Overseas Property, Security & Foreign Exchange

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1.Introduction

Acquisition & Transfer of Overseas property, security and Foreign Exchange(Security, Property and Currency collectively referred as Assets) is dealt under FEMA under Sec 4,6(4) and 9 of the FEMA
It states that,
A person resident in India (PRII) shall not acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. —Save as otherwise provided in this Act, (Sec 4 of FEMA)
A PRII 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 as per Sec 6(4) of FEMA
If there is any amount of foreign exchange due or has accrued to any PRII, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank as per Sec 8 of FEMA
Thus law does not permit PRII, to hold any assets abroad unless it is permitted and also if there is any entitlements of these assets due to PRII it must be brought to India in the manner specified with certain relaxations and the exemptions. However PRII is allowed to continue to hold all the three types of the assets abroad including the income therefrom and the new asset acquired out of proceeds of these assets or the funds if the assets were acquired by him while he was PROI and was inherited from PROI as authorised by Sec 6(4).
The law further provides that
Provisions of section 4 and section 8 shall not apply to the following cases (Sec 9 of FEMA):
(a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;
(b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;
(c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
(d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;
(e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
(f) such other receipts in foreign exchange as the Reserve Bank may specify

Thus except a general approval, PRII cannot hold any assets (property, security or currency) outside India. Such approvals are found under section 6(4), Notification 7(immovable property) , Notification 120 and LRS (Securities)under the FEMA.
The manner of repatriation and possessions/exemptions of currency is also provided in Notification 9 and 11 respectively.

"Acquisition and transfer of Immovable property outside India by a PRII is a capital account transaction under Foreign Exchange Management Act. The relevant regulation is Notification No FEMA 7 /2000-RB dated 3rd May 2000), hereinafter referred to as "Fema 7"

Objective of Fema 7 is to manage the use of foreign exchange through acquisition of property outside India, allowing only specified PRII to acquire and hold property through specified routes/modes ie Acquisition by sale or purchase or by Gift or by inheritance

Immovable property is neither defined under the FEMA, nor defined under the relevant notification. Since Immovable property is not defined, one has to take the meaning as understood in common parlance. Immovable property will include residential property, commercial property, agriculture property, etc.

The law relating to these three assets can not be framed in the same manner as nature of assets are different and it can not be subjected to same set of rules for acquisition, it's sale ,holding and repatriation to India because repatriation of immovable property can not be equated to Currency or the security and hence they are found in dedicated notification for each of these three assets.

2. A PRII can acquire and Transfer Immovable Property outside India through following Modes

2.1 Acquisition of Immovable Property – Resident Foreign Currency Account (RFC)

A PRII can buy Immovable Property outside India out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015; (Regulation 5(1)(b))

2.1.1 What is RFC Account?

RFC Account is a bank account opened by a Resident Individual with an Authorised Dealer to maintain funds earned in Foreign currency. Returning Indians can transfer the balances held in Non - Resident External Account or Foreign Currency Non Resident Account to an RFC Account. The funds in RFC Account are free from restrictions regarding utilisation of foreign currency balances, including any investments outside India. Funds in RFC account can be used freely for any current/capital account transactions.

<u>Permissible Credits:</u>

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 exports of Goods/services, Royalty
5.Disinvestment proceeds 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

2.1.2 Transfer of Immovable property acquired out of funds held in RFC Account

i. A PRII who has acquired property outside India out of funds held in RFC Account:
   a. Can sell the property outside India without RBI permission
   b. Transfer the Property by way of Gift or Inheritance to his relative who is a PRII

ii. Funds held in the RFC Account can be used freely with no restrictions or limits to purchase a foreign security outside India as per Regulation 4 of Notification No. FEMA 120/RB-2004, dated July 7, 2004

2.2 Acquisition of Immovable Property by way of Gift or Inheritance

A PRII may acquire immovable property outside India, by way of gift or inheritance from

i. A PRII in case of property purchased on or before 8th July 1947 and continued to be held by him with the permission of Reserve Bank of India. (Regulation 5 (1)(a))
ii. A PRII if such immovable 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. (Regulation 5 (1)(a))
iii. A PRII who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition. (Regulation 5(2)). **It maybe noted that a PRII can acquire Immovable Property outside India only through the LRS route**

