indexation will not be available to those non-resident who enjoy the concession available in the 1st proviso. In case of assessee, since shares were purchased in Indian currency, the 1st proviso w.r.t. foreign exchange fluctuation was not available but the 2nd proviso w.r.t. indexation was available.

(4) It is important to note here that investments in shares and debentures from a Non-Resident External Rupee Account, which itself may incidentally have been funded in any of the convertible foreign currencies, would be eligible to avail of the benefits of the first proviso to section 48; i.e., conversion method.

(5) The long-term capital gains [except where such gain arises from transfer of capital asset as referred in next paragraph] shall be chargeable to tax at a flat rate of 20%.

And the amount of income-tax on long-term capital gains arising from the transfer of unlisted securities or shares of a company not in which the public are substantially interested, shall be taxed at the rate of 10% on the capital gains computed without Conversion or the Indexation benefit.

Thus, on unlisted securities Non-Resident can pay 10% tax on long term Capital Gains without any benefit of conversion or indexation as provided at proviso to Sec 48 very similar to one provided in Chapter XIIA and can pay 20% after taking benefits of proviso to Section 48.

(6) W.e.f. 1-4-2000 long-term capital gain on listed securities (other than a unit or zero coupon bond) shall be computed after indexation benefit taxed @ 20%. However, the tax rate on such gain on listed securities can be opted at 10% of capital gains, computed without indexation benefit..

(7) W.e.f 1-4-2015 tax payable in respect of long-term capital on a unit of a Mutual Fund specified u/s. 10(23D), being transfer during 1st April, 2014 to 10th July, 2014, will be 10% of the amount of capital gains, without any benefit of indexation.

(8) In case of Non-Resident benefit of the threshold up to which no tax is payable, (proviso to section 112(1)(a)) whereby if the total income (including capital gains) is below the taxable limit, the amount of taxable capital gain cannot be reduced by the threshold of the taxable limit. Therefore, an NRI will have to pay tax on any amount of capital gain earned by him even though it is below the basic taxable limit of ₹ 2.50 lakh or 3 lakh or 5 lakh as the case may be depending upon whether the individual is a senior citizen (age 60 years or more) or not or the senior citizen has attained the age of 80 years or more.

Q.235 How the foreign exchange transactions are converted into Indian Rupees for the purpose of computation of Income?

A.235 Rule 115 of Income Tax Rules provides for conversion of transactions entered into in foreign currency into Indian rupees for the purpose of computation of total income. It provides for rates prevailing on different dates for different sources of income.

Nature of Income	*Conversion Rate as on Specified Date*	*Example*
Salary	Last day of the month immediately preceding the month in which the salary is due, or is paid in advance or in arrears	Salary is due on 5th of every month, the specified date is 30th or 31st of the previous month
Interest on Securities	Last day of the month immediately preceding the month in which the income is due	If interest is due on quarterly basis on 5th the specified date is 30th or 31st of the previous month
Income from house property	Last day of the previous year of the assessee	Specified date is 31st day of March of that year
Profits and gains of business or profession	Last day of the previous year of the assessee	Specified date is 31st day of March of that year
Income from Other Sources (other than Dividend and Interest on Securities)	Last day of the previous year of the assessee	Specified date is 31st day of March of that year
Profits and gains of business or profession" in the case of a non-resident engaged in the business of operation of ships	Last day of the month immediately preceding the month in which such income is deemed to accrue or arise in India	If income is deemed to accrue or arise on 10th July, the specified date is 30th June
Dividend	Last day of the month immediately preceding the month in which the dividend is declared, distributed or paid by the company	If dividend is declared on 20th May, the specified date is 30th April
Capital Gains	Last day of the month immediately preceding the month in which the capital asset is transferred	If capital asset is transferred on 25th September, the specified date is 31st August

However, where transactions are in Indian rupees, rules cannot be applied as held in *CIT v. Chowgule and Co. Ltd. (1996) 218 ITR 384 (SC)*. In case of any outstanding balance from a foreign buyer on the last day of the accounting year, the conversion will have to be done according to the Rule 115. Delhi High Court has held in the case of *DIT (International*

Taxation) v. Dumez Sogea Borie Sae (2002) 257 ITR 576 that though the transaction has taken place wholly outside India, the conversion of foreign currency will have to be done according to Rule 115.

Q.236 Is there any exemption in respect of long-term capital gain if reinvested?

A.236 The long-term capital gains arising from the transfer of any foreign exchange asset will be exempt from tax under chapter XIIA, Sec 115 F, to the extent the net consideration realised on transfer are re-invested or re-deposited within six months after the date of such transfer in any asset (hereafter referred to as the new asset); i.e., specified assets or savings certificates notified u/s 10(4B). The exemption shall be in proportion to the investment made in the new asset.

However, where the new asset is transferred or converted (otherwise than by transfer) into money within a period of three years of its acquisition, the capital gains arising from the transfer of the original asset which has been exempted from tax shall be deemed to be the long-term capital gains of the previous year in which the new asset is transferred or converted into money.

The NRI has to work out whether to claim exemption under this section or pay long-term capital gain tax @ 10% and keep the money free at his disposal.

It is also possible to claim exemption of long-term capital gain for investment in a residential house only in India u/s. 54F of the Act. Earlier, deduction could have been claimed for the investment in residential house outside India and for multiple properties, however, section 54 and 54F have been amended w.e.f. 1-4-2015 restricting the investment in single residential house only in India.

Q.237 Whether brought forward losses relating to long-term capital assets being specified assets can be set off in the subsequent year/s against long-term capital gains?

A.237 Section 115D(1) prohibits deduction in respect of any expenditure or allowance under any provisions of the Act. Section 115D(2) prohibits the deduction under Chapter VIA in respect of investment income and/ or long-term capital gains. However, the brought forward long-term losses can neither be considered as an expenditure nor an allowance and hence one may carry forward and claim the set off of such losses in 8 succeeding years. However, since Long Term Capital Gains on equity shares in a company or units of an equity oriented fund is exempt U/s 10(38) (up to A.Y. 2018-2019), loss arising on transfer of these assets on or after 1st October,2004 cannot be set off against Long Term Capital Gains on any

other assets. The position from A.Y. 2019-20 is different as these Long Term Gains are now taxable.

Q.238 How to compute tax when the total income of NRI consists of investment income, Long-term Capital Gains on equity shares and other income?

A.238 The income of NRI consists of three different income One block will consist of investment income, second block will consist of Long-term Capital Gains and the third block will consist of all other income.

Section 115E provides that the:

(1) Investment income will be liable to tax at 20%;

(2) Long Term Capital Gains will be liable to tax @ 10%.

(3) Other income will be liable at the rates prescribed in schedule to Finance Act for the respective year.

Surcharge, if applicable and Heath & Education Cess at 4% will also be levied in addition to the aforesaid taxes.

Under normal provisions of the Act, in case of Long Term Capital Gains on sale of equity shares and equity oriented mutual funds on which STT has been paid, the Capital gains was exempt from tax until A.Y. 2018-2019 and now taxed at the rate of 10% only even when STT is paid. As stated earlier, from A.Y. 1998-1999 under Chapter XII-A, Non-Residents are taxed at a concessional rate of 10% on the long term capital gain on transfer of equity shares listed and unlisted, without any conversion or indexation benefits amongst other assets.

W.e.f. A.Y. 2019-2020 the long term capital gains on transfer of equity shares or equity oriented mutual funds or units of business trust, in excess of ₹ 1 lakh shall be chargeable to tax @ 10%. Certain conditions have been imposed such as STT should have been paid on such shares both at the time of purchase as well as sale of shares etc.

In a scenario where equity shares were purchased off market (i.e., without payment of STT) but sold through recognized stock exchange (i.e., with payment of STT), the long term capital gain thereon shall not be covered under the provisions of section 112A and hence the beneficial rate of 10% will not apply. In such a case, the long term Capital Gain shall be taxed at 20% u/s. 112 along with indexation benefit. However, a Non-Resident can avail the benefit of section 115E and tax such gain @ 10% albeit without the benefit of conversion or the indexation. Thus, the provisions of section 115E have become relevant again.

Q.239 Is there any option available to NRI for being governed under this Chapter?

A.239 Under section 115-I, a non-resident Indian has the option to claim in respect to any particular assessment year the special provisions relating to taxation of "investment income" and "Long-term Capital Gains" under which the tax on such income is to be charged at a flat rate should not apply to him. Such option can be exercised by furnishing his return of income for that assessment year u/s. 139 declaring therein that the flat rate should not apply to him. In cases where such option is exercised in respect of any assessment year, the total income of that assessment year will be charged to tax under the general provisions of the Income-tax Act. Again, the option exercised for one year does not affect the assessee for the subsequent year. He may exercise the option year to year. The option appears to be for a return of income filed under section 139 and not under section 148 of the Act.

Q.240 Is it compulsory for Non-Resident Indian to file Income-tax Return on account of investment income and Long-term Capital Gains?

A.240 Section 115G provides that if the total income of a non-resident Indian consists of investment income and/or long-term capital gains and the tax has already been deducted under the provisions of Chapter XVIIB, then he need not furnish an income tax return u/s. 139(1). However, it may be noted that the Assessing Officer has the power to call for the income tax return under section 148, etc. The payer has to deduct tax @ 20% in the case of investment income, 15% in the case of short term capital gain where STT is applicable or at slab rate as applicable to Individuals and 10% in the case of Long-term Capital Gains before making the payment thereof to the non-resident Indian. However, to mitigate practical difficulties, the Reserve Bank of India has issued circular No. AD(MA) No. 4 dated 11-2-1987 providing for the following procedure in case of long-term capital gain on foreign exchange asset:

(i) The payer must first check that the asset is a "foreign exchange asset" and declaration to that effect must be submitted by a non-resident Indian.

(ii) It must be verified that the asset transferred is a long-term capital asset and not a stock-in-trade. Again a declaration to that effect is required to be obtained from a non-resident Indian.

(iii) The payer will then compute the Capital Gains.

If however, the payer defaults in deducting tax at source, the non-resident Indian is liable to file his income tax return and pay tax on his own.

Section 201 provided that the deductor shall be deemed to be an assessee in default if tax was not deducted while making payments to Non Residents. However, there was ambiguity w.r.t. default on entire sum paid or only the income portion paid to the Non Resident. This controversy has been set aside by CBDT Circular No. 2/2014 dated 26-2-2014 which has clarified that the payer/deductor who fails to deduct tax at source shall be considered as an assessee in default only to the extent of the sum chargeable to tax i.e., the income portion. Impliedly in the most informed circumstances of cost of the asset in the hands of the seller, it is possible therefore for a payer of the consideration to compute the Income and deduct TDS accordingly in place of deducting TDS on the entire sum.

Q.241 What are the benefits under this chapter available to assessee after he becomes resident?

A.241 If a non-resident Indian becomes a resident in any previous year, section 115H specifically provides for the concessional rate of tax in respect of interest on debentures of Indian public companies, interest on deposits with Indian public companies or interest on any security of the Central Government till such time the asset is either transferred or converted into money. Kerala High Court in the case of *CIT v. N.P. Mathew (Decd.) (2006) 280 ITR 44* held the similar view. It is also held in the case of Dr. Virindra Kumar Raina by AAR No.784 dated 17th December, 2008 that :

1) The income of the applicant arising from the existing NRO deposits with SBI shall be taxed @ 20% plus applicable surcharge and cess.

2) After his return to India, the applicant can invoke the provisions of section 115H until conversion of his NRO account into rupee account as per the extant RBI regulation/instruction.

3) Until conversion, income from NRO account shall be segregated from other income of the applicant and subjected to tax @ 20% plus applicable surcharge and cess.

However, if such fixed deposits are renewed and interest earned on such fixed deposit is redeposited with the original sum, the beneficial provisions of section 115E shall not apply, as held in the case of *Dr. M. Manohar v. ACIT [2011] 12 taxmann.com 312 (Madras High Court).*

But for this specific provision, the benefits under this Chapter would have come to an end.

It is pertinent to note that the benefits are not available either for long-term capital gain or dividend income from Indian companies after the non-resident Indian becomes a resident. Of course, the dividend income is fully

exempt from tax up to A.Y 2018-2019 and from A.Y. 2019-2020, the same is exempt up to ₹ 10 lakh in case of Residents. Long Term Capital Gains on equity shares, units of equity oriented funds and units of business trust which are liable to STT are exempt from tax from 1-10-2004 to 1-4-2018.

The benefits thus available are in relation to such income for that assessment year in which the non-resident Indian becomes a resident and for every subsequent assessment year until such assets are transferred or converted (otherwise than by transfer) into money. Dividend having been excluded from the benefits of this section, it can be noticed that almost all other foreign exchange assets are time bound and shall come to an end on maturity. The intention of the Legislature is clear that it does not want to extend the benefit for an unlimited period of time. The renewal thereof by the resident (who hitherto was a non-resident Indian) will not be eligible for such concessional treatment since renewal is on maturity and such specified assets are not acquired as non-resident Indian. In view of the above, it may be advisable that non-resident Indian, before returning to India, converts his shares and units into long-term debentures/fixed deposits of long-term maturity, if he thinks fit otherwise.

The benefits under this section will be available only if the resident (former non-resident Indian) exercises an option by a declaration in writing to be furnished to the Assessing Officer along with the return of income under section 139 for the assessment year for which he is so assessable. The declaration should specify that the provisions of this Chapter will continue to apply to the investment income derived from any foreign exchange asset; viz., Debentures, Deposits in public limited companies, securities of Central Govt. referred to in sub-clauses (ii), (iii), (iv) or (v) of Sec 115C(f). The option having been once exercised is irrevocable, and the provisions of the Chapter will continue to apply till the transfer or conversion into money of the said assets. In case a non-resident Indian files a return in response to a notice under section 148, it appears, he has no such option as aforesaid.

Q.242 Whether provisions of Chapter XII A are applicable after the death of NRI?

A.242 In case of the death of a non-resident Indian, the legal representative will be charged to tax in respect of income earned until the date of the death. Further, since the residential status of the legal representative would be derived from the status of the deceased, the concessional treatment under this Chapter would be available even in the hands of the legal representative.

The income of the estate of a deceased person shall be chargeable to tax in the hands of the executors until the distribution of the estate is completed. Even for this purpose, the residential status of the executors will be derived from the status of the deceased. Thus, even after the death of the individual, the benefit under Chapter XIIA will be available to the executors of the non-resident irrespective of the status of the executors. However, on the distribution of the estate, even if the beneficiaries themselves are non resident Indians, Chapter XII-A will not apply to them for the reason that the specified assets have not been acquired, purchased with or subscribed to by them in convertible foreign exchange.

Q.243 What are the beneficial provisions of section 115A of the Act applicable to Non-Residents?

A.243 The section 115A provides beneficial rates of tax on dividends, royalty and technical service fees in the case of non residents or foreign companies in receipt of such Income:

Nature of Income	*Dividend*	*Mutual Funds*	*Interest*	*Interest on Infra Debenture Fund*	*Royalty*	*Fees for Technical Services*
Tax Rates	20%	20%	20%	5%	10%	10%
Chapter VIA Deduction	No	No	No	No	Yes	Yes
Requirement of filing Return of Income	No Return of Income is required to be filed if a) income includes only dividend, interest & income from units of MFS, and b) TDS is deducted as per ITA					

Q.244 Are there any beneficial provisions under the I.T. Act for a foreign sports person or entertainer receiving income in India?

A.244 Section 115BBA provides that where the total income of a sportsman (including an athlete) who is not a citizen of India and is a non resident, includes any income by way of participation in any game or sport in India, advertisement or contribution to articles relating to any game or sport in India in newspapers, magazines or journals or an entertainer who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India, then such income shall be taxed at a concessional rate of 20% and the balance income, if any, shall be chargeable to tax at normal slab rates. Further, if his income consisted only of the income as stated above on which TDS (u/s. 194E) is already deducted, then there is no requirement of filing the tax return in India.

Q.245 What are the exempt income for NRIs?

A.245 Exemptions from total income of non-residents are as under:

10(4)(i)	in the case of non-resident interest on notified securities or bonds or even premium redemption of such bonds is exempt.
10(4)(ii)	Interest on NRE A/c. in bank in case of individual who is a person resident outside India as per Sec. 2(w) of FEMA, 1999 or is a person who has been permitted by the RBI to maintain such account.
10(4B)	Interest on NSC VI & VII issue if certificates subscribed in convertible foreign exchange before 1st June, 2002.
10(6)(ii)	Remuneration to employees of embassy, high commission, consulate etc. on reciprocal basis.
10(6)(vi)	Remuneration to employees of foreign enterprise subject to certain conditions.
10(6)(viii)	Salary received by non-resident employed on a foreign ship where total stay in India is less than ninety days.
10(6)(xi)	Remuneration received by an employee of a foreign government in India in connection with his training, subject to conditions.
10(6A)	Tax on royalties or fees for technical services earned by a foreign company on agreements in accordance with Government of India's industrial policy or for approved agreements up to 31st May, 2002.
10(6B)	Tax on income (excluding salary, royalty or fees for technical services) pursuant to agreement entered into up to 31st May, 2002 between Governments or with an International organisation.
10(6C)	Income by way of royalty or fees for technical services earned by notified foreign companies in connection with projects connected with security of India.
10(6D)	Income by way of royalty or fees for technical services rendered in or outside India to the National Technical Research Organization.
10(7)	Allowances or perquisites given by Government to a citizen rendering service outside India.

