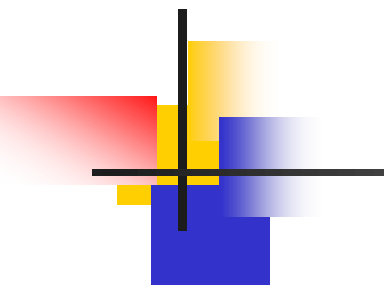


Bombay Chartered Accountants Society

Intensive Study Course on FEMA Case Studies

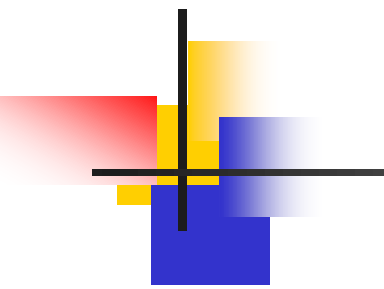
Presented by:
Mr. Paresh P. Shah

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Chartered Accountants
Email: ppshahandassociates@gmail.com



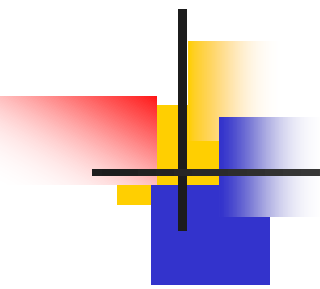
Overview

- Foreign Exchange Management Act – Overview
- Fundamentals of FEMA
- FEMA Practice
- FEMA – Case studies
- Abbreviations :Authorised Dealer(AD),
Capital Account transaction (CAP),
Current Account Transaction(CAT),
Foreign Exchange(FE),
Government of India (GOI) ,
Notification no.(Notf.),
Person Resident Outside India(PROI),
Person Resident in India (PRII),
Reserve Bank of India (RBI),
Non repatriable basis (NRB)
Repatriable basis(RB)
Subject to (SBT)



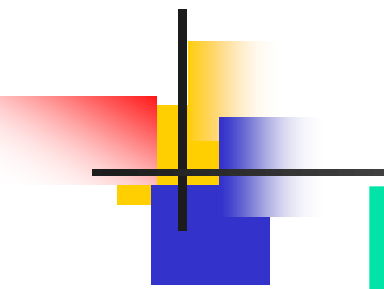
Overview of Foreign Exchange Management Act

- Applies to whole of India and all branches, offices and agencies outside India, which are owned or controlled by person resident in India – Extra territorial jurisdiction
- Broadly, the objectives of FEMA are: (i) To facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the RBI in the administration of FEMA.
- FEMA has total 49 sections in which sections 1 to 9 are substantive and the rest are procedural /administrative to carry out function such as Appellate, Investigation, search and authorization to various statutory bodies to make rules, regulations, amendments
- Section 46 of the Act grants power to Central Government to makes rules and section 47 (as amended by Finance Act, 2015) of the Act grants power to RBI to make regulations to implements its provisions and the rules made there under; also provides that earlier regulations made by RBI, for which power now vests with Central Govt. remain valid until amended / rescinded by Central Govt.
- Every Rule and Regulation made under this Act shall be laid before each house of parliament Section 48.
- Section 49 deals with Repeal and savings
- **Finance Act, 2015 (r.w. Notification No.SO 2454(E) dt. 8-9-2015 has amended Sections 2, 13, 18 & 46 and inserted new Section 37A**



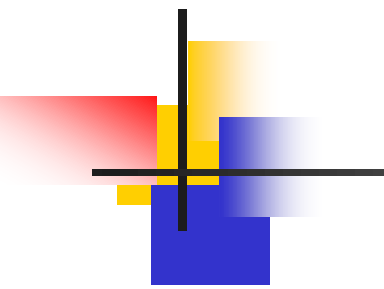
Overview of Foreign Exchange Management Act