2.2.1 Transfer of Immovable Property by way of Gift or Inheritance

A PRII who has acquired property as per the above reference can transfer the same by way of Gift or Inheritance to PRII. Transfer by way of sale can be done after taking special permission from RBI. **One may note that there is no general approval for sale of property acquired by Gift or Inheritance**

2.2.2 Transfer of Immovable Property Outside India - Other cases

i. A PRII who had acquired property outside India when he was not a resident in India can sell the property outside India without the permission of RBI
ii. Fema 7 is silent about transfer of property by way of inheritance from a Non-Resident to a Resident Indian. **Transfer of property from a PROI to a PRII by way of Inheritance maybe presumed as permitted being a right provided under the constitution of India to a citizen of India**

2.3 Acquisition of Immovable Property by Indian company having overseas office

A company incorporated in India having overseas office, may acquire immovable property outside India for its business and for residential purposes of its staff (Regulation 5(3)), provided total remittances do not exceed the following limits prescribed for initial and recurring expenses, respectively:

i. 15 per cent of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth, whichever is higher;
ii. 10 per cent of the average annual sales/ income or turnover during the last two financial years.

2.4 Acquisition of Immovable Property jointly with a relative who is a PROI

A PRII can jointly acquire an Immovable Property with a relative who is a PROI, provided there is no outflow of funds from India;(Regulation 5(1)(c))

'Relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual

2.5 Acquisition of Property through Liberalised Remittance Scheme (LRS)

i. Under LRS an Individual being a resident of India can purchase Immovable property outside India by remitting funds up to US$ 2,50,000 per person per financial year. 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.
ii. Property cannot be purchased on instalment basis under LRS, As Financial commitment cannot be over and above LRS limit. As per Circular 32 dated August 14, 2013 payment allowed in Instalments within LRS is only for pre – existing contracts ie contracts existing before 14.08.13.(This was considered due to the reduction in the LRS limit from US$ 2,00,000 to US$ 75,000)

2.5.1 Transfer of Property acquired through Liberalised Remittance Scheme (LRS)

A Property purchased through LRS can be transferred to a PRII by way of inheritance or gift. Also it can be transferred by way of sale to PROI or PRII

2.6 Acquisition of Immovable Property outside India through a foreign company

Companies, LLPs and registered partnerships (Indian Entities) are permitted to directly invest in the equity of or set up foreign companies, which can then purchase real estate Abroad (provided it is as per the business requirements of the overseas Joint Ventures/Wholly owned Subsidiary). As per Notification 120 dated July 7,2004 The Total Direct Investment of the Indian Party in Joint Ventures / Wholly Owned Subsidiaries shall not exceed 400%, or as decided by the Reserve Bank from time to time, of the Net Worth of the Indian Party as on the date of the last audited balance sheet.

2.7 Buying and Leasing Immovable Property outside India

Can an Indian Party acquire Property for leasing activity abroad as Real Estate Business is not allowed under FEMA Notification No. FEMA 120/RB-2004 dated July 7, 2004 dealing with Overseas Direct Investment?

"Real estate business" means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges; **(Notification No FEMA 120/RB-2004) (ODI)**

Under the FDI guidelines it is defined as:

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; **(Notification No FEMA 20(R)/ 2017-RB) (FDI)**

Explanation:

a. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of “real estate business”.

b. Earning of rent income on lease of the property, not amounting to transfer, will not amount to real estate business.

c. Transfer in relation to real estate includes,

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(v) any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.

In the definition of Real Estate Activity As per Notification No FEMA 20(R)/ 2017-RB It is clarified in the definition that leasing of property does not amount to transfer, Hence earning of Rent Income on lease of property will not amount to Real Estate business and it should be permitted.

Can one Apply the FDI guidelines for Buying and Leasing property outside India if Notification No FEMA 120 is silent on it?

In the definition of Real Estate Activity As per Notification No FEMA 120/RB-2004 Leasing of Immovable property outside India is not mentioned in the prohibited activities under Real Estate Business Definition Nor does it form a part of the Inclusions, which is explained by FAQ no 62 of ODI as given below:

Q. Is development/construction (and thereafter, sale) of residential /commercial premises by an overseas Joint Venture (JV) or Wholly Owned Subsidiary (WOS) treated as real estate business under ODI regulations (FEMA Notification No. FEMA 120/RB-2004 dated July 7, 2004 as amended from time to time)? (Overseas Direct Investment (ODI) FAQ 62)

Ans - No. In terms of regulation 5(2) read with Regulation 2 (p) of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, buying land (along with building/pre-existing structures) for construction/development of residential/commercial premises (before selling) as one integrated core activity, is not treated as real estate business activity.