10(8)	Income of a foreign government employee under a Government agreed co-operative technical assistance programme.
10(8A), (8B)	Remuneration or fees received by non-resident consultants and their foreign employees under a Government agreed technical assistance grant or programme.
10(9)	Income of family members of an employee serving under a co-operative technical assistance programme.
10(10CC)	Income in the nature of the Tax non monetary perquisite where employer pays tax on such Income.
10(13A)	Rent paid by the employer on the residential accommodation occupied by the employee.
10(14)	Any special allowance or benefit granted to the employee for the purposes of meeting expenses wholly for the employer as actually incurred or any special allowance granted at the place where duties are performed by the employee or at the place where employee resides or for the increased cost of living.
10(15)(i)	Interest/premium/redemption/other payments on notified securities, bonds, certificates and deposits.
10(15)(iid)	Interest arising to an NRI or his nominee/survivor or any donee on NRI Bonds issued by S.B.I. in 1988 and 1991 and purchased by NRI in foreign exchange. Exemption continues even if subscriber NRI becomes resident subsequently but it is lost in the year of premature encashment.
10(15)(iii)	Interest on securities held by the issue department of the Central Bank of Ceylon.
10(15)(iiia)	Interest payable to any foreign bank performing central banking functions outside India on deposits with RBI approved scheduled bank.
10(15)(iiic)	Interest payable to the European Investment Bank on loan granted by it in pursuance of framework agreement dated 25-11-1993 for financial corporation between Central Government and that Bank
10(15)(iv)	Interest payable —
	a) By a scheduled bank to a Non-Resident or to a person who is not ordinarily resident on RBI approved deposits in foreign currency. F.C. (Ord.

	Non. Repat.) and R.F.C. Deposits and interest earned by OCBs on FCNR deposits are RBI approved deposits.
	b) by a public company formed and registered in India and approved for the purpose of section 36(1)(viii), with the main object of providing long-term finance for construction of purchase of houses in India for residential purposes on moneys borrowed at approved rates in foreign currency from sources outside India under an approved loan agreement before 1st June, 2001.
10(15)(viii)	Interest received by Non-Resident or a person who is not ordinarily resident on deposit made on or after 1-4-2005 in an offshore Banking Unit referred to in Section 2(u) of the Special Economic Zones Act, 2005
10(15A)	Aircraft or aircraft engine lease rent paid under an approved agreement, to a foreign government or enterprise by an Indian company engaged in the business of operation of aircraft. This applies to agreements entered upto 31st March, 2007.
10(23BBB)	Income by way of interest, dividend or capital gains of European Economic Community derived in India under a notified scheme.
10(23)(BBC)	Income of SAARC fund for regional projects set up under Colombo Declaration issued on 21st December, 1991.
10(34)	Any income by way of dividends referred to in section 115-O r.w.s. 115BBDA.
10(34A)	Any income by way of buy back of shares (not being listed on recognized stock exchange) by the company as referred to in section 115QA.
10(35)	a) Income received in respect of units of mutual fund specified under clause 23D.
	b) Income received in respect of units of administrator of the specified undertaking
	c) Income received in respect of units from Unit Trust of India established under Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002.

10(35A)	Any income by way of distributed income referred to in section 115TA received from a securitisation trust by any person being an investor of the said trust up to 1-6-2016.
10(36)	Any Long Term Capital Gains on transfer of eligible equity shares purchased between 1st March, 2003 to 31st March,2004 which are held for a period of 12 months or more.
10(37)	In case of Individual or Hindu Undivided Family, any Capital Gains on transfer of agricultural land subject to the fulfillment of various conditions.
10(38)	Any Long Term Capital Gain on equity shares or units of equity oriented fund transaction whereof is on or after 1st October, 2004 and on which Security Transaction Tax is chargeable (upto A.Y. 2018-2019).
10(48)	Any income received in India in Indian currency by a foreign company on account of sale of crude oil or any other goods or rendering of services as may be notified by the Central Government, to any person in India under an approved and notified agreement or arrangement (subject to certain conditions).
10(48A)	Any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India (subject to certain conditions).
10(48B)	Any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil from the facility in India after expiry of the agreement referred to in Section 10(48A) or on termination of the said agreement (subject to certain conditions).
10(50)	Any income which is chargeable to Equalization Levy under Chapter VIII of the Finance Act, 2016.

Q.246 What are the provisions for deduction of tax at source (TDS) on payments to non-residents and foreign companies?

A.246 The sections under which taxes have to be deducted at source, in the cases of payments to non-residents are 194E, 194LB, 194LBA, 194LBB, 194LC, 194LD, 195, 196A, 196B, 196C and 196D of which section 195 is more important and applicable in many cases and the same is discussed hereunder:

1. This section is placed in the Income-tax Act in Chapter XVII-B, which deals with deduction of tax at source. As per the provisions of Section 195, any person responsible for paying to a Non-Resident (not being a company) or to a foreign company any interest (not being interest u/s. 194LB, 194LC and 194LD) or any other sum chargeable under the provisions of this Act (except Salaries) has to deduct income tax at the rates in force at the time of payment or credit whichever is earlier.

2. It is very important to note that both the following conditions should be cumulatively satisfied in order to attract the provisions of this section.

   a) The payee should be either a non-resident or a Foreign Company and

   b) The amount payable should be interest or any other sum (not being salaries) chargeable under the provisions of the Income-tax Act.

3. The section is expressed in the widest possible terms. It covers all sums chargeable under this Act other than Salaries. The heading of section 195 as given in the Income-tax Act is, thus, quite inappropriate. The heading given merely mentions "other sums", implying thereby, that it relates to tax deducted at source from other sums; i.e., amounts not covered by the provisions of sections 192 to 194H. The correct position is, however, that section 195 pertains only to tax deduction at source from payments made to any non-resident or to foreign companies. Consequently, any payments made to a resident are not covered by section 195. This section also does not apply to payments made outside India by one foreigner to another even if the other foreigner has rendered services in India. This is because a country does not recognize or enforce the Revenue Laws of another country. Therefore, if a payer in a foreign country, bound to make the payment under a contract governed by the laws of that foreign country, were to seek to deduct Indian Income-tax, the payee would be entitled to object to the deduction. He can object on the ground that no deduction can be made in that foreign country, since it is not authorised by laws of that foreign country or by the terms of the agreement. The decision of the House of Lords in *Government of India v. Taylor 27 ITR 356*, establishes that in no circumstances will courts of a country, directly or indirectly, enforce the Revenue Laws of another country and therefore no state can sue in a foreign country for any taxes due under the laws of that State.

4. Section 195 is applicable only in respect of certain payments made to "Non-Residents", (other than a company) or to a foreign company. All Non-Resident persons, as determined under the provisions of section 2(30) and as determined by the tests of residence under section 6 of the Income-tax Act, are persons covered by section 195. Thus, besides non-resident individuals, even Non-Resident HUFs or Non-Resident firms/associations of persons are covered. In the case of *ITO v. Raza Textiles Ltd. (1977) 106 ITR 408 (All.)* it was held that since the control and management of the firm was only partly within the taxable territories, the firm was not a non-resident, and the assessee was not obliged to deduct any tax on the payment made to the firm. In another case, *S. K. Dutt – ITO v. Anglo Indian Jute Mills Co. Ltd. (1958) 33 ITR 866 (Cal.)* it was held that for the purpose of deduction of tax at source, the tests prescribed in the Act for non-residents will alone have to be applied in order to determine whether the payee is a Non-Resident.

5. This section also covers payments made to foreign companies. Section 2(23A) read with section 2(22A), defines a foreign company as under:

   [(23A) "foreign company" means a company which is not a domestic company;]

   [(22A) "domestic company" means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income;]

6. Kinds of payments covered

   Section 195 covers the following types of payments

   a) Interest (not being interest payable by an infrastructure debt fund or by an Indian Company or on certain bonds and Government securities),

   b) Any other sum chargeable under this Act (other than salaries).

   Under this section, tax has to be deducted at source from interest, other than interest payable by an infrastructure debt fund or by an Indian Company or on certain bonds and Government securities, on securities and other sums chargeable under the provisions of this Act. The words "chargeable under the provisions of this Act" in this section also qualify and govern interest, and therefore, where the

interest though payable to a non-resident is not taxable under the Act, there would be no obligation to make any deduction. No such deduction will be made in case of dividends paid by a domestic Company covered u/s. 115-O.

7. Moreover, in the case of "other sums", where a payment is to made to a non-resident, a question will arise as to whether the payment is in the nature of income or it is a mere gross receipt. In *Anglo Indian Jute Mills Co. Ltd. v. Dutt (1958) 33 ITR 525* and *P. C. Ray & Co. (India) Pvt. Ltd. v. ITO 36 ITR 365* the Calcutta High Court held that the words "any other sums chargeable under this Act" shall also apply to payments which are in reality not "pure income profit" but are "gross trading receipts" in the hands of the recipient and tax has to be deducted in such cases. According to the learned author Shri N. A. Palkhivala, these decisions of the Calcutta High Court are in his view, with respect, incorrect as section 195(2) does not contemplate a trading receipt, a portion of which may be a profit, but it refers to a sum which is "pure income profit". According to the learned author, when making payment of "pure income profit" to a non-resident, deduction of tax has to be made at the prescribed rate irrespective of the fact that the non-resident, in view of his other losses, may ultimately turn out to be not assessable at all.

8. When the assessment is ultimately made upon him again, according to Shri N. A. Palkhivala, the fact that the non-resident may be entitled to certain deduction from the "pure income profits" would not be enough to negative the application of this section. But "gross trading receipts" stands on a different footing, since they are different in nature from "pure income profits" and according to Shri N.A. Palkhivala, the words "any other sum chargeable under this Act" are not appropriate to cover such receipts.

9. Supreme Court in the case of *Transmission Corporation of A.P. Ltd. And Another v. CIT (1999) 239 ITR 587* has held that the person making payment to Non-Resident may file application before assessing officer for determination of sum chargeable to tax. Where no such application is filed, tax must be deducted on gross sum. The Supreme Court affirmed the decision in the case of *CIT v. Superintending Engineer (1985) 152 ITR 753 (AP).*

10. Another important decision to be kept in mind is *CIT v. Fertiliser and Chemicals Travancore Ltd. (1990) 86 CTR (Ker.) 40.* This decision is important because it deals with the basic question as to whether tax deduction can be resorted to, before deciding as to whether any income at all accrued to a foreign collaborator in India, and thus,

came under the purview of any other sum chargeable under the provisions of this Act.

The Kerala High Court held that there would be no failure to deduct tax at source under section 195 if the foreign collaborator has not rendered any service in India.

The Calcutta High Court held in *ITO v. Sriram Bearing Ltd. (1987) 164 ITR 419* that no tax be deducted at source u/s. 195 in respect of payments for sale of trade secrets, when it was not taxable in India.

Further, even the *Bombay High Court decision in the case of CIT v. Cooper Engg. Ltd. (1968) 68 ITR 457,* supports the view that a person paying any sum to a non-resident is not liable to deduct any tax if such sum is not chargeable under the provisions of the Act. This case is approved by the Supreme Court in case of *GE India Technology Cen Pvt. Ltd. v. CIT [2010] 193 Taxman 234* wherein it was analyzed that section 195 uses the expression "sum chargeable under the provisions of the Act". This means that a person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax. Further, Section 195(1) uses the word 'payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation u/s. 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. Section195(2) applies where the payer is in no doubt that tax is payable in respect of some part of the remittance but is not sure as to what is the taxable portion. In that situation, he is required to make an application to the ITO(TDS) for determining the amount.

While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Act, one cannot read the charging sections of that Act *de hors* the machinery sections. If the contention of the department, that the moment there is remittance, the obligation to deduct tax arises, is to be accepted, then the words 'chargeable under the provisions of the Act' in section 195(1) will be obliterated. Section 195 appears in Chapter XVII which deals with collection and recovery. The provisions for deduction of tax which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Act, form one single integral, inseparable Code and, therefore, the provisions relating to TDS apply only to those sums which are 'chargeable to tax' under the Act. Hence, the provisions relating to TDS apply only to those sums which are chargeable to tax under the Act.

Q.247 What is the procedure for remittance of any payment to Non-Resident which is chargeable to tax under the Act?

A.247 Any person who makes payment to Non-Resident of any amount chargeable to tax under the Act shall deduct tax at source at the rates in force and pay into the treasury of the Government.

The remittance can be made after obtaining the certificate from the Income Tax Department for non deduction of tax or deduction of tax at a lower rate or deduction of tax on the income/profit component and not the entire consideration/payment.

Under section 195(2), if the payer considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable. Alternatively, under section 195(3), the receiver may make an application in the prescribed form (Form 15C & 15D) to the Assessing Officer for the grant of a certificate authorizing him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

Section 195(6) inserted by Finance Act 2015 w.e.f. 1-6-2015 states that the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in Form 15CA and in certain cases obtain a certificate from Chartered Accountant in Form 15CB.

Form 15CA – Information to be furnished by the payer (to be uploaded on IT website). Form 15CB – Certificate to be obtained from Chartered Accountant. The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from the Non-Residents.

Form 15CA is a declaration by Remitter, used as a tool to collect information in respect of payments made to Non-Residents whether chargeable to tax in their hands in India. It is divided into 4 parts.

Part A – Payment or aggregate of payments chargeable to tax & not exceeding ₹ 5,00,000 (no requirement to obtain CA certificate).

Part B – Payment or aggregate of payments chargeable to tax & not exceeding ₹ 5,00,000 – after obtaining certificate from AO u/s. 197 or 195 (2)/(3)

Part C – Payment or aggregate of payments chargeable to tax & exceeding ₹ 5,00,000 - after obtaining certificate under Form 15CB from Chartered Accountant

Part D – For all payments not chargeable to tax under Income-tax Act [other than those exempted under Rule 37BB(3)].

Form 15CB is a certificate from Chartered Accountant on the basis on information provided by client in Form 15CA to determine the chargeability of income. It requires detailed enumeration of the taxability of the amount under the I.T. Act, without giving any effect to the DTAA. Where DTAA provisions are sought to be applied, the details of the Tax Residency Certificate, applicable DTAA and its relevant article, as also tax liability under the DTAA are to be furnished. The nature of remittance is divided as — for royalties, FTS, interest, dividend; on account of business income; on account of short-term and long-term capital gains; and any other remittance.

Q.248 What is the difference between sections 195(2), 195(3) and 197?

A.248 Under section 197 an application can be made by any person who is recipient of the income, resident or non resident w.r.t. any income which justifies deduction of tax at Nil or lower rate than the prescribed rates. Such application is to be made to the AO by the assessee i.e. recipient of income (in Form 13). If AO is satisfied, certificate may be issued for Nil or lower rate of tax deduction. Such certificate is to be provided to the payer in order to enable him to deduct TDS at rates mentioned therein.

Particulars	***195(2)***	***195(3)***	***197***
Application by	Payer	Payee (subject to Rule 29B)	Payee
Purpose	To determine the appropriate withholding rate for sum chargeable to tax	For claiming NIL or lower withholding rate for a specified receipt	For claiming NIL or lower withholding rate for all receipts
Applicability	Applicable to specified payments	Applicable to specified receipts	Applicable to all receipts

Particulars	*195(2)*	*195(3)*	*197*
Application Form	Not Prescribed	Form 15C or 15D	Form 13
Whether Appealable?	Appeal u/s. 248 denying liability to deduct tax after payment of tax	No appeal. Writ Petition to High Court	No appeal. Writ Petition to High Court
Whether revisable u/s. 263 or 264?	Yes	Yes	Yes

Q.249 Is there any penalty for non furnishing or furnishing of inaccurate information u/s. 195?

A.249 W.e.f. 1-6-2015, section 271-I states that if a person who is required to furnish information u/s. 195(6), fails to furnish such information or furnishes inaccurate information, the AO may direct such person to pay penalty of ₹ 1 lakh.

However, there is no clarity if penalty is per transaction or per financial year or per TAN/assessee.

Q.250 Can any penalty be imposed on Chartered Accountant for issue of inaccurate/incorrect certificate under Form 15CB?

A.250 Earlier, no penalty had been prescribed for furnishing inaccurate certificate under Form 15CB by the Chartered Accountant.