Section	Description
1	Application and commencement of FEMA w.e.f. 1/6/2000
2	Definitions (amended by Finance Act, 2015 to include "Authorised Officer" and "Competent Authority")
3 to 9	Substantive provisions, Dealing in FE, No drawal of FE, CAT, CAP, Export & Import, Repatriation, Possession of FE etc. (Section 6 amended by Finance Act, 2015 to provide that equity flows shall be under Central Govt.)
10 to 12	Authorized person Delegation of power by RBI ,ADs & Documents
13 to 15	Contraventions and penalties (Section 13 amended by Finance Act, 2015 for penalty for holding foreign exchange, security or property in excess of threshold specified in new S. 37A)
16 to 38	Adjudication, Appeal and Directorate of enforcement [new Section 37A vide Finance Act, 2015: Special provisions relating to assets held outside India in contravention of section 4]
39 to 49	Miscellaneous provisions, Power of RBI, Power of Government of India, Procedure for issue of Notification etc. Sunset clause for FERA upto 31 st May 2002, Repeal and Savings



Overview of Foreign Exchange Management Act

Section	Description
3	Dealing in foreign exchange by any Person in India. Receipt by PRII without Remittance, Payment in India by PRII with a right O/I
4	Holding of foreign exchange, Security and Immovable property by PRII.
5	Current account transactions, List and Restrictions
6	Capital account transactions-Powers of RBI, Central Govt. and the list.
7	Export of goods and services- Declaration, Information, Direction to receive FE.
8	Realisation and repatriation of foreign exchange
9	Exemption from realization and repatriation in certain cases And possession of FE



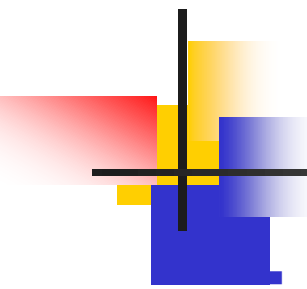
Fundamentals of FEMA

- **SEC. 3:** Dealing in foreign exchange, etc.
- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-
 - (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
 - (b) make any payment to or for the credit of any person resident outside India in any manner;
 - (c) receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.- For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorized person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorized person;

- (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.- For the purpose of this clause, " financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.



Fundamentals of FEMA

SEC. 4: Holding of foreign exchange, etc.

Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

SEC. 5: Current account transactions

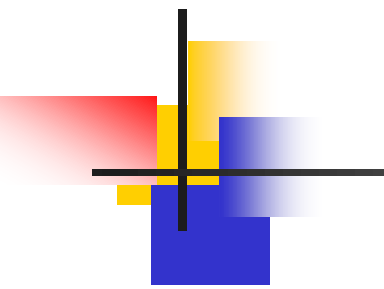
- **Any person may** sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction:

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

SEC. 6: Capital account transactions

- (1) Subject to the provisions of sub- section (2), any person may sell or draw foreign exchange to or from an authorized 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 which are permissible;~~ 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

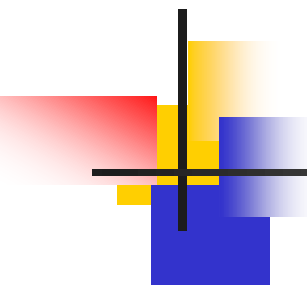
Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary courts of business.



Fundamentals of FEMA

SEC. 6: Capital account transactions (con't)

- (2A) The Central Government may, in consultation with the Reserve Bank, prescribe—
 - (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible;
 - (b) the limit up to which foreign exchange shall be admissible for such transactions; and
 - (c) any conditions which may be placed on such transactions.
- (3) Omitted;
- (7) For the purposes of this section, the term “debt instruments” shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.



Fundamentals of FEMA

SEC. 6: Capital account transactions (con't)

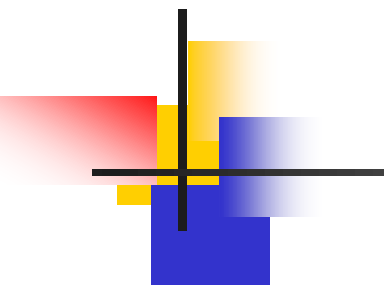
- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India **or inherited from a person who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

Thus Asset held abroad can be inherited however for asset in India one may have to look for the concerned notification for inheritance two residents of such asset 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.**

This is similar to note on 6(4) for inheritance of assets in India between two non Residents

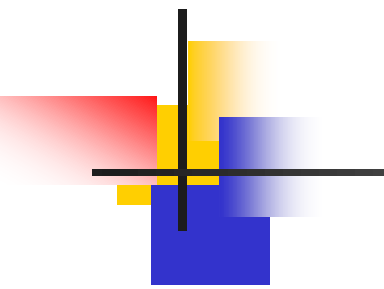
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.



