DIRECT INVESTMENT OUTSIDE INDIA INCLUDING ESTABLISHMENT OF BRANCH OFFICE OUTSIDE INDIA BY INDIAN ENTITIES

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1. Introduction:

1.1 This Article deals with the provisions of Direct Investment outside India for Resident Indians including setting up of Branches / Offices abroad by Indian entities. It also covers various investments which can be made other than direct investment including prohibition and exceptions where provisions do not apply.

1.2 Section 6(3)(a) of FEMA deals with the "Transfer or issue of any foreign security by a person resident in India". Regulations relating to overseas investment is notified by RBI as Notification No. FEMA 120/RB dt. 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 dt. 01.01.2016. 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. Eligible entities:

2.1 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 net worth into listed companies abroad. [Regulation 6B]

Indian mutual fund registered with SEBI can also invest up to 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 proprietory 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 up to 10% of their average export realisation in last three preceding financial years or up to 200% of their new 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 dt. 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 (i) acquisition of foreign securities by way of gift from PROI, (ii) acquisition of foreign shares by way of inheritance from a person whether resident in or outside India, (iii) acquisition of 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]

3. Financial Commitment and methods / sources of financial commitment:

3.1 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.

3.2 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.

4. Conditions of overseas investments:

4.1 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.

4.2 Overall investment financial commitment is permitted up to 400% of the net worth 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. Net worth of Indian party will include the net worth of its 51% subsidiary or its parent, provided that subsidiary and the parent has not availed of this facility.

The overall ceiling of 400% of net worth 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.

4.3 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.

4.4 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.

4.5 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.

4.6 Form ODI is filed by the Indian party to the AD and have submitted all the APR

Investment in Overseas Venture as per conditions of regulations 6(2) is also popularly known as "Automatic Route" of Investment Outside India.

5. Prohibited overseas investments:

5.1 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.

5.2 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.

6. Procedure of making overseas investments:

6.1 The Indian party proposing to invest abroad has to

(a) 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

(b) Board Resolution authorising such an investment,

(c) Last three years financial statements, along with

(d) Net worth certificate in the prescribed format, now attached as a part of the application in form ODI

7. Overseas investment in financial services sector:

7.1 As provided in Regulation 7 of the Notification, 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.

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

7.2 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

8. Post-approval conditions:

8.1 The post-approval conditions that are to be observed by Indian party making investment in an overseas venture as stipulated in Regn. 15 are as under:

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 accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian party based on the un-audited 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 accounts of JV/WOS and the figures in the APR are as per the un-audited accounts of the overseas JV/WOS.

b) That the un-audited 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 email by July 15 every year.

9. Investments by individual in overseas venture by way of direct investment:

9.1 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) JV or WOS abroad should not be engaged in the real estate business or banking business or in the business of financial services activity.

b) The JV or WOS abroad shall be engaged in bonafide business activity.

c) 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.

d) 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.

e) 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.

f) 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.

g) 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.

h) 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.

9.2 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.

9.3 Disinvestment by Resident Individuals

a) Disinvestment may be partial or full by way of transfer / sale or by way of liquidation / merger of the JV or WOS.

b) Disinvestment shall be allowed after one year from the date of making first remittance for setting up or acquiring the JV or WOS abroad.

c) 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.

d) No write off shall be allowed in case of disinvestments by the resident individuals.

9.4 Reporting Requirements

a) Part I of the Form ODI, duly completed, should be submitted to the designated authorised dealer, within 30 days of making the remittance.

b) The investment shall be reported by the designated authorised dealer to the Reserve Bank in Form ODI Part I and II within 30 days of making the remittance.

c) 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.

d) 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

10. Other methods of making investment by individual in an overseas venture other than by way of direct investment:

10.1 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.

10.2 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.

11. Different modes of disinvestments from the JV / WOS abroad:

11.1 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. The divestment may or may not involve write-off, the conditions of which are as follows:

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 Rs.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 Rs.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

12. Pledge of foreign shares and creation of charge on assets:

12.1 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].

12.2 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

13. Acquisition of immovable property outside India by a resident:

13.1 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 (iii) who has acquired such property 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.

14. Branch outside India by Indian entity:

14.1 As defined in Section 2(v)(iv) of FEMA, a 'person resident in India', includes an office, branch or agency outside India owned or controlled by such a person resident in India. Accordingly, though the branch is located in a foreign country, it would be deemed to be resident of India and consequently FEMA law, notifications and regulations, including restrictions that are applicable to a person resident in India applies equally to a foreign branch.