Considering the clarification given in FAQ 62 of ODI it could be concluded that Leasing of Immovable property after construction could be permitted, But since there is no clarification given by Reserve Bank regarding buying and Leasing of property, It is advisable to approach the Reserve Bank of India in such cases and get the Clarification/Approval on the same

4.Exemptions

i. Property Held by a PRII who is a national of a foreign state;
ii. Property acquired by a PRII on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.
iii. If Property is acquired on a lease not exceeding five years

(As per Regulation 4)

5. Acquisition & Transfer of Foreign Security outside India

5.1 A PRII can acquire Foreign security by way of:

i. Holding, Owning and Transferring Approval of Foreign Securities as allowed under Sec 6(4) of the FEMA as referred to in paragraph 2 of the Introduction
ii. Through funds in RFC Account
iii. Through the LRS route, which allows selling of foreign security as well as retaining the funds abroad

iv. Acquisition under notification 120 of FEMA for a bonafide business activity (as discussed in the earlier article of Investment outside India). Now we can consider the other aspects of Overseas security in the following paragraph:
   A. A PRII being an Individual may acquire foreign securities by way of:
      a) Gift from a PROI
      b) Cashless Employees Stock Option Scheme issued by a Company Incorporated outside India. Provided there is no remittance from India
      c) Inheritance from a person whether resident in or outside India.
      d) Qualification shares issued by an entity incorporated outside India for holding the post of a director in the entity. Subject to certain conditions
      e) Accepting shares issued by a Foreign company to a PRII who is an employee or a director of Indian office or branch of a foreign entity or of a subsidiary in India of a foreign entity or of an Indian company in which foreign entity has direct or indirect equity holding, may accept the shares offered by such foreign entity. Subject to certain conditions.

   B. A Domestic Depository may acquire, hold and transfer equity shares of eligible company resident outside India, being the underlying shares for the purpose of issuing IDRs as may be authorized by such company or its Overseas Custodian Bank.

5.2 A PRII can transfer Foreign security by way of:

i. Gift to a relative who is a PROI upto the LRS limit
ii. Inheritance to a PROI or PRII
iii. Sale of Security to a PROI by a PRII, thus transfer through sale of Foreign Security to a PRII is not permitted

6.Acqusition of Currency: Currency can be acquired by PRII under Current Account Transaction Rules for various bona fide purposes such as travel, maintenance of relatives, Medical ,Educational etc by Individuals as well as purposes of setting up education Chair feasibility study etc by Non Individuals.

It can also be acquired overseas by Gift or inheritance or as Income

Currency can be used only for the purposes for which it is granted and subject to certain allowance for possession it must be surrendered to the Authorised dealer.

Rules are framed to use the Foreign Exchange through currency , travellers cheques, debit and credit cards.

It can be used only outside India most of the time and hence Currency rules for it's export and Import are also framed including it's repatriation and surrender.

Certain overseas Foreign Currency accounts are also permitted to PRII as well as rules for it's closure.

Transactions in Foreign exchange are also required to be carried out through authorised dealer only with a restriction to compensatory transactions in India for payment of rupees India against foreign exchange outside India and vice versa.(Sec3 of FEMA)

We will deal with these aspects in detail in the next article.

6. Conclusion

Sr.No	Transferor	Gift	Inheritance	Sale
Immovable Property Outside India				
1	PRII	Permitted	Permitted	Not Permitted
2	PROI	Not Permitted	Not Permitted	Permitted
Foreign Security Outside India				
3	PRII	Not Permitted	Permitted	Permitted
4	PROI	Permitted**	Permitted	Permitted
Foreign Exchange				
5	PRII	Not Permitted	Permitted	Not Permitted
6	PROI	Permitted**	Permitted	Permitted

* All the Above transfers are done by a PRII

** Upto LRS Limit of US$ 2,50,000

It may be Inferred from the above that law relating to Immovable Property, Foreign Security and Foreign exchange in case of It's acquisition and transfer is different. For Eg: Inheritance of overseas immovable property from a PROI is not permitted in favour of PRII where as in Securities transfer is permitted.