In the case of *Mahindra & Mahindra Ltd v. ADIT [2007] 106 ITD 521* it was held that "The certificates issued by the chartered accountants have no role to play so far as determination of withholding tax liability is concerned. These certificates cannot, and do not, impose any tax deduction liability on the assessee-tax deductors. The only role these certificates play is that when an assessee has to make a remittance to non-residents, based on the assessee's own understanding of the withholding tax requirements and at his risk of consequences for short deduction of tax at source or non-deduction of tax at source, such a remittance has to be supported by a chartered accountant's certificate in support of the assessee's contention."

There are various provisions that exist under the I.T. Act to penalize the defaulting assessee in case of furnishing incorrect information. However, there exists no penal provision for levy of penalty for furnishing incorrect information by the person who is responsible for certifying the same.

In order to ensure that the person furnishing report or certificate undertakes due diligence before making such certification, section 271J was inserted by the Finance Act 2017 w.e.f. 1-4-2017 so as to provide that if an accountant or a merchant banker or a registered valuer, furnishes incorrect information in a report or certificate under any provisions of the Act or the rules made thereunder, the Assessing Officer or the Commissioner (Appeals) may direct him to pay a sum of ₹ 10,000/- for each such report or certificate by way of penalty.

Q.251 What is the point of time at which tax is to be deducted?

A.251 Tax shall be deducted either at the time of credit of such income to the account of such payee or at the time of such payment thereof in cash or by the issue of a cheque or draft, or by any other mode, whichever is earlier. Further, the explanation added makes it clear that where any interest or other sum is credited to any other account whether called "Interest Payable Account" or "Suspense A/c", or by any other name in the Books of Account of the person liable to pay such income, such crediting, shall be deemed to be credit of such income to the account of the payee and the provisions relating to tax deduction shall apply even in such a case. In short, therefore, the payer cannot escape provisions of section 195 by merely crediting the amount in some account in his books while claiming benefit of the expenditure by debiting to his Profit and Loss Account. However, the section provides that in the case of interest payable by the Government or by a public sector bank or by a public Financial Institution within the meaning of section 10(23D), deduction of tax shall be made only at the time of payment thereof in cash or by the issue of cheque or draft or by any other mode. Further, it has been clarified that the obligation to deduct tax u/s. 195(1) is meant to extend to all persons resident or non-residents, whether or not the not resident has –

i) A residence or place of business or business connection in India; or

ii) Any other presence in any manner whatsoever in India.

Q.252 What should be the quantum of deduction?

A.252 Tax should be deducted "at the rates in force"; i.e., at the rates for deduction prescribed by the Finance Act of the relevant year or where there exists a DTAA u/s. 90 with the payee's country, then at such rates specified in the DTAA whichever are beneficial to the payee. The above deduction is subject to the following exceptions:

a) Where the payer has obtained from the Assessing Officer, a determination of the portion of the sum chargeable under this Act, the tax should be deducted only in respect of the portion so determined as chargeable [section 195(2)].

b) Deduction should not be made or should be made at a lower rate where an appropriate certificate has been obtained u/s. 197 from the Assessing Officer by the payee where such payee is not a company.

c) In cases notified by the Central Board of Direct Taxes, under section 195(5), where the payee has obtained certificate from the Assessing Officer u/s. 195(3), no deduction of tax should be made.

The Delhi High Court in *CIT v. Jay Engg. Works Ltd. (1984) 149 ITR 425* held that an application u/s. 195(2) need not contain all the requirements of section 195(2) to enable the Income-tax Officer to exercise his jurisdiction. An assessee can approach the Income-tax Officer by merely stating that an order u/s. 195(2) maybe made after submission of all the relevant facts.

Q.253 What are the consequences of failure to deduct tax at source?

A.253 *Interest* - Section 201(1A) provides for levy of interest for failure to deduct the whole or any part of the tax, or delay in remitting tax deducted at source by the person responsible for deducting. The simple interest is levied at 1% for every month or part of a month from the date on which such tax was deductible to the date on which such tax is deducted. And 1.5% for every month or part of a month from the date on which such tax was deducted to the date on which such tax is actually paid. Such interest, if chargeable, is mandatory in nature and has to be paid before furnishing of quarterly statement of TDS for respective quarter.

Penalty - Under section 221, when the assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct. Further, section 271C provides for imposition of penalty for failure to deduct tax at source of an amount equal to tax not deducted/paid which could be imposed by the Joint Commissioner. Section 275 provides that the penalty proceedings will have to be completed before the end of the financial year in which the proceedings of penalty is initiated or within 6 months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later.

Prosecution - Section 276B states that if a person fails to pay the TDS to the credit of the Central Government within the prescribed time, he shall be punishable with rigorous imprisonment for a term which shall be between 3 months to 7 years, along with fine.

Disallowance - Section 40(a)(i) provides that any interest, royalty, fees for technical services or any other sum chargeable under the Act, which is

payable (A) outside India or (B) in India to a non–resident, other than company or to a foreign company, will not be allowed as a deduction while computing Business Income of the payer, if tax has not been deducted or after deduction has not been deposited with the Government till the due date of filing the return of income. However, if tax has been deducted or deposited in any subsequent year, as the case may be, the expenditure shall be allowed as a deduction in that year.

Sections 25 and 58(1)(a)(iii) are similar provisions for annual charge and interest payable outside India for House Property income and for interest and salary payable outside India for Other Sources income with the exception that it is not provided in these sections that if tax withholdings are made in a subsequent year, the deductions would be allowed at that time.

Q.254 Who is responsible to deduct tax?

A.254 An individual or an H.U.F. is not liable to deduct TDS on such payment except where the individual or H.U.F. is carrying on a business/profession where accounts are required to be audited u/s. 44AB, in the immediately preceding financial year.

A person is liable to get its accounts audited u/s. 44AB if during the relevant financial year its gross sales, turnover or gross receipts exceeds ₹ 1 crore applicable from A.Y 2019-2020 in case of a business, or ₹ 50 lakh from A.Y 2019-2020 in case of a profession.

Persons who are liable to deduct TDS as per above stated conditions must apply for allotment of 'TAX DEDUCTION AND COLLECTION ACCOUNT NUMBER' (TAN) in Form No. 49B within one month from the end of the month in which tax was deducted. TAN is mandatory to mention on all transaction related to TDS like TDS certificate, TDS Returns and other related documents. There is penalty of ₹ 10,000 on failure to apply TAN.

There are also some conditions where is no liability of deductor to deduct TDS as follows;

- On declaration furnished by payee in Form 15G or 15H as the case may be
- On certificate issued by ITO
- Payment to Government/RBI/Statutory Corporation etc.
- Exempt Incomes
- Interest Payment by Offshore Banking Units

- Payment to New Pension System Trust
- Notified payment to Notified Institutions/Associations

Q.255 Where a Non Resident Indian is desirous of selling a property owned by him in India to a Resident Indian, what are the TDS implications on the said transactions?

A.255 As per the provisions of section 194IA of the Act, any person responsible for paying a resident any sum by way of consideration for transfer of immovable property (includes residential property, commercial property, plot of land etc but excludes agricultural land), TDS @ 1% has to be deducted on the transaction value. TDS to be deducted only when consideration exceeds ₹ 50 lakh. The said section is applicable w.e.f. 1-6-2013.

However, the said section applies when property is purchased from a Resident and not a Non-Resident, as in our case.

In case of purchase of property by a Resident from a Non Resident, the provisions of section 195 of the Act will apply, irrespective of the amount of consideration (i.e. the limit of ₹ 50 lakh u/s. 194IA does not apply and hence even if sale consideration is less than ₹ 50 lakh, TDS will have to be deducted).

Under section 195 of the Act, the Resident will be liable to deduct TDS on the entire sales consideration and not on the capital gain amount as may be computed by the Non-Resident transferor.

In the case of *Syed Aslam Hashmi v. ITO [2012] 26 taxmann.com 6 (Bangalore Tribunal)* it was held that where seller of Indian property was NRI according to address given in sale deed, assessee-purchaser ought to have made TDS under section 195 on sale consideration payable to NRI seller, failing which he was to be treated as assessee-in-default under section 201(1). Thus, TDS liability was spread on the entire sale consideration amount and not just limited to the amount of estimated capital gains on sale of immovable property, unless application was made to AO w.r.t. the same.

If the capital asset (property in our case) is held for more than 2 years, capital gain thereon will be long term capital gain which shall be taxed @ 20%. If it's a Short Term Capital Gains then the same shall be taxed as per normal slab rates (plus surcharge and cess). Now, if the NRI claims that after taking indexation benefit on the purchase of property, the taxable Capital Gains is minimum and does not warrant withholding at such a high rate, he may make an application in Form 13 to his Assessing Officer, explaining the same along with his estimated computation of total

income and tax liability thereon. The Assessing Officer, if satisfied with the same, shall issue a certificate u/s. 197 of the Act for no deduction of tax or deduction of tax at a lower rate. The NRI seller is then required to give this certificate to the Resident Buyer who will deduct tax at the rates mentioned in such certificate.

The buyer should have a TAN for deduction of TDS. TAN is not required in case the property is purchased from a Resident Indian but is required in case the property is purchased from Non-Resident Indian. In case buyer does not possess TAN, he can apply by filing Form 49B. The TDS so deducted by the buyer shall be deposited with the Government within 7 days from the end of the month in which the TDS has been deducted. After the deposit of TDS, the buyer is required to furnish a TDS return. This TDS return is required to be furnished in Form 27Q and is required to be furnished separately for each quarter.

Q.256 What are the provisions for grossing up of tax under the Act?

A.256 Section 195A prescribes grossing up of income (for the purpose of deducting tax) wherever the tax chargeable on any income specified in Chapter XVII of the Act, is to be borne by the person by whom that income is payable. For the purposes of deduction of tax, such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable.

However, it must be remembered that no grossing up is required of the tax that is classified as income, exempt under the provisions of section 10 of the Act. The Karnataka High Court in *Hyderabad Industries Ltd. v. ITO (1991) 188 ITR 749* has also held that amounts exempt u/s 10(6A), do not constitute income for the purpose of section 195.

In the case of *Nagarjuna Fertilizers & Chemicals Ltd v. ACIT [2017] 78 taxmann.com 264 (Hyderabad Tribunal)* it was held that if the rate of tax applicable under DTAA is lower than 20 per cent tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if non-resident deductee fails to furnish his PAN. (In view of circular no. 5/2010 dated 03.06.2010). Also see: *Wipro Ltd. v. ITO (IT) [2017] 88 taxmann.com 435 (Bangalore Tribunal).*

Q.257 What are the provisions of section 206AA of the Act?

A.257 Section 206AA states that where any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as 'deductee') shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred

to as 'deductor'), failing which tax shall be deducted at the higher of the following rates, namely:—

(i) At the rate specified in the relevant provision of this Act; or

(ii) At the rate or rates in force; or

(iii) At the rate of twenty per cent.

These provisions apply to Non-Residents as well.

However, the provisions of this section shall not apply to a non-resident, not being a company, or to a foreign company, in respect of payment of interest on long-term bonds as referred to in section 194LC; and any other payment subject to such conditions as may be prescribed.

The CBDT has *vide* notification No. 53/2016 introduced Rule 37BC to the Income-tax Rules 1962 which provides relaxation to Non Residents from deduction of tax at source at a higher rate u/s. 206AA. It provides that a Non Resident deductee without a PAN shall not be subjected to higher withholding u/s. 206AA in respect of payments in the nature of interest, royalty, fees for technical services and payments on transfer of any capital asset, if the deductee furnishes the following;

(i) Name, e-mail ID, contact number;

(ii) Address of its Country of Residence;

(iii A tax residency certificate (TRC) of his being resident in any other country;

(iv) Tax Identification Number of the deductee in the country of Residence and if no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident.

Q.258 At what rate is grossing up required to be done u/s. 195A of the Act?

A.258 The provisions of section 195A states that grossing up is to be done at the rates in force.

In case of *Bosch Ltd. v. ITO [2012] 28 taxmann.com 228 (Bang-Tribunal)* it was held that *"A literal reading of section implies that the income should be increased at the rates in force for the financial years and not the rates at which the tax is to be withheld by the assessee. The Hon'ble Apex Court in the case of GE India Technology (cited Supra) has held that the meaning and effect has to be given to the expression used in the section and while interpreting a section, one has to give weightage to every word used in that*

section. In view of the same, we are of the opinion that the grossing up of the amount is to be done at the rates in force for the financial year in which such income is payable and not at 20% as specified u/s. 206AA of the Act."

For e.g. M/s. X in India has to make payment of ₹ 5 crores to M/s Y in UK as per agreement.

The rate of tax as per treaty is 10% whereas the rate of tax as per I.T. Act is 15%. The rate whichever is more beneficial to assessee shall be adopted i.e., 10%. Now M/s. Y, the deductee, does not have a PAN No. in India and has also not obtained a TRC. In this case, as per provisions of section 206AA, TDS @ 20% is to be deducted. The deductor has to bear the tax amount i.e., grossing up u/s. 195A at the rates in force.

Particulars	***Section 195A***	***Effective Rate***
Correct Calculation		
Payment	₹ 5,00,00,000	
Gross Up @ 10% (i.e. rate in force)	₹ 5,55,55,556	
TDS thereon @ 20%	₹ 1,11,11,111	22.22%
Wrong Calculation		
Payment	₹ 5,00,00,000	
Gross Up @ 20% (i.e. TDS Rate)	₹ 6,25,00,000	
TDS thereon @ 20%	₹ 1,25,00,000	25%
Savings	₹ 13,88,889	2.78%

Q.259 What are the rates at which taxes to be deducted in the case of Non-Resident Indians and Foreign Companies?

A.259 The taxes to be deducted in the case of Non-resident Indians or foreign companies for the financial year 2018-2019 (A.Y. 2019-2020) as per Finance Act 2018 are as under:

Where the person is not resident in India —

Section	***Particulars***	***TDS Rate***
192	Payment of Salary	Normal Slab Rate
192A	Payment of accumulated balance of provident fund which is taxable in the hands of an employee.	10%

Section	*Particulars*	*TDS Rate*
194B	Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort	30%
194BB	Income by way of winnings from horse races	30%
194E	Payment to non-resident sportsmen/sports association	20%
194EE	Payment in respect of deposits under National Savings Scheme	10%
194F	Payment on account of repurchase of unit by Mutual Fund or Unit Trust of India	20%
194G	Commission, etc., on sale of lottery tickets	5%
194LB	Payment of interest on infrastructure debt fund	5%
194LBA(2)	Business trust shall deduct tax while distributing any interest income received or receivable by it from a SPV to its unit holders.	5%
194LBA(3)	Business trust shall deduct tax while distributing any income received from renting or leasing or letting out any real estate asset owned directly by it to its unit holders.	30%
194LBB	Investment fund paying an income to a unit holder [other than income which is exempt under Section 10(23FBB)].	30%
194LBC	Income in respect of investment made in a securitisation trust (specified in Explanation of section115TCA)	30%
194LC	Payment of interest by an Indian Company or a business trust in respect of money borrowed in foreign currency under a loan agreement or by way of issue of long-term bonds (including long-term infrastructure bond) ***Note***: With effect from April 1, 2018 benefit of such concessional TDS rate has been further extended by three years. Now TDS at concessional rate of 5% will be applicable for borrowings made before July 1, 2020.	5%

Section	***Particulars***		***TDS Rate***
194LD	Payment of interest on rupee denominated bond of an Indian Company or Government securities to a Foreign Institutional Investor or a Qualified Foreign Investor ***Note***: With effect from April 1, 2018 benefit of such concessional TDS rate has been further extended by three years. Now TDS at concessional rate of 5% will be applicable for borrowings made before July 1, 2020.		5%
195	a)	Income in respect of investment made by a Non-resident Indian Citizen	20%
	b)	Income by way of Long-term Capital Gains u/s. 115E in case of a Non-resident Indian Citizen	10%
	c)	Income by way of Long-term Capital Gains u/s. 112(1)(c)(iii)	10%
	d)	Income by way of Long-term Capital Gains u/s. Section 112A	10%
	e)	Income by way of Short-term Capital Gains u/s. 111A	15%
	f)	Any other income by way of Long-term Capital Gains [not being Long-term Capital Gains referred to in clauses 10(33), 10(36) and 112A	20%
	g)	Income by way of interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency (not being income by way of interest referred to in Section 194LB or Section 194LC)	20%
	h)	Income by way of royalty	10%
	j)	Income by way of fees for technical services	10%
	k)	Any other income	30%
196B	Income from units (including long-term capital gain on transfer of such units) to an offshore fund		10%
196C	Income from foreign currency bonds or GDR of an Indian company (including long-term capital gain on transfer of such bonds or GDR)		10%

Section	*Particulars*	*TDS Rate*
196D	Income of foreign Institutional Investors from securities (not being dividend or capital gain arising from such securities)	20%

In case where the company is not a domestic company:

Section	*Particulars*	*TDS Rate*
194B	Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort	30%
194BB	Income by way of winnings from horse races	30%
194E	Payment to non-resident sports association	20%
194G	Commission, etc., on sale of lottery tickets	5%
194LB	Payment of interest on infrastructure debt fund	5%
194LBA(2)	Business trust shall deduct tax while distributing any interest income received or receivable by it from a SPV to its unit holders	5%
194LBA(3)	Business trust shall deduct tax while distributing any income received from renting or leasing or letting out any real estate asset owned directly by it to its unit holders	40%
194LBB	Investment fund paying an income to a unit holder [other than income which is exempt under Section 10(23FBB)]	40%
194LBC	Income in respect of investment made in a securitisation trust (specified in *Explanation* of section 115TCA)	40%
194LC	Payment of interest by an Indian Company or a business trust in respect of money borrowed in foreign currency under a loan agreement or by way of issue of long-term bonds (including long-term infrastructure bond) ***Note***: With effect from April 1, 2018 benefit of such concessional TDS rate has been further extended by three years. Now TDS at concessional rate of 5% will be applicable for borrowings made before July 1, 2020	5%

Section	Particulars		TDS Rate
194LD	Payment of interest on rupee denominated bond of an Indian Company or Government securities to a Foreign Institutional Investor or a Qualified Foreign Investor ***Note***: With effect from April 1, 2018 benefit of such concessional TDS rate has been further extended by three years. Now TDS at concessional rate of 5% will be applicable for borrowings made before July 1, 2020.		5%
195	a)	Income by way of Long-term Capital Gains u/s. 112(1)(c)(iii)	10%
	b)	Income by way of Long-term Capital Gains u/s. 112A	10%
	c)	Income by way of short-term capital gains u/s 111A	15%
	d)	Any other income by way of Long-term Capital Gains [not being Long-term Capital Gains referred to in clauses 10(33), 10(36) and 112A	20%
	e)	Income by way of interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency (not being income by way of interest referred to in Section 194LB or Section 194LC)	20%
	f)	Income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1976 where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of Section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of Section 115A of the Income-tax Act, to a person resident in India	10%

Section	Particulars			TDS Rate
	g)	Income by way of royalty [not being royalty of the nature referred to in point e) above C] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy—		
		A)	Where the agreement is made after the 31st day of March, 1961 but before the 1st day of April, 1976	50%
		B)	Where the agreement is made after the 31st day of March, 1976	10%
	h)	Income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy—		
		A)	Where the agreement is made after the 29th day of February, 1964 but before the 1st day of April, 1976	50%
		B)	Where the agreement is made after the 31st day of March, 1976	10%
	i)	Any other income		40%
196B	Income from units (including Long-term Capital Gains on transfer of such units) to an offshore fund			10%
196C	Income from foreign currency bonds or GDR of an Indian company (including long-term capital gain on transfer of such bonds or GDR)			10%

Section	*Particulars*	*TDS Rate*
196D	Income of foreign Institutional Investors from securities (not being dividend or capital gain arising from such securities)	20%

The amount of income-tax deducted is to be increased by a surcharge at the rate of:

(a) In the case of individual if income/payment exceeds ₹ 50 lakh but not exceed ₹ 1 Crore, surcharge at the rate of 10%.

(b) In the case of individual if income/payment exceeds ₹ 1 Crore, surcharge at the rate of 15%.

(c) In the case of foreign company where the income/payment exceeds ₹ 1 crore but not exceed ₹ 10 crore, surcharge at the rate of 2%

(d) In the case of foreign company where the income/payment exceeds ₹ 10 crore surcharge at the rate of 5%.

(e) In the case of non resident co-operative society and firms, if income/ payment exceeds ₹ 1 crore, surcharge at the rate of 12%.

In addition to the above, health and education cess at 4% is also payable on income tax and surcharge.

Q.260 Are there any benefits available to NRI under Double Taxation Avoidance Treaties?

A.260 Section 90 of the Income-tax Act, empowers the Central Government to enter into Agreements commonly known as "Double Tax Avoidance Agreements" (DTAA) of Tax Treaties with the Government of any foreign country. The objects of section 90 are basically twofold:

1. Seeking to eliminate Double Taxation of certain incomes where a resident of one country derives income from a source in another country, either by assigning to one of the two countries, the whole claim for levying tax or else by prescribing the basis on which the tax claim is to be shared between the two countries.

2. To try and prevent tax evasion by exchange of information among the revenue authorities of both the countries.

DTAAs are of two kinds:

Having limited application, which deal with avoidance of double taxation of income derived from a particular type of international business, e.g. International Shipping Business or International Air Transport Business.

The other of a more general application, much wider in their scope and coverage and generally encompassing all known sources of revenue with an object of avoiding double taxation.

Before going to other aspects of Double Tax Avoidance Agreements, it is important to note that Double Tax Avoidance Agreements are not signed by India with all countries. In such a situation, section 91 provides for unilateral relief where an assessee resident in India, incurs a tax liability in a country with which India has no DTAA. Similarly, this section will also grant relief to cases where income is arising and taxed in any country with which India has signed only limited and not comprehensive agreement and such income is not covered within the scope of the limited agreement.

There are certain conditions prescribed in Section 91, which have to be complied with before the relief provisions operate. These are:

1. The assessee must be a person resident in India in any previous year.
2. He must have, during that previous year, earned income outside India.
3. That income itself must be such as not to have been deemed to accrue or arise in India, as for example, income of the type referred to in section 9 of the Income-tax Act.
4. The assessee resident in India must prove to have paid tax either by way of withholding or otherwise on such income in the foreign country with which India has not signed any DTAA.
5. Such income should be shown to have been doubly taxed; i.e., taxed in both the countries i.e. the foreign country and in India.

If all the above conditions are satisfied then that assessee is entitled to a deduction from the Indian income-tax payable by him of a sum, calculated at the lower of the average Indian rate of tax or the average foreign rate of tax or at the Indian rate of tax if both the rates are equal.

The judgment of Rajasthan High Court in the case of *Mahavir Kumar Jain v. CIT (2005) 277 ITR 166 /142 Taxman 130* had held that where tax is imposed by two different legislatures under different enactments, question of double taxation in strict sense does not arise, has been reversed by the Supreme Court in its own case (See *92 taxmann.com 340*).

If there is treaty with the source State/country but certain Taxes are not covered as they are paid in the source State then in such a case payment of such taxes may be available as deduction from income as if no treaty was signed for those taxes. E.g. State level taxes on Income levied by USA

on the Income of Indian Resident where India has signed the tax treaty with USA only in respect of Federal Taxes.

Q.261 What are the provisions applicable in case of conflicts between the general provisions of the Act and special provisions of Tax Treaties?

A.261 It is now very well settled that the provisions of Double Tax Avoidance Agreements override the general provisions of the taxing statutes of a particular country. Moreover, with the retrospective insertion of section 90(2) in the Income-tax Act, it is now clear that assessee has an option of choosing to be governed either by the provisions of a particular DTAA or the provisions of the Income-tax Act, whichever are more beneficial to him.

The CBDT had issued a Circular No. 333 [F.No. 506/42/81-FTD], dated April 2, 1982 – [1982] 137 ITR (St.) 1 stating that where a Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Act. Where there is no specific provision in the agreements, it is the basic law, i.e., the Income-tax Act that will govern the taxation of income.

In *CIT v. Davy Ashmore India Ltd. [1991] 190 ITR 626*, the Calcutta High Court explained the CBDT's Circular No. 333 as follows :

"In our view, the circular reflected the correct legal position in as much as the convention or agreement is arrived at by the two contracting Governments in deviation from the general principles of taxation applicable to the Contracting States; otherwise, the double taxation avoidance agreement will have no meaning at all." (p. 632)

The following decisions of High Courts may also be referred on this point:

— *CIT v. VR. S.R.M. Firm [1994] 208 ITR 400 (Mad.)*

— *CIT v. R. M. Muthaiah [1993] 202 ITR 508/67 Taxman 222 (Kar.)*

— *Arabian Express Line Ltd. of United Kingdom v. Union of India [1995] 212 ITR 31 (Guj.)*

— *CIT v. Hindusthan Paper Corpn. Ltd. [1994] 77 Taxman 450 (Cal.)*

— *CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146/15 Taxman 72 (AP)*

— *Advance Ruling A. No. P-11 of 1995 In re [1997] 228 ITR 55, (AAR).*

— *Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*

— *CIT v. P.V.A.L. Kulandagan Chettiar [2004] 137 Taxman 460 (SC)*

— *CIT v. AV. M. Nazimuddin [2003] 131 Taxman 515 (Mad.)*

— *DCIT v. Turquoise Investment & Finance Ltd. [2008] 168 Taxman 107 (SC)*

— *CIT v. M. R. M. Plantations (P.) Ltd. [2016] 72 taxmann.com 246 (Madras)*

As an exception to the principle that the tax treaty provisions have an overriding effect, section 90(2) inserted by the Finance (No. 2) Act, 1991 operative with effect from April 1, 1972 provides that the provisions of the Act shall apply to the extent they are more beneficial to the assessee. The CBDT has explained the provision in its Circular No. 621, dated September 19, 1991 – [1992] 195 ITR (St.) 154 as follows :

"43. Tax treaties generally contain a provision to the effect that the laws of the two Contracting States will govern the taxation of income in the respective States except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a lower than what has been provided in the tax treaty.

Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage *vis-à-vis* other taxpayers, section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial." (p. 187)

The Act has provided for exemption from income-tax in respect of the following income:

(i) Dividend declared, distributed or paid as referred to in section 115-O by domestic company on or after April 1, 2003, whether out of current or accumulated profit. The exemption is available with effect from the assessment year 2004-05 – Section 10(34) upto ₹ 10 lakh in case of Residents alone.

(ii) Income received in respect of units from the Unit Trust of India established under the Unit Trust of India Act, 1963 – Section 10(35).

(iii) Income received in respect of the units of a mutual fund as notified by the Central Government under section 10(23D) of the Act – Section 10(35)

(iv) Long Term Capital Gain arising on the transfer of equity shares in a company or units of an equity oriented fund or units of business

trust which are chargeable to Securities Transaction Tax – Section 10(38) upto A.Y. 2018-2019.

(v) Any specified income from the notified international sporting event held in India arising to notified persons, subject to conditions.

In view of the provision of section 90(2), the abovementioned income earned by the non-resident Indians and foreign nationals will not be taxable since the more beneficial domestic tax provisions will override the provisions of the tax treaty to the contrary, if any.

To conclude, it is well settled that the tax treaty is not a charging provision. It is intended to avoid double taxation and cannot impose additional tax liabilities. Therefore, if there is no tax liability because of exemptions, income cannot be subjected to tax under the tax treaty.

In the case of *Prashant Kumar Gulati v. ITO [2014] 50 taxmann.com 415*, Pune Tribunal it was held that where assessee claimed benefit of Article 13 of DTAA between India and UAE in respect of LTCG earned on sale of securities, he was entitled to benefit of DTAA, as per un amended Article 13 irrespective of he having not paid tax in UAE. Similarly, in the case of *ITO v. Birla Sunlife Management Co. Ltd [2010] 3 taxmann.com 782*, Mumbai Tribunal held that the expression 'liable to tax' in contracting State as used in article 4(1) does not necessarily imply that person should actually be liable to pay tax in that contracting State, it is enough if other contracting State has a right to tax such person, whether or not such a right is exercised.

Also see decisions of Authority for Advance Ruling in *Mohsinally Alimohammed Rafik v. CIT [1995] 213 ITR 317/79 Taxman 75 (AAR-New Delhi)* and *Dr. Rajnikant R. Bhatt v. CIT [1996] 222 ITR 562/89 Taxman 82 (AAR-New Delhi); ADIT v. Green Emirate Shipping & Travels (2006) 100 ITD 203 (Mumbai Tribunal). General Electric Pension Trust (2006) 150 Taxman 545 (AAR New Delhi).*

Q.262 Is there any tax relief in cases of assessees having incomes in the countries with which India does not have a tax treaty?

A.262 In such cases, section 91 of the I.T. Act grants unilateral relief of tax on income which is taxed twice; i.e., once in the State of Residence and again in the State of Source. The assessee shall be entitled to the deduction from the Indian income tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is lower, or at the Indian rate of tax if both the rates are equal.

Q.263 Whether Double Non-Taxation is possible?

A.263 The assessee has to prove that he has income in one country and is assessed in another country to be eligible to the relief under Double Tax Avoidance Treaty. In the case of *Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706*, the Supreme Court dealt with the subject in detail including a reference to commentary by Klaus Vogel. For the purpose of determination of residence, "place of effective management" test has to be applied if the company is found resident of both the countries. The general principle of tax avoidance has prevailed and held that the tax payer is entitled to so adjust his affairs as to reduce tax burden to minimum and thereby approved treaty shopping. It overruled the contrary decisions in the case of *Cyril Eugene Periera, In re (1999) 239 ITR 650 (AAR)*. However, the Income Tax Department succeeded in the case of *Abdul Razak A. Meman, In re (2005) 276 ITR 306 (AAR).* AAR in this case ruled that i) the "person" means a body corporate as defined in Article 2(4), UAE Tax Decree of 1969 and therefore individual is excluded from the definition of person ii) that the person must be liable to tax iii) that there was no provision in UAE Tax Decree to tax the income of individuals and hence the individual was not a tax entity under UAE Tax Decree and cannot avail of the benefits of Articles 10, 11 and 13 of DTAA. Similar view has been taken in the case of *Sedco Forex International Inc. v. CIT (2005) 279 ITR 1* by Uttranchal High Court.

Bombay High Court in the case of *Jt. CIT v. Digital Equipments India Ltd. (2005) 277 ITR (AT) 15 (Mum)*. Double Taxation is the pre-condition for tax credit, i.e., income is taxed in both the countries. The agreement normally provides for set-off of lesser tax on the twice taxed income in the country of residence of the assessee. Since there was no tax liability in India in respect of the relevant income, the taxes paid in USA cannot be given credit for.

Q.264 What are the methods of granting relief in case of Double Taxation?

A.264 In a situation where the same income is taxed twice, i.e., once in State of Residence and again in the State of Source, there are two methods of elimination of double taxation which are as under:

1. Exemption method

   a) <u>Full exemption method</u> - Under this method, the State of Residence fully exempts the income earned by a tax payer in the State of Source. For eg: DTAA signed by India with Brazil provides for full exemption with respect to dividend income.

   b) <u>Exemption with progression</u> - Though exemption is given by the State of Residence, the income will have to be considered for the purpose of determining rate of tax which would be

required to be applied on other taxable income. For e.g. DTAAs entered into by India with Greece, Austria etc.

2. Credit method

a) Full credit - Under this method the State of Residence will provide full credit for the entire amount of tax paid in the State of Source. For eg: DTAA signed by India with Namibia.

b) Ordinary credit - The State of Residence will provide credit for the tax paid in State of Source but only to the extent of the incremental tax liability due to inclusion of such income in the total taxable income in the State of Residence. Therefore, if the tax paid in State of Source is higher than the tax liability on the same income in State of Residence, the assessee will lose out on such excess amount paid in State of Source. If the tax paid in Sate of Source is lower than the tax liability on the same income in the State of Residence, the assessee will be required to pay the incremental tax in the State of Source. This method is often preferred by India in most of its DTAAs for e.g.: USA, UK etc.

c) Tax sparing method - Tax sparing is also referred to as deemed tax credit. It consists of granting a tax credit in the State of Residence, for the amount of tax that would have been paid in the State of Source had there been no exemption or concession under the domestic law of State of Source. Thus, tax incentives offered by State of Source are deemed to have been paid as a foreign tax for the purpose of computing FTC to be granted by State of Residence. India has conditional tax sparing clause in various DTAAs with Australia, Belgium, Cyprus, Canada, Mauritius, Singapore etc.

E.g. Mr. X earns income from State of Residence and State of Source as under:

Income from State of Residence	₹ 4,00,000
Income from State of Source	₹ 1,00,000
Total Income	₹ 5,00,000
Tax Liability in State of Residence is assumed to be as under	
30% up to ₹ 1,00,000 &	₹ 30,000
35% above ₹ 1,00,000	₹ 1,05,000
	₹ 1,35,000
Tax Liability in State of Source @ 40% on income	₹ 40,000

The taxation under various methods of elimination of double taxation will be as under:

1. (a) Full exemption method :

Assuming that the State of Residence levies tax only on income from State of Residence; i.e., domestic income and exempts the income earned in the State of Source, then the tax on domestic income will be ₹ 1,35,000/- and there will be no tax on income earned in the State of Source. May be that State of Source may levy tax on the income earned there at their respective tax rates. Thus, the double taxation of the same income is eliminated.

1. (b) Exemption with progression

In the example given herein above, the State of Residence levies tax on domestic income @ 35% on income above ₹ 1,00,000/-, the rate of slab, therefore, under this method maybe applied @ 35% on foreign income of ₹ 1,00,000/-. The tax, therefore, will be ₹ 35,000/-. Thus, there is a partial exemption.