Fundamentals of FEMA

- (7) – Power of Central Government to prescribe Debt instruments in consultation with RBI
- **SEC. 8: Realisation and repatriation of foreign exchange. –**
Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Note: The above is dealt with by Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 issued under Notification No. FEMA 9 (R)/2015-RB dt. December 29, 2015



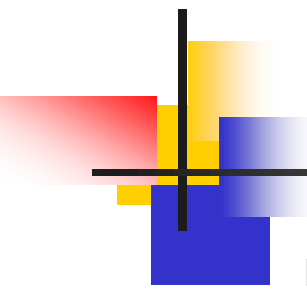
Fundamentals of FEMA

SEC. 9: Exemption from realization and repatriation in certain cases. – The provisions of sections 4 and 8 shall not apply to the following, namely:-

- (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 y; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.

Note: The above is dealt with by Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 issued under Notification No. FEMA 11 (R)/2015-RB dt. December 29, 2015 and Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 issued under Notification No. FEMA 6 (R)/2015-RB dt. December 29, 2015

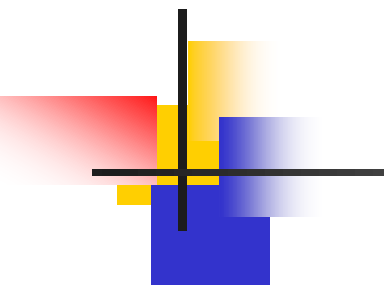
P. P. Shah & Asso.



Section 46 of FEMA - amendments by Finance Act, 2015

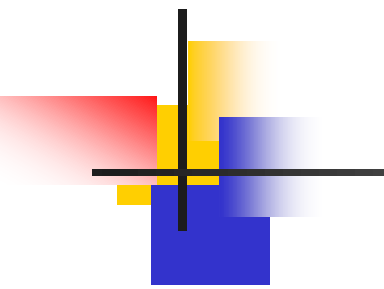
Power to make rules.—

- (1) The Central Government may, by notification, make rules to carry out the provisions of this Act
- (2) Without prejudice to the generality of the foregoing power, such rules may provide for,—
 - (a) the imposition of reasonable restrictions on current account transactions under section 5;
 - **(aa) the instruments which are determined to be debt instruments under sub-section(7) of section 6;**
 - **(ab) the permissible classes of capital account transactions in accordance with sub-section(2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;”;**
 - **(gg)the aggregate value of foreign exchange referred to in subsection (1) of section 37A**



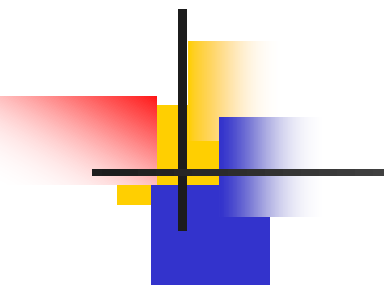
Important Definitions under FEMA

- S. 2(e) "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6
- S. 2(j) "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) payments 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



Relevance of Capital Account & Current Account Transactions

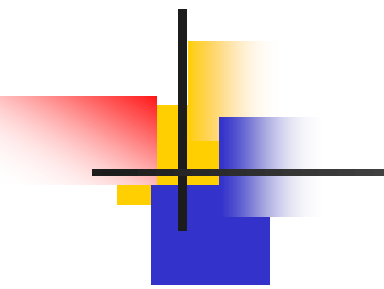
- **Capital account transactions are prohibited unless generally permitted**
- **Current account transactions are freely permitted unless prohibited**
- Capital Account transactions are covered (PRIIs in Schedule I; PROIs in Schedule II) of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 issued vide Notification No. FEMA 1/2000-RB dated 3rd May 2000.
- Current Account transactions are more specifically covered in Schedule I, II & III of Foreign Exchange Management (Current Account Transactions) Rules, 2000.