14.2 Establishment of a foreign branch by an Indian entity is regulated by way of FEMA notification relating to Foreign currency accounts of a person resident in India viz. FEMA Ntf. 10(R) which gives general permission to a firm or company registered or incorporated in India to open a foreign currency account with a bank outside India in the name of its office (trading or non-trading) or its branch set up outside India or its representative posted outside India

14.3 The general permission is available to open an overseas branch and a bank account outside India only if the following conditions are fulfilled:

(i) Conducting normal business activities: The overseas branch or office has been set up or representative is posted overseas for conducting normal business activities of the Indian entity.

(ii) Permissible amount of remittance: The total remittances by the Indian entity shall not exceed -

<u>Remittance for Initial expenses</u>: - 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, where the remittances are made to meet initial expenses of the branch or office or representative.

<u>Recurring expenses</u>: - 10 per cent of such average annual sales/ income or turnover during the last financial year where the remittances are done to

meet recurring expenses of the branch or office or representative.

Above restrictions on remittances not applicable in a case where:

a) remittances are made out of funds held in EEFC account of the Indian entity, or

b) the overseas branch/ office is set up or representative posted by a 100% Export Oriented Unit (EOU) or a unit in Export Processing Zone (EPZ) or in a Hardware Technology Park or in a Software Technology Park, within two years of establishment of the Unit.

(iii) The Overseas Branch/Officer/representative shall not enter into any contract or agreement in contravention of the Act, Rules or Regulations made thereunder;

(iv) The account so opened, held or maintained shall be closed,

(a) if the overseas branch/ office is not set up within six months of opening the account, or

(b) within one month of closure of the overseas branch/ office, or

(c) where no representative is posted for six months,

and the balance held in the account shall be repatriated to India;

14.4 Important explanations –

Purchase of acquisition of office equipment and other assets required for normal business operations of the overseas branch/ office/ representative will not be deemed as a capital account transaction;

Transfer or acquisition of immovable property outside India, other than by way of lease not exceeding five years, by the overseas branch/ office/ representative will be subject to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015.

14.5 Export to Branch

The overseas office / branch of software exporter company/firm may repatriate to India 100 per cent of the contract value of each 'off-site' contract.

In case of companies taking up 'on site' contracts, they are required to repatriate the profits of such 'on site' contracts after the completion of the said contracts.

An audited yearly statement showing receipts under 'off-site' and 'on-site' contracts undertaken by the overseas office, expenses and repatriation thereon should be sent to the AD Category – I banks

14.6 Foreign Branch vs Foreign Subsidiary: As a foreign branch is deemed to be a person resident in India, all the restrictions under FEMA that apply to a person resident in India applies to its foreign branch unlike in the case of a foreign subsidiary which by reason of being incorporated overseas acquires the status of person resident outside India. Thus restrictions of purchase of overseas immovable properties, borrowing from Non Residents, business in permitted currency etc will apply to Branch but not to the oversea company. Some of the key differences are as under:

(i) A branch is not a legal entity distinct from its parent company, therefore it is the liability of parent company in foreign jurisdiction in relation to the activities of the branch, as compared to subsidiary the liability of which is limited to the extent of its paid-up capital.

(ii) Activity of branch is normally restricted by the local jurisdictions and it may not be permitted to operate beyond limits of territory.

(iii) Most of the overseas jurisdiction requires registration as a place of business of foreign corporation with comprehensive details of foreign corporation including its accounts, published accounts etc., whereas once subsidiary is established, the entity which is regulated, is a subsidiary and not the parent company which is a shareholder of the subsidiary.

(iv) Most of the country where parent company is resident requires comprehensive details of operations of its branch established in overseas territory including prior approval in cases where exchange controls are prevalent. e.g. India

(v) Losses incurred by branch can be set off by the parent in its tax return, whereas losses of subsidiary in most cases may not be possible for setoff.

(vi) Branch is normally taxed as corporation in most of the jurisdictions, it would be relatively simpler for parents to adjust taxes in other countries paid by branches as tax credit in its own Tax Return as compared to the corporation tax paid by the subsidiary in overseas jurisdiction.

(vii) Branch may not pay taxes on remittance while corporation will have to pay withholding tax on dividend in most of the jurisdictions. In U.S.A. even branch is required to pay taxes on distribution/remittance. Except few offshore jurisdictions where branch can be registered as offshore Co., may not be able to access the treaty network of its place of establishment, whereas subsidiary will be able to access treaty network.

The above is only a illustrative list, there may be number of other factors based on the operations between particular Home country and a Host country.