2. (a) Full credit method :

Total Income	₹ 5,00,000
Income from State of Source	₹ 1,00,000
Tax Liability in State of Source	₹ 40,000
Tax Liability in State of Residence	₹ 1,70,000
Less: Credit Available in State of Residence	₹ 40,000
Net Tax Liability in State of Residence	₹ 1,30,000

2. (b) Ordinary Credit method :

Total Income	₹ 5,00,000
Income State of from Source	₹ 1,00,000
Tax Liability in State of Source	₹ 40,000
Tax Liability in State of Residence	₹ 1,70,000
Less: Credit Available in State of Residence (35% of ₹ 1,00,000)	₹ 35,000
Net Tax Liability in State of Residence	₹ 1,35,000

2. (c) Tax sparing method :

Assuming that Mr. X has tax free income of ₹ 40,000/- in the State of Source. In that case, a deemed tax credit for ₹ 16,000/- (40% of ₹ 40,000/-) will be granted by the State of Residence.

Q.265 Are there any provisions under which NRIs can have certain transactions, which have been undertaken or proposed to be undertaken, decided in advance so as to avoid future litigations and uncertain tax liabilities?

A.265 Yes there is chapter XIX B (Sections 245N to 245V) prescribing the scheme of advance ruling so as to enable the assessee to get ruling or determination in advance avoiding future litigations and uncertain tax liabilities.

Advance ruling under this chapter means:

A. A determination by advance ruling authorities in relation to a transaction already undertaken or proposed to be undertaken by a Non-Resident applicant;

B. A determination by advance ruling authority in relation to the tax liability of a Non resident arising out of transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non resident;

C. A determination by advance ruling authority in relation to the tax liability of a resident applicant arising out of transaction which has been undertaken or is proposed to be undertaken by such applicant including determination of any question of law or of facts;

D. A determination or decision by advance ruling authority in respect of issues relating to computation of total income which is pending before any income tax authority or Appellate Tribunal including any question of law or facts relating to computation of total income;

E. A determination or decision by the Authority whether an arrangement, which is proposed to be undertaken by any person being a resident or a non-resident, is an impermissible avoidance arrangement as referred to in Chapter X-A or not (i.e. provisions relating to GAAR).

A Non-Resident who has undertaken or proposes to undertake transaction or a resident who has undertaken or proposes to undertake a transaction with a non-resident or a resident falling within notified class or category of persons can make application to the advance ruling authority (AAR).

The relevant forms are 34C, 34D, 34DA, 34E and 34EA, all in quadruplicate, respectively. The prescribed fee is ranging from ₹ 10,00,000/- to ₹ 5,00,000/- depending upon the category of applicant and category of case. The same has to be paid *via* Demand Draft in favour of "Authority for Advance Rulings" payable at New Delhi.

Application can be withdrawn by the applicant within 30 days from the date of application.

The authority shall not allow the application where the question raised in the application:

i) Is pending before Income Tax Authority, Appellate Tribunal or any Court

ii) Involves determination of fair market value of any property

iii) Relates a transaction designed *prima facie* for avoidance of Income Tax except in the case of resident assessee falling within notified class or category of person

The authority is required to pronounce its advance ruling within 6 months of the date of receipt of application. The special feature of advance ruling is that it is binding on the applicant, the commissioner and the income tax authority subordinate to him only in respect of transaction for which the ruling is sought. The Income Tax Authority or the Appellate Tribunal are barred to decide any issue in respect of which an application has been made.

Q.266 Who are required to obtain Income Tax Clearance Certificate while going abroad?

A.266 Section 230(1) of the I.T. Act provides that any person who is not domiciled in India and who has come to India in connection with business, profession or employment and who has derived income from any source in India shall not leave India unless he furnishes to the authority an undertaking in Form 30A from his employer or his payer of income to the effect that the tax payable by such person shall be paid by the employer or the person through whom such income is received by him. The prescribed authority shall on receipt of such undertaking immediately give to such person a no objection certificate in Form 30B for leaving India.

However, the above provision shall not apply to a person who is not domiciled in India but visits India as a foreign tourist or any purpose not connected with business, profession or employment.

Section 230(1A) provides that every person who is domiciled in India at the time of his departure from India shall furnish in Form 30C to Income Tax Authority his permanent account number allotted to him under section 139A, the purpose of his visit and an estimated period of stay abroad. However, in the opinion of income tax authority it is necessary for such person to obtain the certificate under this section he shall not leave the territory of India unless he obtains a certificate from income tax

authority that either there are no tax liabilities, or he has made satisfactory arrangement for payment of such taxes.

Liabilities herein shall mean liabilities to taxation outstanding on the date of departure or at the best liability with reference to the date of departure as held in *Laura Hamilton v. V. K. P. Menon, TRO (1990) 184 ITR 252 (Bom).*

Q.267 What are the provisions regarding transfer pricing applicable to Non-Residents?

A.267 The relevant sections are sections 92, 92A, 92B, 92C, 92CA, 92D, 92E, 92F. The scheme in brief regarding transfer pricing is that any income arising from an international transaction shall be computed having regard to the arm's length price (ALP). In case international transaction consists only of outgoing, the allowance for such expense or interest arising from international transaction shall also be determined having regard to ALP. The international transaction must be between two or more associated enterprises, at least one of whom must be a non-resident.

Once the transaction gets covered within the meaning of international transaction, then the party to it must take care to establish that the transaction is at arm's length price. Computation or arm's length price should be based on most appropriate method. The initial burden of maintaining the records and selecting the most appropriate method is on the tax-payer and therefore he would be required to justify the selection of method and applicability of the same.

Further, section 92C provides that if during the course of any proceeding for the assessment of income, the assessing officer on the basis of material or information or document in his possession, is of the opinion that arm's length price is not determined as provided under the transfer pricing regulations, then he may proceed to determine the arm's length price. Once the assessing officer determines arm's length price which is different then the arm's length price of tax-payer, then the total income maybe recomputed by substituting the arm's length price determined by the assessing officer. The taxpayer shall be given opportunity of being heard before the income is recomputed.

Vide Notification No.50/2017 dated 9-6-2017, CBDT has notified that where the variation between the arm's length price determined under section 92C of the Act and the price at which the international transaction has actually been undertaken does not exceed 1% of the latter in respect of wholesale trading and 3% of the latter in all other cases, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price for A.Y. 2017-2018 and A.Y. 2018-2019.

Attention is invited to CBDT Instruction No. 3 of 2016 dated 10-3-2016 (which replaces the earlier Instruction no. 15/2015 dated 16-10-2015 and Instruction No. 03/2003 dated 20-5-2003) under which guidelines is given for selection of the case by the Assessing Officer for making reference to the Transfer Pricing Officer. The same is now based on risk parameters instead of aggregate value of international transaction. However, before making a reference to the TPO, the AO shall seek the approval of the Commissioner or Director as contemplated under the Act. The role of the TPO shall be limited to determination of ALP in relation to international transactions referred to him by the AO.

A proviso has been added to section 153 and section 153B under which the time limit for completion of assessment or re-assessment is increased by 12 months.

Q.268 What is Safe Harbour Rules?

A.268 The Finance (No. 2) Act 2009 introduced section 92CB wherein CBDT was given powers to make rules for safe harbour i.e. circumstances in which the income tax authorities will accept the transfer price declared by the assessee.

The Ministry of Finance *vide* Notification dated 18-9-2013 inserted Safe Harbour Rules ("SHR 2013") by way of Rule 10TA to Rule 10TG in the Income-tax Rules, 1962. The Rules provide minimum operating profit margins in relation to operating expenses, a taxpayer is expected to earn for certain categories of international transactions, that will be acceptable to the income tax authorities as arm's length price (ALP). The rule also provides acceptable norms for certain categories of financial transactions such as intra-group loans made or guarantees provided to non-resident affiliates of an Indian taxpayers. The Safe Harbor Rules, optional for a taxpayer, contains the conditions and circumstances under which norms/ margins would be accepted by the tax authorities and the related compliance obligations. The Safe Harbour Rules are not arm's length prices, but in the nature of presumptive taxation, which generally enthuse taxpayers to opt for the same, as a compromise for not having to be involved in protracted litigation. It typically includes a premium payable by taxpayers for avoiding disputes and protracted litigations.

The transfer price contained in the Safe Harbour Rules shall be applicable for five years beginning from financial year A.Y. 2013-2014. However, SHR 2013 received a tepid response from taxpayers due to perceived high margins and ambiguity in the classification of services. Therefore, CBDT revised the existing Safe Harbour Rules ("SHR 2017") *vide* notification dated 7-6-2017 which would apply from A.Y 2017-2018 till A.Y 2019-2020.

The earlier SHR 2013 were applicable from A.Y 2013-2014 till A.Y 2017-2018. For A.Y 2017-2018, the taxpayer has the option to choose from old rules or new rules whichever is more beneficial. In general, the amended rules seek to make the safe harbor rules more attractive for eligible taxpayers with the objective of reducing TP litigation.

Where a taxpayer's transfer price is accepted by the Tax Authority under the Safe Harbour Rules, the taxpayer shall not be entitled to invoke the mutual agreement procedure (MAP) under an applicable tax treaty.

Any taxpayer who has entered into an eligible international transaction and who wishes to exercise the option to be governed by the Safe Harbour Rules is required to file Form 3CEFA. Form 3CEFA requires the taxpayer to declare the following:

- Transaction entered with an AE is an eligible international transaction;
- Quantum of the international transaction;
- Whether the AEs country or territory is a no tax or low tax country or territory; and
- Operating profit margin/transfer price.

Q.269 What are the provisions of Advanced Pricing Agreement?

A.269 An APA is an agreement between a taxpayer and tax authority determining the transfer pricing methodology for pricing the taxpayer's international transactions for future years. Advance Pricing Agreement (APA) provisions were introduced in the I.T. Act w.e.f. 1-7-2012. The rules in respect of the APA scheme have been notified by the CBDT by way of insertion of Rule 10F to Rule 10T and Rule 44GA in the Income-tax Rules, 1962. The APA scheme endeavours to provide certainty to taxpayers in the domain of transfer pricing by specifying the methods of pricing and setting the prices of international transactions in advance. Since its inception, the APA scheme has been well-accepted by taxpayers and that has resulted in more than 800 applications (both Unilateral and Bilateral) being filed so far in five years.

As per Section 92CC of the I.T. Act the Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person, determining the arm's length price or specifying the manner in which arm's length price is to be determined, in relation to an international transaction to be entered into by that person. Such an agreement will be valid for five consecutive previous years. Such an agreement entered into will be binding on (a) the assessee and the

transaction in which case the agreement has been entered into; and (b) on the Principal Commissioner or Commissioner and the income-tax authorities subordinate to him, in respect of the said assessee and the said transaction. It should be noted that such an agreement shall not be binding if there is a change in law or facts having bearing on the agreement so entered.

Finance Act 2014 w.e.f. 1-10-2014 introduced roll back provisions i.e. Roll back is available for the roll back years, and a 'roll back year' has been defined to mean any previous year falling within the period of four previous years, preceding the first previous year covered in the APA. For e.g. If the applicant files an APA application on or before 31st March 2015 covering a period of upto 5 years from financial year (FY) 2015-16 to FY 2019-20 and applies for a roll back, the roll back years can cover the period from FY 2011-12 to FY 2014-15. For the roll back years, the agreement may provide for determining the ALP or specify the manner in which ALP shall be determined.

In the case of *Ranbaxy Laboratories Ltd. v. ACIT [2016] 68 taxmann.com 322 (Delhi Tribunal)* it was held that where the assessee had entered into APA with CBDT and CBDT had principally approved concept of overseas AEs adopted as tested party and availability of data for past year was also on similar lines as suggested in APA, provisions for comparability analysis in APA could be rolled back for past years thereby accepting overseas AEs as tested party being least complex of transacting entity.

The Board may, with the approval of the Central Government declare an agreement to be void *ab initio*, if it finds that the agreement has been obtained by the person by fraud or misrepresentation of facts. Upon declaring the agreement void *ab initio*, all the provisions of the Act shall apply to the assessee as if such agreement had never been entered into and in calculating any period of limitation under the I.T. Act, the period beginning from the date on which agreement is entered into till the date of order declaring the agreement void *ab initio* (minimum of 60 days) will be excluded.

The progress of the APA scheme strengthens the Government's resolve of fostering a non-adversarial tax regime. The Indian APA programme has been appreciated nationally and internationally for being able to address complex transfer pricing issues in a fair and transparent manner including a mechanism for the bilateral APA if one were to consider transfer pricing provisions of the state where AE is located.

Q.270 What are the provisions regarding Dispute Resolution Panel applicable to Non-Residents?

A.270 The Dispute Resolution Panel (DRP) under the I.T. Act is an Alternative Dispute Resolution (ADR) mechanism for resolving the disputes relating to Transfer Pricing in International Transactions. The subjects of transfer pricing audit and the taxation of foreign company were at nascent stages in India during that time. Often the Assessing Officers and Transfer Pricing Officers took a conservative view. The correction of such view took a very long time with the existing appellate structure. Flow of foreign investment is extremely sensitive to prolonged uncertainty in tax related matter. Therefore, in the Finance (No. 2) Act, 2009, an alternative dispute resolution mechanism was introduced to facilitate expeditious resolution of disputes in a fast track basis.

Prior to the formation of DRP the assessee had to approach the Commissioner of Income Tax Appeal [CIT (A)] against the Assessment Order if the assessee wanted to raise objections against the Assessment Order. However, after the formation of DRP the assessee has an additional option to approach DRP on the basis Draft Order issued by AO. (As clarified by CBDT F. No. 142/22/2009-TPL(Pt. II) dated 20-1-2010).

Section 144C (Reference to DRP) has been inserted in Chapter-XIV of the I.T. Act. Assessee under section 144C refers to a Foreign Company and any person in whose case the Assessing Officer proposes to make any variation in the income or loss stated in the return filed by such person, as a consequence of the order passed by the Transfer Pricing Officer under Section 92CA(3) of the I.T. Act. All the issues of variation will have to be addressed by the DRP although one of the aspects of the variation only is in respect of Transfer Pricing.

DRP is acting on the draft order upon appeal by the assessee and hence it is a mechanism to appeal without making any payment of taxes due to variations proposed in the draft order and an efficient method to approach Income Tax Appellate Tribunal as appeal against the order of DRP is provided before the ITAT.

The Dispute Resolution Panel is a collegium of three Commissioners of Income Tax to be constituted by the Board (CBDT). Appeal against an Assessment Order passed in pursuance of the directions of DRP can be filed only before the Appellate Tribunal in Form No. 36B, and not before the Commissioner (Appeals). The orders of the Tribunal can be challenged before the High Court and Supreme Court as in respect of other orders of the Tribunal.

Where the Assessing Officer proposes to make any variation in the returned income or loss prejudicial to an eligible assessee he must first forward a draft assessment order to such an assessee. The eligible assessee has the option to either accept the proposed variations or file objections against these before the DRP.

Where the assessee accepts the Draft Order or does not file objections within thirty days of its receipt, the AO is required to complete the assessment on the basis of the Draft Order within one month from the end of the month in which the acceptance is received or the period for filing of objections expires.

Where objections are filed by the assessee against the Draft Order the proceedings move over to the DRP. The DRP is then required to consider the Draft Order, the objections and the evidence furnished by the assessee, the relevant records, the report of the AO and the Transfer Pricing Officer etc, the evidence, and the results of any enquiry made or caused to be made by the DRP.

The DRP is required to give proper opportunity of hearing to the assessee and the AO. It can make further enquiries itself or through any income-tax authority. It has also been given powers of issuing summons etc under Section 131. The DRP is thereafter required to issue such directions, as it thinks fit, for the guidance of the AO to enable him to complete the assessment. It may confirm, reduce or enhance the variations proposed in the Draft Order. But it cannot set aside any proposed variation or issue any direction for further enquiry by AO for passing the assessment order. The decisions of the DRP are to be reached by majority.

The directions of the DRP are to be issued within nine months from the end of the month in which the Draft Order was forwarded to the eligible assessee. These are binding on the AO, who has to complete the assessment in conformity with the directions within one month from the end of the month in which such directions are received. No further opportunity of hearing needs to be given to the assessee by the AO. The time limit for completion of assessment in Section 153 have been amended accordingly.

A Division Bench of Hon'ble Bombay High Court, while deciding the Writ Petition filed by *Vodafone India Services Pvt. Ltd. v. Union of India and Others (Writ Petition No.1877 of 2013 39 taxmann.com 201)* directed Vodafone India Services Pvt. Ltd (wholly owned subsidiary of Mauritian Entity Vodafone TeleServices (India) Holdings Ltd.) to approach the Dispute Resolution Panel (DRP) to submit objections to the Income Tax Department's demand of INR 1,300 crore and made the following observation with regards to DRP "The proceeding before the DRP is not an

appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assessee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appealable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing Officer under Section 144C(5). The DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order (draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP."

Q.271 Does the DRP have the power to enhance the additions made by the Assessing Officer?

A.271 Yes. The following are the powers of the DRP which includes power of enhancement.