Current Account vs Capital Account transactions

- **Current Account OR Capital Account?**

Transaction	Type	Reasons
Gift from NRI by transfer from NRE account in India	Capital Account	Change in assets in India of a person resident outside India [Sec. 2(e) of FEMA]
Gift from NRI by way of remittance from abroad	Current Account	No change in assets in India of a person resident outside India [Sec. 2(e) of FEMA]
Payments towards Import & Export of Goods	Current Account	Payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in the ordinary course of business [Sec. 2(j) of FEMA]

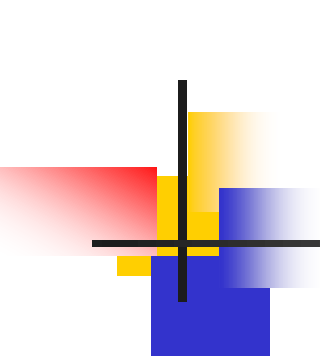


Current Account vs Capital Account transactions

- **Current Account OR Capital Account?**

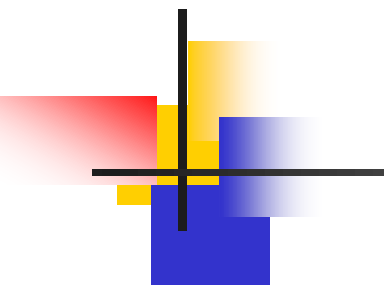
Transaction	Type	Reasons
Guarantee given by PROI in favour of PRII	Current Account	Does not change liabilities in India of a person resident outside India [Sec. 2(e) of FEMA] 'Contingent liabilities' in the definition of Capital account transactions is not applicable to PROIs
Guarantee given by PRII in favour of PROI	Capital Account	Changes contingent liability outside India of a Person resident in India [Sec. 2(e) of FEMA]

- *Recap:* Sec. 2(e) of FEMA: "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6



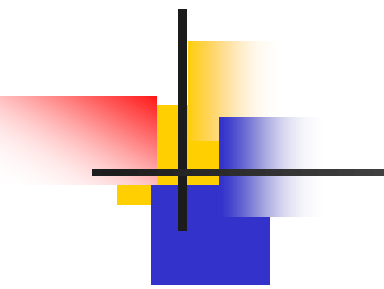
Important Definitions under FEMA (con't)

- S. 2(v) " 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;



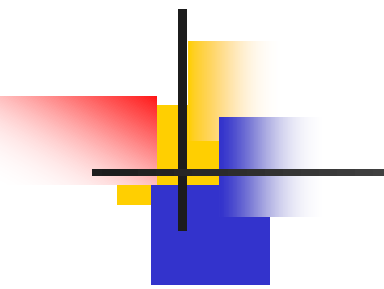
Important Definitions under FEMA

- S. 2(v) " person resident in India" means – (con't)
 - (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
- S. 2(w) " person resident outside India" means a person who is not resident in India



Important Definitions under FEMA

- 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India
- OCI is now defined separately in new FEMA Foreign Exchange Management (Non Debt Instruments) Regulations, 2019as: 'Overseas Citizen of India (OCI)' means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under 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. 12.05.2015. PIO's were directed to accept the OCI card by extending the timeline from time to time up to September, 2018 without any additional fee.
- 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.

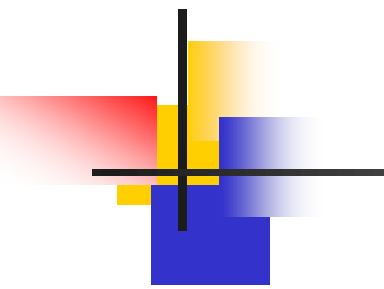


Important Definitions under FEMA

- 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. 26.01.1950; or
- (2) who was eligible to become a citizen of India on 26.01.1950; or
- (3) who belonged to a territory that became part of India after 15.08.1947; 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.



Fundamentals of FEMA

- Foreign Exchange belongs to Govt. of India except permitted.(Sec 5 about Current Account Transaction and Sec 6 about Capital Account Transactions)
- Dealing in Foreign Exchange by PRII as well as by PROI is regulated(Section 3(R) of The FEMA)
- Dealing between PRII and PROI in Rupees is also regulated(Borrowing and Lending in Rupees, deposit in Rupees, Gifts in India by PROI except to relatives etc)
- Permissible Capital Account or Current Account Transaction -Drawal of Foreign Exchange are specific to purposes for which they are granted.

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
1	Permissible Capital Account Transactions	-	-
2	Issue of Security in India by a branch, office or agency of a PROI	-	-
3	Borrowing and lending in Foreign currency	FEMA.3(R)/2018-RB_FEM (Borrowing and Lending) Regulations, 2018 dt 17.12.2018	FED No. 5 / 2018-19.Updated up to August 08,2019
4	Borrowing and lending in Rupees	-	FED No. 6 / 2015-16
5	Deposits by NRs	FEMA 5(R)_ FEM (Deposit) Regn. 2016 dt. 01.04.2016	FED No. 14 / 2015-16. Updated up to April 12, 2019
6	Export and Import of foreign currency	FEMA 06(R)/RB 2015_ FEM (Import & Export of Currency) Regn 2015 dt 29.12.2015	
7	Acquisition and transfer of immovable properties outside India	FEMA 7(R)/2015_ FEM (Acquisition and Trnsfr of Immovable Properties outside India) Regn 2015 dt 21.01.2016	FED No. 12 / 2015-16
8	Guarantees	-	-
9	FE realisation, repatriation, surrender	FEMA 09(R)/2015_ FEM (Realisation, repatriation, surrender of FX) Regn 2015 dt 29.12.2015	-
10	Foreign Currency Accounts by a PRII	FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016	FED No. 14 / 2015-16. Updated up to April 12, 2019
11	Possession and retention of Foreign currency	FEMA 11(R)_ FEM (Possession and Retention of FC) Regn 2015 dt 29.12.2015	-
12	Insurance	FEMA 12(R)_ FEM (Insurance) Regn 2015 dt 29.12.2015	FED No. 9 / 2015-16. Updated up to Nov 17, 2016
13	Remittance of assets in India	FEMA 13(R)/2016_ FEM (Remittance of Assets) Regn 2016 dt 01.04.2016	FED No. 13 / 2015-16. Updated up to April 28, 2016