Section 144C(8) states that the DRP may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction for further enquiry and passing of the assessment order. The power of the DRP to enhance the variation shall include the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

In the case of *Hamon Shriram Cottrell Pvt Ltd v. ITO [2013] 34 taxmann.com 162 (Mumbai Tribunal)* it was held that in case of a reference made by assessee seeking relief against proposed transfer pricing adjustment, DRP has the power to even enhance said amount of adjustment made by Assessing Officer pursuant to TPO's order.

The DRP also has the power to consider additional evidence filed by the assessee. In the case of *Bekaert Industries Pvt. Ltd. v. ACTI [2018] 94 taxmann.com 120 (Pune Tribunal)* it was held that the assessee after receiving draft assessment order in which transfer pricing adjustments are proposed, is empowered to file additional evidence before DRP, and the DRP has power to consider evidences furnished by assessee, and after considering additional evidence, DRP has to comment upon same and dispose of objections of eligible assessee.

In the case of PGS Geophysical as *[Successor of PGS Exploration (Norway) AS] v. Addl. CIT [2014] 50 taxmann.com 392 (Delhi Tribunal)* it was held that in terms of provisions of section 144C(8), DRP does not have power to set aside any proposed variation in draft assessment order and issue

direction for further enquiry. The statute has provided sufficient powers to the DRP for considering all the material placed before it and equipped it with vast powers to conduct enquiry before issuing any direction to the Assessing Officer. The statute contemplates that after empowering the DRP, with such wide powers, the DRP shall give clear and speaking directions to the Assessing Officer for passing the assessment order and the Statute ensures that the said power is not delegated to the Assessing Officer.

Q.272 Explain the provisions of taxation in the cases of foreign embassy and/or consulates in India?

A.272 Remuneration received by an official of an embassy, high commission, legation, commission, consulate or the trade representation of a foreign state, or a member of the staff of any of these officials for service in such capacity is exempt. However, that the remuneration received as trade commission or other official representative in India of Government of a foreign state or as a member of the state of any of these official shall be exempt only if the remuneration of the corresponding officials or, as the case may be, members of the staff, if any, of the government resident for similar purposes in the country concerned enjoys a similar exemption in that country. The exemption is available provided that such members of the staff are subjects of the country represented and are not engaged in any business or profession or employment in India otherwise than as members of such staff. Refer section 10(6).

Q.273 What are the provisions under General Anti-Avoidance Rule (GAAR)?

A.273 GAAR is an anti-tax avoidance Rule of India.

(1) Introduction of GAAR

India also has taken a giant leap forward, in its fight against non-legitimate tax planning, by bringing into effect GAAR. As in other countries, in India also, it has been stated by the Government, that this is not a revenue raising but a deterrent measure. It is not to act as a weapon but as a shield. A promise is held that it would be used only against aggressive and blatant attempts to avoid tax.

The Finance Minister in his speech while introducing the Finance Bill, 2012 stated that GAAR is proposed to be introduced to counter aggressive tax avoidance schemes. GAAR has been introduced to curb "Impermissible Avoidance Arrangement (IAA)" entered into by a person to avoid taxes.

GAAR was initially introduced in the Direct Tax Code in 2009 which did not see the daylight. It was reintroduced in the I.T. Act by the

Finance Act, 2012 w.e.f. 1-4-2014 but later on pushed to 1-4-2016 by the Finance Act, 2013. Finance Act 2016 provided the effective date of GAAR provisions i.e., Chapter X-A from 1-4-2018.

(2) Provisions of GAAR under the I.T. Act

The substantive provisions relating to GAAR are contained in Chapter X-A (consisting of sections 95 to 102) of the I.T. Act. The procedural provisions relating to mechanism for invocation of GAAR and passing of the assessment order in consequence thereof are contained in section 144BA.

Section 95 of the Act is the basic section that provides for declaring an arrangement entered into by a taxpayer as an impermissible avoidance arrangement. It may be noted that section 95 of the Act overrules the entire Act and shall have operation notwithstanding anything contained in the Act. Even in cases where relief is available under Double Taxation Avoidance Agreement ('DTAA'), the tax payer will still be continued by the provisions of GAAR by virtue of section 90(2A) of the Act.

CBDT *vide* Circular No. 7 of 2017, dated 27-1-2017 further clarified that anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. In fact India-Singapore Tax Treaty provide for the GAAR under ITA to apply to the transaction even over Treaty provisions on the matter not covered by the Anti Avoidance provisions of the Tax Treaty.

Rule 10U of the Income-tax Rules, 1962 ('Rules') restrict applicability of GAAR only in cases where tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does exceed a sum of rupees three crore.

Section 96 states that an impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it—

(a) Creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) Results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

(c) Lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or

(d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.

Also, an arrangement shall be presumed impermissible, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.

Section 98 of the I.T Act state the consequences of GAAR and section 102 describes various definitions.

Q.274 What is Multilateral Instruments (MLI)?

A.274 As part of the Base Erosion Profit Shifting (BEPS Project) OECD was mandated to come out with Multilateral Instrument (MLI) which would avoid the task of modifying 3000 plus bilateral tax treaties. Recognizing the need to accommodate a variety of tax policies while implementing the tax treaty related BEPS measures, the MLI provides four different types of flexibility.

1. Choice which existing treaties will be modified by the MLI.
2. Options on how to meet the minimum standards on treaty abuse and dispute resolution.
3. Opting out from entirety or parts of provisions
    a. That do not reflect a minimum standard
    b. With respect to covered tax agreements that contain existing provision
4. Choice to apply optional and alternative provisions where there are alternative ways to address particular BEPS issues.

OECD has issued the text of MLI and Explanatory Statements which has been signed by 68 Countries on 7th June, 2017 including India at a ceremony held in Paris. A provisional list of expected reservations and notifications by each of the signatories has also been released.

The Indian Govt. Press Release on MLI signing says "It will not function in the same way as an amending protocol to a single existing treaty which would directly amend the text of the Covered Tax Agreement. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures." Further, the Principal CCIT of International Tax & Transfer Pricing Mr. Akhilesh Ranjan said "The MLI is

an innovation that is both audacious in its scope and full of promise for the future. It is a symbol of the new age of cooperation in international taxation."

Many of India's important treaty partners have signed the Multilateral Convention. These include the United Kingdom, Canada, Australia, Belgium, Finland, France, Germany, Cyprus, Singapore, Netherlands, Luxembourg, Japan, South Africa and Ireland. Key countries that have so far not signed the Multilateral Convention include the United States, Brazil, Ukraine and others. The Convention continues to remain open for signatures and more countries are expected to sign it.

Q.275 What is the global development on Multilateral Instruments (MLI)? What is the impact of Multilateral Instrument that India has signed with G20 and other countries on the operation/implementation of the existing Tax Treaty?

A.275 On 5th October 2015, the OECD released its final report on developing a multilateral instrument to modify bilateral tax treaties under its Base Erosion and Profit Shifting (BEPS) Action Plan (Action 15). On 24th November 2016, the OECD released the text of the MLI and explanatory notes. On 7th June 2017, 68 jurisdictions signed the MLI during a signing ceremony hosted by the OECD in Paris.

The MLI will not replace the existing treaties but will apply alongside them. It will apply only to those countries that have signed the MLI & will modify only those tax treaties which are notified by both the treaty partners. A signatory of the MLI has a choice to reserve its right, except for the mandatory minimum standards, for a provision of MLI not to apply to its CTA in their entirety or in part.

The MLI contains four types of provisions. A provision can have one of the following formulations: (i) "in place of"; (ii) "applies to"; (iii) "in the absence of"; and (iv) "in place of or in the absence of." A provision that applies "in place of" an existing provision is intended "to replace an existing provision" if one exists, and is not intended to apply if no existing provision exists. A provision that "applies to" provisions of a CTA is intended "to change the application of an existing provision without replacing it," and therefore may only apply if there is an existing provision. A provision that applies" in the absence of" provisions of a CTA is intended "to add a provision" if one does not already exist. A provision that applies "in place of or in the absence of" provisions of a CTA is intended "to replace an existing provision or to add a provision." This type of provision will apply in all cases in which all the parties to a CTA have not reserved their right for the entirety of an article to apply to its CTAs.

A treaty or agreement notified by a country while signing MLI is called a "Covered Tax Agreement (CTA)". India has notified 93 i.e., almost all of its tax treaties as CTA.

<u>Provisions of the MLI</u>

Article of MLI	Nature	Clause	Whether India has opted for it
Article 3	Transparent entities	This Article provides that income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax laws of either contracting jurisdiction shall be treated as an income of a resident of either contracting jurisdiction but only to the extent that income is treated as the income of a resident of that contracting jurisdiction. The provision is not a minimum standard and, hence, the application of the same can be opted out.	India has reserved its right to not apply this Article in its entirety.
Article 4	Dual resident entities	This Article provides that where a person other than an individual is resident of more than one contracting jurisdiction, the competent authorities of the contracting jurisdictions shall determine the residential status by mutual agreement procedure (MAP) taking into account its PoEM, place of incorporation or constitution, and any other relevant factors. It also provides that in the absence of any agreement between the jurisdictions, a dual resident entity (DRE) is not entitled to any relief or exemption from tax under the treaty except as may be agreed upon by the Contracting Jurisdictions.	India chooses to apply this provision and has notified 91 CTAs wherein treaty residence of a DRE will be determined on the basis of MAP. This MLI provision will be made applicable only if the other Contracting Jurisdiction agrees to apply this article. Presently, a majority of India's tax treaties use the PoEM test as a tie-breaker rule to determine treaty residence of a DRE

Article of MLI	Nature	Clause	Whether India has opted for it
		This Article will replace the "effective management" test generally followed in the bilateral tax treaties.	
Article 5	Application of methods for elimination of double taxation	Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation arising due to the resident state providing relief under the exemption method in respect of income that is not taxed in the source state.	India has made a reservation on non-applicability of Article 5 for all of its tax treaties. In general, most of India's tax treaties follow the credit method and, hence, the situation of double non-taxation on account of the exemption method is, generally, unlikely in the Indian context.
Article 6	Purpose of a CTA	As one of the minimum standards to address treaty shopping scenarios, it requires Contracting Jurisdictions to amend the title and preamble of the tax treaties to express the common intention of avoiding double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements	Adoption of the preamble of the MLI is a mandatory requirement and, as a result, India's tax treaties are likely to get modified to include the text of the preamble.
Article 7	Prevention of treaty abuse	As a minimum standard, this Article requires countries to implement at least one of the following anti abuse measures: (i) a Principal Purpose Test (PPT) alone; (ii) PPT plus either simplified or detailed Limitations on Benefits (LOB) Provision or (iii) a detailed LOB provision, supplemented by specific rules targeting conduit financing arrangements.	India has opted for (ii) i.e., PPT plus Simplified LOB.

Article of MLI	Nature	Clause	Whether India has opted for it
		Principle Purpose Test (PPT) has been introduced as a default test which provides that benefits under the CTA shall not be available if it is reasonable to conclude that obtaining that tax benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.	
Article 8	Dividend transfer transactions	Article 8 of the MLI stipulates satisfaction of the ownership condition throughout a minimum holding period of 365 days in order to claim exemption or lower withholding tax rate on dividend income. Contracting Jurisdictions can bilaterally agree to include the withholding rate and certain ownership threshold in their tax treaties for applying this Article.	India has made a reservation for Article 8 not to apply treaty with Portugal that already contains provisions with a minimum holding period longer than a 365 day have period.
Article 9	Capital Gains from alienation of shares or interests of entities deriving their value principally from immovable property	Article 9 of the MLI provides for indirect transfer taxation to tax the capital gains arising on account of alienation of shares/comparable interest of companies/other entities (such as partnership or trust) that derive more than a certain percent of their value (value threshold) from immovable properties. The taxation rights are provided to the country where such property is situated (i.e., the source country). It provides for two alternatives. (i) Specifies that where the value threshold is met at any time during the 365 days preceding the alienation (look-back period),	India has opted for (ii) in respect of all its CTA

Article of MLI	Nature	Clause	Whether India has opted for it
		the capital gains from the sale of shares or comparable interests shall be taxable in the source country. (ii) Is similar to (i) and additionally fixes a normative value threshold of more than 50% (i.e., share or comparable interest derives more than 50% of its value directly or indirectly from immovable property) for trigger of source taxation in this behalf.	
Article 10	Anti-abuse rule for Triangular PE	Article 10 contains the anti-abuse rule for PEs situated in third jurisdictions, the so-called "triangular provision." The Article provides that treaty benefits will be denied if an item of income derived by a treaty resident and attributable to a PE in a third jurisdiction, is exempt from tax in the residence state and the tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state if the PE were located there. The article makes an exception for cases where the income is derived in connection to or incidental to an active trade or business carried out through the PE and allows discretionary relief to be requested when treaty benefits are denied under this Article.	India has not made any reservation or notified any of its CTAs under Article 10.
Article 11	Application of tax agreements to restrict a party's right to tax its own residents	Article 11 contains a so-called "saving clause" rule that preserves a Party's right to tax its own residents.	India has not made any reservation or notified any of its CTAs under Article 11.

Article of MLI	Nature	Clause	Whether India has opted for it
Article 12	Artificial avoidance of PE status through commissionaire arrangements and similar strategies	It widens the scope of the types of arrangements that may be deemed PEs. This Article provides that a PE would be deemed to exist in a scenario where a person in a contracting jurisdiction is acting on behalf of an enterprise and in doing so, habitually concludes contracts or habitually plays the principal role leading to the conclusion of contract that are routinely concluded without material modification. It specifies that these contracts should be: a. In the name of the enterprise; b. For the transfer of ownership or the right to use property belonging to the enterprise; or c. For providing services by the enterprise. Above provisions shall not apply if the person acting on behalf of the enterprise does so in an independent capacity and in the ordinary course of business.	No reservations have been made by India in respect of this Article
Article 13	Artificial Avoidance of PE Status through the Specific Activity Exemptions	Article 13 provides two options for modifying preparatory and auxiliary PE exemption in line with the BEPS Action 7 final report. Option A provides that listed activities would qualify for a specific activity exemption only if such activity qualifies to be preparatory or auxiliary in character.	India has chosen option A and has notified all its 93 CTAs to apply the same. On the anti-fragmentation rule, India has not made any reservation for its application

Article of MLI	Nature	Clause	Whether India has opted for it
		Option B allows countries to retain the automatic exemption to listed activities, irrespective of the same being preparatory or auxiliary. This Option considers that these specifically listed activities are intrinsically preparatory or auxiliary and, therefore, there should be no need to subject these activities to the preparatory or auxiliary condition This Article contains a provision for adopting an anti-fragmentation rule which denies a specific activity exemption where the activities carried out by the foreign enterprise along with its closely related entities, at the same or another place, go beyond the preparatory or auxiliary nature.	
Article 14	Splitting-up of Contracts	Article 14 contains a provision for determining whether a specific time threshold as given in a tax treaty (for construction/installation/ supervisory or any PE provision in relation to similar activities/ projects which are based on a time threshold) is exceeded (30 days). The Article provides for aggregation of time spent on connected activities by closely related entities at the same project to determine the threshold.	India has neither made any reservation nor notified any CTAs in respect of the same.

Article of MLI	Nature	Clause	Whether India has opted for it
Article 15	Definition of a person closely related to an enterprise	A person shall be considered "closely related" to an enterprise if based on the all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises, if one possesses directly or indirectly more than 50% of the beneficial interest in the other (or, in the case of a company, more than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50% of the beneficial interest (or, in the case of a company, more than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.	Countries are only permitted to have a reservation for Article 15 if they have also a reservation on Articles 12(1), 13(4) and 14(1). Accordingly, India has not exercised its right of reservation with respect to Article 15, and all its treaties would stand modified to include this provision to the extent that its relevant treaty partner has also not made such reservation.
Article 17	Corresponding adjustments	One of the minimum standards under dispute resolution was that Contracting Jurisdictions were to provide MAP access in transfer pricing (TP) cases. As a complementing best practice, the MLI suggested that countries include the enabling provision of Article 9(2) of the OECD MTC in its CTAs, which provides that where a TP adjustment is made in one of the states, the other state shall provide corresponding adjustment. This obligation is not conditional on the existence of the enabling provision of Article 9(2) in CTAs,	India has opted to include the enabling Article 9(2) in its CTAs and this makes adoption of bilateral advance pricing agreements a possibility for India's CTAs if a similar position is adopted by the other Contracting Jurisdictions.

Q.276 What is the meaning of Liaison Office with reference to Foreign Companies?

A.276 The Liaison office generally means an office to carry out no activities of business in respect of buying, selling, concluding contracts etc. The Liaison office generally deals with trade inquiries, collecting and furnishing information, sample pertaining to business. The Liaison office does not generate income. Under such circumstances, the Liaison Office cannot be liable to tax as was held in the case of *Angel Garment Ltd. In re (2006) 287 ITR 341 (AAR)* and *Gutal Trading EST In re (2005) 278 ITR 643 (AAR).* Contrary decisions are found in the case of P.No.28 of 1999, *In re (2000) 242 ITR 208 (AAR)* and *UAE Exchange Centre LLC In re (2004) 268 ITR 9 (AAR).*

In the case of *Brown & Sharpe Inc v. CIT [2014] 51 taxmann.com 327* (Allahabad High Court) it was held that where activities of liaison office of foreign company included not only preparatory or auxiliary service but also marketing services, liaison office would be treated as Permanent Establishment of foreign company and its income would be taxable in India.