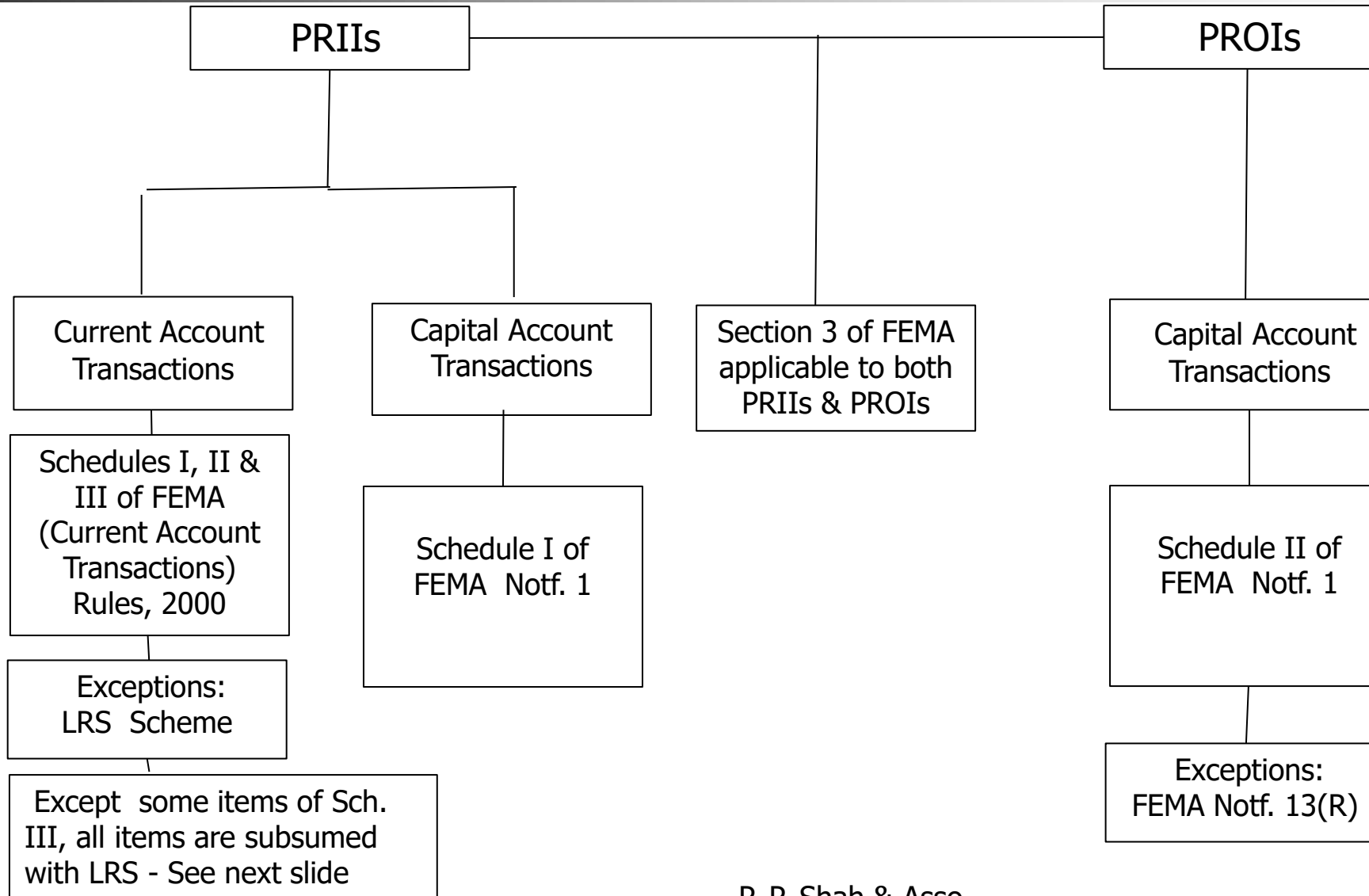
FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
14	Manner of receipt and payment	FEMA 14(R)_ FEM (Manner of Receipt and Payment) Regn 2016 dt 02.05.2016	-
15	Definition of Currency	FEMA 15(R)/2015_ FEM (Currency) Regn 2015 dt 29.12.2015	-
16	Receipt and payment to person outside India	-	-
17	Transaction in Indian rupees with resident of Nepal and Bhutan	-	-
18	Post Office (Postal Money Orders)	FEMA 18(R)_ FEM (Postal Money Order) Regn 2015 dt 29.12.2015	-
19	Overseas Direct Investment	-	FED No. 15 / 2015-16. Updated up to Jan 04, 2018
20	FDI, PIS	Foreign Exchange Management (Non-debt Instruments) Rules, 2019	FED No. 11 / 2017-18. Updated up to March 08, 2019 (unamended)
21	Immovable property in India	SUBSUMED IN Foreign Exchange Management (Non-debt Instruments) Rules, 2019 w.e.f 17-10-2019	FED No. 12 / 2015-16. Updated up to April 11, 2018 (unamended)
22	Branch etc in India	FEMA 22(R)_ FEM (Branch Liaison Project office) Regn 2016 dt 31.03.2016	FED No. 10 / 2015-16. Updated up to March 29, 2019
23	Export of Goods & Services	FEMA 23(R)_ FEM (Export of Goods & Services) Regn 2015 dt 12.01.2016	FED No. 16 / 2015-16. Updated up to January 12, 2018
24	Investment in Firm or Proprietary concern in India	SUBSUMED IN FEMA 20(R) w.e.f. 07.11.2017 which is substituted by Foreign Exchange Management (Non-debt Instruments) Rules, 2019 w.e.f. 17-10-2019	-
25	Foreign investment in Debt	Foreign Exchange Management (Debt Instruments) Regulations, 2019 w.e.f 17-10-2019	-