Q.277 Please explain as to how branch transaction are taxed ?

A.277 In case of non resident, head office expenditure is allowed in accordance with the provisions of section 44C. It is non obstante provision. Anything contrary contained in section 28 to 43A is not applicable. Deduction in respect of head office expenditure is restricted to lower of the following:

a) 5% of adjusted total income or

It is therefore predominantly in the nature of indirect expenses capable of attribution to Branch Business and hence most of the direct expenses of the branch may not come for attribution but allowed u/s. 37 of the ITA.

b) Head Office expenditure as attributable to business or profession of taxpayer in India.

In case adjusted total income is a loss, amount under clause a shall be 5% of average adjusted total income.

In the case of *CIT v. Emirates Commercial Bank Limited [2003] 262 ITR 55 Bom.* Section 44C places a cap on head office expenditure at 5% at the adjusted total income as defined in the explanation thereto while computing the income of Non-Resident attributable to activities in India. Section 44C cannot curtail the expenditure incurred by the branch office. The High Court held that the travel expenses incurred by the staff members of the Head Office on their visits to a branch has to be fully

allowed as that of the branch, since they had come exclusively for the work of the branch. Same was held in the case of *DIT (IT)-II Mumbai v. Oman International Bank S.A.O.G [2017] 80 taxmann.com 139 [Bombay High Court].*

Despite the cap u/s. 44C on the head office expenditure of a non-resident carrying on business in India, Bombay High Court in the case of *CIT v. Bank of America NT and SA [2003] 262 ITR 504* allowed the average expenditure.

In the case of *American Bureau of Shipping v. CIT [2003] 263 ITR 590* Bombay High Court held that the adjusted total income was NIL on account of loss suffered by the assessee. Therefore, the proviso to section 44C was attracted and deduction was restricted to 5% of the average adjusted total income as defined under explanation II.

In the case of *DIT (IT)-II Mumbai v. Oman International Bank S.A.O.G [2017] 80 taxmann.com 139* (Bombay High Court) held that expenses incurred on travelling of head office personnel of foreign bank who had travelled to various Indian branches were allowable under section 37(1) and section 44C would not apply in such case.

In the case of *Lloyd's Register Asia (India Branch Office) v. ACIT (ITAT Mumbai) [2015] 58 taxmann.com 58 (Mumbai-Trib.)* it was held that Licence fees and management service fees paid by assessee and Indian branch to its UK Head Office does not fall in nature of Head Office expenses hence, could not be disallowed under section 44C.

The Mumbai Tribunal in the case of *Addl. DIT (I.T.) v. Bank of Bahrain & Kuwait Kuwait [2011] 44 SOT 693/9 taxmann.com 309* held that the exclusive expenses incurred by the head office for Indian branch are outside the purview of section 44C and only common head office expenses are governed by this section.

Q.278 Whether interest paid by Indian Branch (PE) to its Foreign Head Office is liable to tax in India in hands of the Head Office and whether the same is deductible as expense for the India Branch (PE)?

A.278 In the case of *ABN Ambro Bank NV v. CIT [2012] 343 ITR 81 (Calcutta High Court),* the assessee was a Netherlands Company having its principal branch office in India, which remitted substantial funds to it as payment of interest. The issue which arose was whether interest payment by Indian Branch to HO was to be allowed as a deduction in computing the profits of the assessee's branch in India and whether there was any requirement of deduction of TDS on such interest payment made.

The High Court had held that as per section 90 of ITA, a more beneficial provision amongst the rival provisions in the tax treaty and the Act would apply to the assessee. As per Article 5(2) of the tax treaty 'permanent establishment' includes branch. As per Article 7 of the tax treaty the permanent establishment or the branch is to be treated as a separate unit. Article 7(2) specifically states that it is to be considered as a distinct and separate enterprise and its profits are to be so computed, as profit properly attributable to such a permanent establishment. In the calculation of such profit by banking enterprise, interest paid can be taken as a deduction by virtue of Article 7(3), read with Article 11(7). Therefore, it was held that as far as the remittance of interest is concerned, neither could the permanent establishment nor could the branch and the head office be treated as one entity for the purpose of deduction of tax under section 195 of the Act.

The High Court also stated that the word 'chargeable' as used in Section 195 is not to be taken as qualifying the phrase 'any other sum' only but it qualifies the word 'interest' also. Therefore, in case where the remittance of interest results in an income which is chargeable under the Act, in those circumstances, tax may be deducted at source. But where the interest is not so chargeable under the Act, no tax is required to be deducted. In the instant case, by virtue of the Convention, the head office of the assessee was not liable to pay any tax under the Act. Therefore, there was no obligation on part of the assessee's Indian branch to deduct tax while remitting interest income to its head office or any other foreign branch. As a result, if no tax was deductible under section 195(1) and section 40(a)(i) would not come in the way of the assessee claiming such deduction from its income.

Therefore, the assessee would be entitled to deduct such interest paid, as permitted by the Convention or Agreement, in the computation of its income.

In the case of *Sumitomo Mitsui Banking Corporation v. DDIT [2012] 19 taxmann.com 364*, it was held that where an Indian branch of a foreign bank pays interest to head office and other overseas branches of said foreign bank, on advances received by it, said interest is neither deductible in hands of Indian branch nor chargeable to tax in hands of head office and overseas branches, all being single entity.

Considering the above and in order to provide certainty, Finance Act, 2015 amended section 9 as under:

Explanation to section 9(v)(c) of the Act was inserted which stated that *"in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment*

or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly."

Also section 195(6) has been amended w.e.f. 1-6-2015 which states that *"the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed."*

Therefore, where any branch in India makes interest payment to the HO, it will be liable to deduct TDS at the time of remittance.

Particulars	**Pre-amendment**		**Post-amendment**
	Non-Treaty scenario	**Favorable Treaty scenario**	**Treaty as well as non-treaty scenario**
Income of PE in India	100	100	100
Less: Interest payment to HO			
(as per the DTAA, without withholding of tax)	NIL	20	20
Taxable income of the PE in India	100	80	80
Income of the HO	NIL	NIL	20

Q.279 What is FATCA? How will the same impact Non-Resident Indians residing in USA?

A.279 FATCA stands for Foreign Account Tax Compliance Act which was enacted in USA in 2010 to curb tax evasion by the US persons through the use of offshore financial accounts. India has entered into Inter Governmental Agreement (IGA) with the USA in July 2015 which will enable the Indian tax authorities to automatically receive information of Indian residents who have stashed assets in foreign participating jurisdictions. This exchange of information is reciprocal, and India also needs to provide information to other participating jurisdictions about their residents holding assets in India.

For implementation of FATCA and CRS in India, necessary legislative changes have been carried out in the I.T. Act and the I.T. Rules so as to collect and provide relevant information to the foreign tax authorities. Rules 114F to 114H and Form 61B were inserted by Notification No. 62/2015 dated 07.08.2015 to provide a legal basis to the Reporting Financial Institutions (RFI) for maintaining and reporting information about the Reportable Account. The due date for filing of Form 61B for the calendar year 2018 is 31st May, 2019.

Process of Reporting under FATCA (Foreign Account Tax Compliance Act) and CRS (Common Reporting Standard) is as under;

1. Identifying a Reporting Financial Institution (RFI)
2. Reviewing the Financial accounts of RFI
3. Identifying the Reportable Accounts by applying due diligence rules
4. Report the relevant information in respect of identified Reportable Accounts in Form 61B

FATCA is applicable to US taxpayers which include US citizens (Individuals of Indian origin who are US citizens having assets in India), US residents (green card holders) and non-residents who own foreign financial accounts or other offshore assets.

For identifying foreign bank or investment accounts, you are considered a US person if one or more of these criteria apply to you, US Citizenship, Lawful permanent resident (green card) status, US birthplace, US residence address or a US correspondence address including a US PO box, Standing instructions to transfer funds to an account maintained in the US or directions regularly received from a US address, An 'in care of' address or a 'hold mail address' that is the sole address with respect to the client or a power of attorney or signatory authority granted to a person with a US address.

Like any other US citizen, non-resident Indians too living in US and having investments and assets in India are required to declare details of their earnings in India and pay tax thereon to the US government according to the laws of that country. Even if the income is earned in India and is exempt from income tax in India as per the Indian tax laws, it may not be tax free in US and it may be subject to local taxes. Under the new enactment, the IRS of US will get these details directly from the Indian government.

From January 2016, it is mandatory for all Indian and NRI investors (existing and new) to file a FATCA self-declaration. While the details might

be slightly different with each financial institution, the common info they mandate are:

a. Name

b. Permanent Account Number (PAN)

c. Address

d. Place (city/state) of birth

e. Country of birth

f. Nationality

g. Gross Annual Income

h. Occupation

i. Whether the resident of another country? If yes, then the country of residence, Tax ID number, and type

The declaration specifically asks to include the USA as a country of residence if you are a US citizen or a green card holder. This holds true even if you have moved to India and are now an Indian resident.

Q.280 Kindly explain the concept of International Taxation?

A.280 (1) Most of the countries have their own domestic tax laws defining the meaning of income, expenditure, various exemptions and deductions, rates of taxations, rights and obligations of the taxpayers and tax gatherers etc. However, with the concept of global village coming in play on a very large scale, volumes in cross border transactions in respect of goods, services, technology transfer, capital transfer and movement of personnel have increased tremendously. Consequently, International Taxation has gathered a lot of importance. Thus, International Taxation deals with the determination of income and the right of different countries to tax it. It also eliminates the income being taxed twice i.e., once in the Country of Residence and again in the Country of Source. Many countries have introduced transfer pricing provisions with the result that there is no escapement of income from being taxed.

(2) Many countries have entered into Double Tax Avoidance Agreements (DTAA) with a view to avoiding double taxation of the same income by two different countries, specify the rights of the Country of Residence and the Country of Source to tax different income under different circumstances. This results into growth in international

trade and investments in respect of goods, services, technology, capital and human resources.

(3) DTAAs are broadly based on four different models i.e.,

i) OECD Model

ii) U.N. Model

iii) U.S. Model

iv) Andean Model

By and large the models specify the provisions in respect of the followings:

i) The rights of taxation of contracting states

ii) Specifying the liability to tax in one contracting state and granting credit/exemption of tax in the other contracting state.

iii) Specify the provisions regarding the nature of income and the country in which income is deemed to arise. For example, different income are taxed under U.N. Model as follows :

a) Taxation of Income from Immovable Property is governed under article 6 and is taxed in the source state i.e. where the property is located

b) Under Article 5 & 7, Business income is taxed in the source country to the extent it is attributed to the activities carried through the fixed place of business i.e. Permanent Establishment (PE). However, if there is no fixed place of business (PE) in the source country, it is taxed in the country of residence.

c) Dividend under Article 10, Interest under Article 11, Royalty under Article 12, Capital Gains under Article 13 are taxed in the country of residence, However, the country of source may also tax by way of withholding tax.

d) Article 14 deals with Independent Personal Services. Nature of income covered here is Professional Services and is normally chargeable to tax in the Country of Residence unless person has a fixed place in the other country through which service is rendered in that other country.

e) Article 15 deals with Dependent Person Services, it is taxed in the State of Residence unless employment is exercised in other state and under certain conditions it is taxed only in State of Residence of the employer.

f) Directors fees under Article 16 is taxed in the state of residence of company (generally source state) subject to terms of agreement between two states and so on.

g) Article 17 deals with Income of Artistes & Sports Persons is normally taxed in the State where performance is carried out and taxed in the state of Residence.

h) Article 19 deals with Government Service normally taxable in the State of Service.

i) Article 20 deals with the students.

j) Article 21 deals with "Other income"

k) Article 24, onwards are special provisions administrative in nature such as "non discrimination", mutual agreement procedure, exchange of information, etc.

iv) Provisions in the Treaty (DTAA) overrides provisions of domestic tax laws (refer CBDT Circular No.333 and section 90 (2) of the I.T. Act. This is supported by number of judgments, like:

a) *CIT v. Visakhapatnam Port Trust (1983) 44 ITR 146 (AP)*

b) *CIT v. Davy Ashmore India Ltd. (1991) 190 ITR 626 (Cal.)*

c) *CIT v. R. M. Muthaiah (1993) 202 ITR 508 (Kar.)*

d) *Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*

e) *DIT v. Infrasoft Ltd (2013) 264 CTR 329 (Delhi)*

f) *Sanofi Pasteur Holding SA v. MOF (2013) 354 ITR 316 (AP)*

g) *Mrs. Shalini Seekond v. ITO (2016) 71 taxmann.com 120 (Mumbai Tribunal)*

h) *AB Holdings Mauritius-II (2018) 402 ITR 37 (AAR New Delhi)*

15 Chapter — Prevention of Money Laundering Act, 2002 (PMLA)

Q.281 What is PMLA? What is the object of PMLA?

A.281 PMLA refers to the Prevention of Money Laundering Act, 2002 ('PMLA'). It is an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and to punish those who commit the offence of money laundering. PMLA came into force with effect from 1st July, 2005 and has been amended in 2009 and 2012.

Q.282 What is Money Laundering? What are the key definitions under PMLA?

A.282 The goal of a large number of criminal activities is to generate profit for an individual or a group. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. Illegal arms sales, smuggling, and other organized crime, including drug trafficking and prostitution rings, can generate huge amounts of money. Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to "legitimize" the ill-gotten gains through money laundering. The money so generated is tainted and is in the nature of 'dirty money'. Money Laundering is the process of conversion of such proceeds of crime, the 'dirty money', to make it appear as 'legitimate' money.

In PMLA, "money laundering" has been defined as "any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property" and whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any such process or activity shall be guilty of offence of money laundering (Section 3).

In PMLA, "proceeds of crime" means "any property derived or obtained, directly or indirectly, by any person as a result, of criminal activity relating to a scheduled offence or the value of any such property" [Section 2(1)(u)].

The offences listed in the schedule to PMLA are "scheduled offence" [Section 2(1)(y)]. There are 2 parts – Part A & Part C. Part A comprise of offences under: IPC, NDPC, Explosive Substances Act, Unlawful Activities (Prevention) Act, Arms Act, Wild Life (protection) Act, Immoral Traffic (Prevention) Act, Prevention of Corruption Act, Antiquities and Arts treasures Act etc. Part C deals with transborder crimes.

"Property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located. Further, property includes, property of any kind used in the commission of an offence under this Act or any of the scheduled offences [Section 2(1)(v)].

Q.283 How does Money Laundering actually take place?

A.283 The process of Money Laundering generally involve the following three stages:

a) *Placement*: This refers to the process of transferring the proceeds from illegal activities into financial system in a manner not detectable by governmental authorities. This might be done in the following manner:

- Breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments (cheques, money orders, etc.)
- Buying high value goods such as precious metals, artwork, etc that can be resold later for payment by cheque
- Smuggling out of the country

b) *Layering*: This second stage refers to a process of disassociating the illegal money from the source of the crime by creating a complex web of financial transactions for concealing its source, trail and ownership. It involves creation of complex layers of financial transactions for concealing or disguising the source of the ownership of the funds such as:

- Channeling through the purchase and sale of investment instruments such as bonds, stocks, and traveler's cheques or the launderer might simply wire the funds through a series of accounts at various banks across the globe, particularly to those jurisdictions that do not cooperate in anti-money laundering
- Disguising the transfer as payments for goods or services, thus giving them a legitimate appearance
- A number of rotations to slush funds are given through banks and this complex layer of financial transactions are carried out to divorce the illicit proceeds from their source and mislead the investigating agencies.

- The high-value goods and monetary instruments are resold and the proceeds are invested in real estate and legitimate businesses, particularly in the leisure and tourism industries.
- Shell companies i.e. paper companies / bogus companies serve as front and are registered in offshore havens.

c) *Integration*: Having successfully processed his criminal profits through the first two stages of money laundering, the launderer then moves to this third stage in which the funds reach the legitimate economic and financial system, after getting inseparably mixed with the legitimate money earned through legal sources of income. The money launderer might then choose to invest the funds into real estate, business ventures & luxury assets, etc. so that he can enjoy the laundered money, without any fear of law enforcement agencies

Q.284 Which agency administers the PMLA?

A.284 The Directorate of Enforcement in the Department of Revenue, Ministry of Finance is responsible for investigating the cases of offence of money laundering under PMLA.

Financial Intelligence Unit - India (FIU-IND) under the Department of Revenue, Ministry of Finance is the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to enforcement agencies and foreign FIUs.

Q.285 Who can investigate a case of money laundering ?

A.285 As per Sections 48 & 49 of the PMLA, the officers of the Directorate of Enforcement have been given powers to investigate cases of money laundering. The officers have also been authorised to initiate proceedings for attachment of property and to launch prosecution in the designated Special Court for the offence of money laundering.

Q.286 What are the possible actions which can be taken against persons / properties involved in money laundering?

A.286 Following actions can be taken against the persons involved in money laundering:

a) Attachment of property under Section 5, seizure/ freezing of property and records under Section 17 or Section 18. Property also includes property of any kind used in the commission of an offence under PMLA, 2002 or any of the scheduled offences.

b) Persons found guilty of an offence of Money Laundering are punishable with imprisonment for a term which shall not be less than three years but may extend up to seven years and shall also be liable to fine [Section 4].

c) When the scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.

d) The prosecution or conviction of any legal juridical person is not contingent on the prosecution or conviction of any individual.

Q.287 What are the powers available to the Investigating Officers under the Act?

A.287 The Investigating Officers have the powers:-

a) To provisionally attach any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Section 5];

b) To conduct survey of a place [Section 16];

c) To conduct search of building, place, vessel, vehicle or aircraft & seize/freeze records & property [Section 17];

d) To conduct personal search [Section 18];

e) To arrest persons accused of committing the offence of Money Laundering [Section 19];

f) To summon and record the statements of persons concerned [Section 50].

Q.288 Kindly give an overview of the enforcement process under PMLA?

A.288 PMLA empowers Enforcement Directorate to carry out investigations in cases involving offence of money laundering and also to attach the property involved in money laundering.

PMLA envisages setting up of an Adjudicating Authority to exercise jurisdiction, power and authority conferred by it essentially to confirm attachment or order confiscation of attached properties.

PMLA also envisages setting up of an Appellate Tribunal to hear appeals against the order of the Adjudicating Authority and the authorities like Director FIU-IND. Appellate Tribunal is vested with powers of a civil court. It can also review its decisions and decide cases *ex parte*. Further appeal

can be made against the order of the Appellate Tribunal to High Court within 60 days.

Q.289 Which Courts are designated as Special Courts under PMLA? What is its role & function?

A.289 For trial of offence punishable under section 4 of PMLA, the Central Government, in consultation with the Chief Justice of the respective High Courts, by notification, has designated one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as specified in the notifications.

While trying an offence of money laundering under PMLA, a Special Court has also to try the offences, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial [Section 43] i.e., offence under PMLA plus the offence at the trial court.

The Special court can take cognizance of any offence of money laundering upon a complaint being made by an authority, without the accused being committed to it for trial. The provisions of the CrPC shall apply to the proceedings before a Special Court.

In case a trial court has taken cognizance of a scheduled offence, then in such cases, on an application by the authority authorized to file a complaint under PMLA, the trial court (which has taken cognizance of the scheduled offence) shall commit the case relating to the scheduled offence to the Special Courts under PMLA.

The Special Court, PMLA, on receipt of such case committed to it, shall proceed to deal with it from the stage at which it is committed [Section 44(1)(c)].

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court [Section 47].

Q.290 Kindly explain the parallel streams of proceedings under PMLA?

A.290 Once the Complaint Report is filed with the Special Court by the office of the ED, the investigation / attachment proceedings before the Director and/or the Adjudicating Authority will continue and in parallel, trial proceedings before the Special Court will also be continuing by the prosecution for determining proof of guilt of the accused 'beyond

reasonable doubt' and the establishment of 'mens rea' in order to demonstrate that there is "substantial probable cause" to form opinion that the property under attachment is proceeds of crime.

Thus, there is the possibility of a matter under PMLA going from Special Court to High Court and in parallel, going from adjudicating officer to Appellate Tribunal to High Court. The matter may continue under both the streams of proceedings unless the Special Court decides in favour of the accused. In such a case, probably the adjudicating officer during adjudication process or at the stage of Appellate Tribunal, as the case may be, will have to consider the findings of the Special Court to decide the matter.

Q.291 Can a suit be brought in any Civil Court against proceedings under PMLA?

A.291 No suit can be brought in any civil court to set aside or modify any proceeding taken or order made under PMLA and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything done or intended to be done in good faith under the PMLA [Section 67].

Thus, jurisdiction of civil courts is barred. The offence of money laundering is triable only by a special court constituted for the area in which the offence has been committed.

It would be useful to also note that the provisions of PMLA have overriding effect, notwithstanding anything inconsistent therewith contained in any other act or law for the time being in force [Section 71].

Q.292 What are the implications under PMLA of holding of foreign assets in contravention of Section 37A of FEMA?

A.292 As provided in Section 37A of FEMA, if any person is found to have acquired any assets (i.e. foreign exchange, foreign security or immovable property) outside India in contravention of Section 4, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable under Section 13(1A) to 13(1D) of FEMA to penalty up to three times the sum involved and confiscation of equivalent value situated in India and also imprisonment up to five years. The Directorate of Enforcement, which is a common investigating authority under FEMA and PMLA is authorized to investigate such serious cases. In case the foreign assets held in contravention of FEMA are not on account of money laundering, the provisions of FEMA shall apply. Moreover, even if the foreign assets are acquired by means of money laundering, FEMA

is not a scheduled offense under the PMLA and hence the investigation, proceedings and penalties as stipulated in FEMA shall apply to such cases.

Q.293 What is the Black Money Act, 2015 and the implications of same under PMLA?

A.293 The Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 was enacted to deal with the problem of Black Money i.e., undisclosed foreign income and assets. This Act restricted its scope to only taxable foreign income on which tax has not been paid in India and assets stashed abroad from such un-taxed foreign income. The Act provided, *inter alia*, for taxing undisclosed foreign income & assets at the rate of 30%, levying penalty at the rate of 300% of the tax payable and imprisonment up to 10 years.

PMLA was amended to include the offense of tax evasion under section 51 of Black Money Act as a scheduled offence under PMLA. Thus, the offence of wilful attempt to evade tax has become a scheduled offence under PMLA and accordingly, the provisions of the PMLA would apply to such instances. However, where a declaration of an asset has been duly made under Section 59 of the Black Money Act, the provision of section 51 will not be applicable in respect of that asset and therefore, PMLA will not be applicable in respect of the such scheduled offence being one of evasion of tax.

Notwithstanding the above, in case the foreign income / asset is derived out of proceeds of crime i.e., through an offence under any of the other laws included in the schedule to PMLA such as through corruption or immoral traffic, etc., the provisions of PMLA may apply irrespective of the declaration made, if any, under the Black Money Act.

Reference to Double Taxation Avoidance Agreements

Introduction

India has entered into Double taxation agreements with more than 92 countries. An attempt has been made to provide one stop source for various double taxation agreements.

Sr. No.	Country	Current Treaty effective from	Citations of Treaties and amendments Assessment Year
1	Albania	A.Y. 2015-16	(2013) 355 ITR 80 (St)
2	Argentine Republic	A.Y. 2012-13	(2013) 352 ITR 46 (St)
3	Armenia	A.Y. 2006-07	(2004) 271 ITR (St) 72
4	Austria	A.Y. 2003-04	(1965) 56 ITR (St) 17 / (2001) 250 ITR (St) 99 / (2001) 251 ITR (St) 97
5	Australia	A.Y. 1993-94	(1992) 194 ITR (St) 241/ (2013) 358 ITR 15 (St.)
6	Bangladesh	A,Y. 1993-94	(1992) 198 ITR (St) 99/ (2013) 355 ITR 97 (St)
7	Belarus	A.Y. 2000-01	(1998) 233 ITR (St) 4 / (2016) 380 ITR 70 (St)
8	Belgium	A.Y. 1999-00	(1975) 101 ITR (St) 6 (1998) 170 ITR (St) 245 / (1998) 171 ITR (St) 231 / (1990) 182 ITR (St) 415 / (1997) 228 ITR (St) 79 / (2001) 247 ITR (St) 39
9	Belize	A.Y. 2014-15	(2014) 360 ITR 44 (St)
10	Bhutan	A.Y. 2013-14	(2013) 351 ITR 284 (St)
11	Botswana	A.Y. 2010-11	(2008) 302 ITR (St) 277
12	Brazil	A.Y. 1999-00	(1992) 195 ITR (St) 73 (2018) 400 ITR 85 (St)
13	Bulgaria	A.Y. 1997-98	(1996) 220 ITR (St) 30

Sr. No.	Country	Current Treaty effective from	Citations of Treaties and amendments Assessment Year
14	Canada	A.Y. 1999-00	(1987) 164 ITR (St) 87 / (1992) 196 ITR (St) 35 / (1992) 198 ITR (St) 130 / (1998) 229 ITR (St) 44
15	China (Hong Kong)	A.Y. 1996-97	(1995) 214 ITR (St) 160 / (1995) 216 ITR (St) 52 (2018) 402 ITR 34 (St)
16	Cyprus	A.Y. 1994-95	(1996) 218 ITR (St) 70
17	Czech Republic	A.Y. 2001-02	(2000) 241 ITR (St) 90
18	Denmark	A.Y. 1991-92	(1989) 180 ITR (St) 1
19	Estonia	A.Y. 2014-15	(2012) 346 ITR 143 (St)
20	Ethiopia	A.Y. 2014-15	(2013) 353 ITR 78 (St)
21	Finland	A.Y. 2000-01	(1985) 152 ITR (St) 57/(1998) 233 ITR (St) 84 / (2008) 297 ITR (St) 142 / (2010) 324 ITR (St) 1
22	French Republic	A.Y. 1996-97	(1994) 209 ITR (St) 130 / (2000) 244 ITR (St) 134 / (2009) 315 ITR (St) 26
23	Germany (Federal Republic of Germany)	A.Y. 1998-99	(1997) 223 ITR (St) 130
24	Georgia	A.Y. 2014-15	(2012) 341 ITR (St) 1
25	Gibraltar	A.Y. 2013-14	(2013) 352 ITR 58 (St)
26	Greece	A.Y. 1964-65	(1967) 64 ITR (St) 86
27	Hungary	A.Y. 1989-90	(1991) 187 ITR (St) 58 / (1987) 167 ITR (St) 4 / (2005) 274 ITR (St) 74
28	Iceland	A.Y. 2009-10	(2008) 298 ITR (St) 2
29	Indonesia	A.Y. 1989-90	(1988) 171 ITR (St) 27
30	Ireland	A.Y. 2003-04	(2002) 254 ITR (St) 245/(2002) 255 ITR (St) 95/(2002) 256 ITR (St) 6
31	Israel	A.Y. 1994-95	(1996) 222 ITR (St) 10
32	Italy	A.Y. 1997-98	(1996) 220 ITR (St) 3
33	Japan	A.Y. 1991-92	(1990) 182 ITR (St) 380 / (2000) 245 ITR (St) 15 / (2006) 284 ITR (St) 64/ (2008) 306 ITR (St) 10 / (2012) 345 ITR (St) 91

Sr. No.	Country	Current Treaty effective from	Citations of Treaties and amendments Assessment Year
34	Jordan	A.Y. 2001-02	(2000) 241 ITR (St) 69
35	Kazakhstan	A.Y. 1999-00	(1997) 228 ITR (St) 162 (2018) 403 ITR 320 (St)
36	Kenya	A.Y. 1985-86	(1986) 157 ITR (St) 8
37	Korea (South)	A.Y. 1987-88	(1987) 165 ITR (St) 191 / (1991) 187 ITR (St) 152
38	Kuwait	A.Y. 2009-10	(2007) 295 ITR (St) 44/ (2015) 235 Taxman 48 (St) (2018) 403 ITR 315 (St)
39	Kyrgyz Republic	A.Y. 2003-04	(2001) 248 ITR (St) 218
40	Latvia	A.Y. 2014-15	(2014) 363 ITR 1 (St)
41	Libya	A.Y. 1984-85	(1982) 137 ITR (St) 27
42	Luxembourg	A.Y. 2011-12	(2009) 318 ITR (St) 9
43	Malaysia	A.Y. 1973-74	(1977) 107 ITR (St) 36/ (2004) 270 ITR (St) 62/ (2013) 353 ITR 53 (St.)
44	Maldives	A.Y. 2017-18	(2016) 386 ITR 16 (St)
45	Malta	A.Y. 1997-98	(1996) 218 ITR (St) 13
46	Myanmar	A.Y. 2011-12	(2009) 314 ITR (St) 6
47	Mauritius	A.Y. 1983-84	(1984) 146 ITR (St) 214 / (2000) 243 ITR (St) 25 / (2016) 384 ITR 133 (St)
48	Mongolia	A.Y. 1995-96	(1996) 222 ITR (St) 44
49	Monaco	A.Y. 2014-15	(2013) 216 Taxman 3 (St)/ (2013) 355 ITR 197 (St)
50	Montenegro	A.Y. 2010-11	(2009) 308 ITR (St) 42
51	Morocco	A.Y. 2003-03	(2000) 243 ITR (St) 26
52	Mozambique	A.Y. 2012-13	(2011) 335 ITR (St) 65
53	Namibia	A.Y. 2001-02	(1999) 236 ITR (St) 230
54	Nepal	A.Y. 1990-91	(1989) 175 ITR (St) 32 / (2012) 345 ITR 128 (St.)
55	Netherlands	A.Y. 1998-99	(1989) 177 ITR (St) 20/ (1999) 239 ITR (St) 56/ (2013) 350 ITR 39 (St)
56	New Zealand	A.Y. 1988-89	(1987) 166 ITR(St) 90 / (1997) 225 ITR (St) 15 / (2000) 242 ITR (St) 147 / (1989) 176 ITR (St) 214 (2017) 399 ITR 1 (St)

Sr. No.	Country	Current Treaty effective from	Citations of Treaties and amendments Assessment Year
57	Norway	A.Y. 1988-89	(1988) 169 ITR (St) 15/(2007) 288 ITR (St) 1
58	Oman	A.Y. 1998-99	(1997) 228 ITR (St) 21
59	Philippines	A.Y. 1996-97	(1996) 219 ITR (St) 60 / (2005) 273 ITR (St) 13
60	Poland	A.Y. 1991-92	(1990) 182 ITR (St) 147
61	Portuguese Republic	A.Y. 2002-03	(2000) 244 ITR (St) 57 / (2005) 278 ITR (St) 8
62	Qatar	A.Y. 2002-03	(2000) 242 ITR (St) 165 (2018) 405 ITR 39 (St)
63	Romania	A.Y. 1989-90	(1988) 171 ITR (St) 170
64	Russian Federation	A.Y. 2000-01	(1998) 233 ITR (St) 90
65	Saudi Arabia	A.Y. 2008-09	(2006) 286 ITR (St) 87
66	Serbia	A.Y. 2010-11	(2009) 308 ITR (St)18
67	Singapore	A.Y. 1995-96	(1994) 209 ITR (St) 1 / (2011) 337 ITR (St) 93
68	South Africa	A.Y. 1999-00	(1998) 231 ITR (St) 23 / (2015) 371 ITR 66 (St)
69	Spain	A.Y. 1997-98	(1995) 214 ITR (St) 197
70	Slovak Republic	A.Y. 1987-88	(2015) 374 ITR 24 (St)
71	Slovenia	A.Y. 2007-08	(2005) 275 ITR (St) 144 / (2016) 384 ITR 155 (St) (2017) 398 ITR 38 (St)
72	Sri Lanka	A.Y. 1982-83	(1983) 143 ITR (St) 7 / (1985) 152 ITR (St) 196 / (2014) 363 ITR 39 (St)
73	Sudan	A.Y. 2006-07	(2004) 271 ITR (St) 3
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9. Mode of citation of Notifications of RBI is abbreviated as Notification No. FEMA _____ or Notf. No. _____

10. Notifications and Regulations as referred to in this book are of FEMA unless otherwise mentioned

Handbook on

FEMA-TAXATION

Frequently Asked Questions

HIGHLIGHTS

- 293 Questions, Frequently asked by Overseas Indians and Residents, answered in detail
- Concept of Non-Resident under FEMA and Income-Tax
- Emigrating Indians and their planning including check list
- Various kinds of Bank Accounts of Non-Residents
- RFC Account and RFC Domestic Accounts
- Foreign Currency Accounts outside India by Residents
- Borrowing and lending by Non-residents
- Investment in securities in India, Foreign Direct Investments and Portfolio Investments
- Investment in movable & immovable properties by Non-residents
- Current and Capital Account Transactions by Residents and Non-Residents
- Planning and Checklist for Returning Indians
- Overseas Investments in Joint Ventures & Wholly Owned Subsidiaries by Residents
- Other Investments outside India by Residents
- Imports and Exports by Residents
- Appeal provisions of FEMA
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- Customs Baggage Rules
- Citizenship of India
- Provisions relating to Overseas Citizenship of India (OCI) and Person of Indian Origin Card
- Comparative Analysis of NRI, PIO, PIO Card holder and OCI
- Foreign Contributions received by Residents
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- Business Connection India
- Place of Effective Management
- Tax Deduction at Source from payments to Non-Residents
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