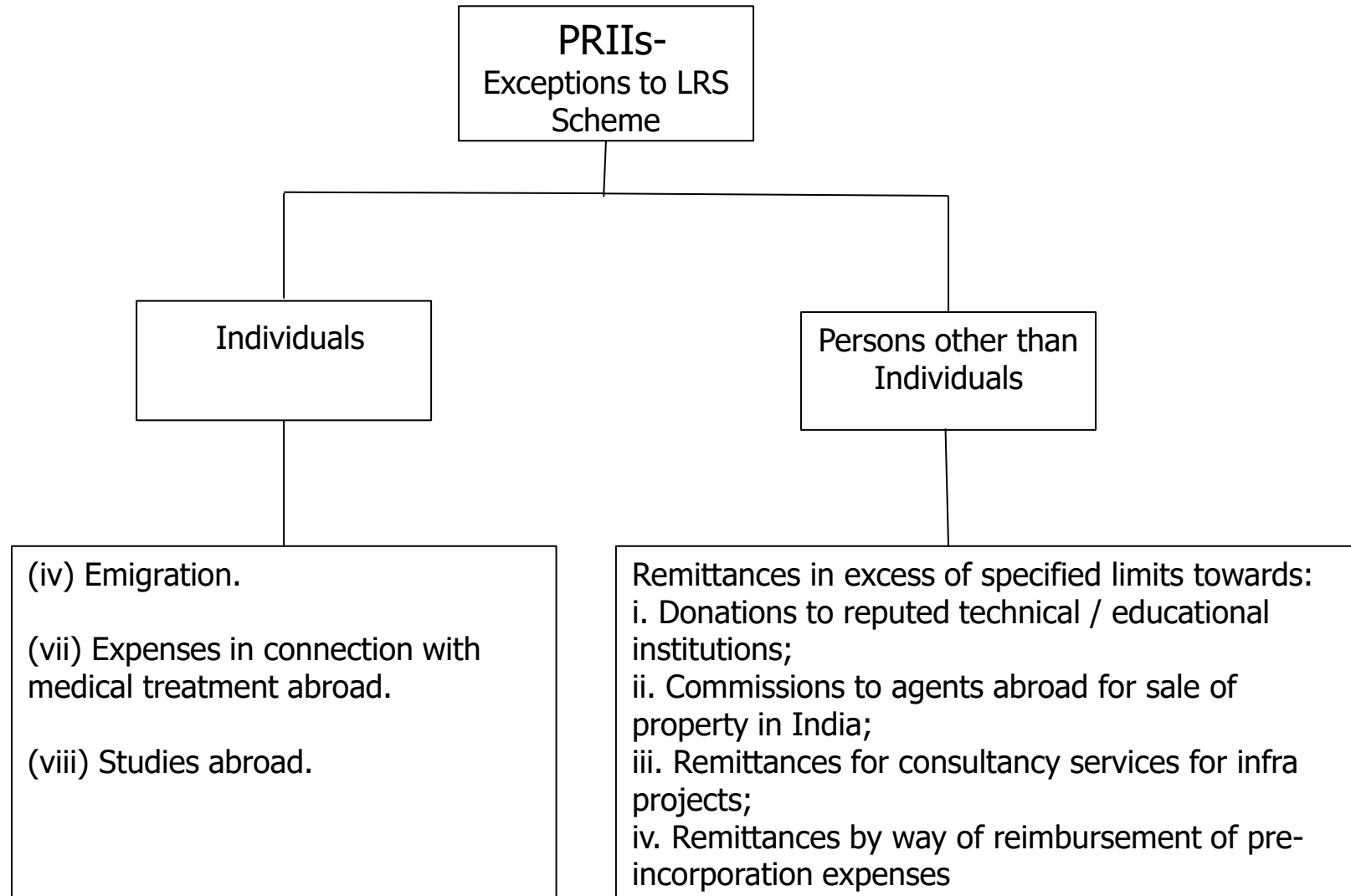
FEMA Practice - Revised Notifications & Master Directions

Particulars	Master Direction
Import of Goods & Services	FED No. 17 / 2016-17
Liberalized Remittance Scheme	FED No. 7 / 2015-16. Updated up to June 20, 2018
Compounding of Contraventions	FED No. 4 / 2015-16. Updated up to April 04, 2019
Other Remittance facilities (current account)	FED No. 8 / 2015-16. Updated up to Nov 06, 2018
Reporting under FEMA	FED No. 18 / 2015-16. Updated up to April 04, 2019
Misc Directions that do not figure in other Master Directions (TDS on remittances, repatriation of assets abroad & under LRS, Medical expenses of NRI, Routing of funds to India, SIT - sharing of information, IFSC guidelines, FEMA & Black Money Act)	FED No. 19 / 2015-16. Updated up to Nov 12, 2018
Money Changing Activities	FED No. 3 / 2015-16. Updated up to March 29, 2019
Vostro Accounts by Non-Resident Exchange Houses	FED No. 2 / 2015-16. Updated up to Aug 31, 2018
Money Transfer Service Scheme (MTSS)	FED No.1/2016-17
Gold Monetisation Scheme 2015 dt 22.10.2015_amended to 21.01.2016	DBR.IBD.No.45/ 23.67.003 / 2015-16

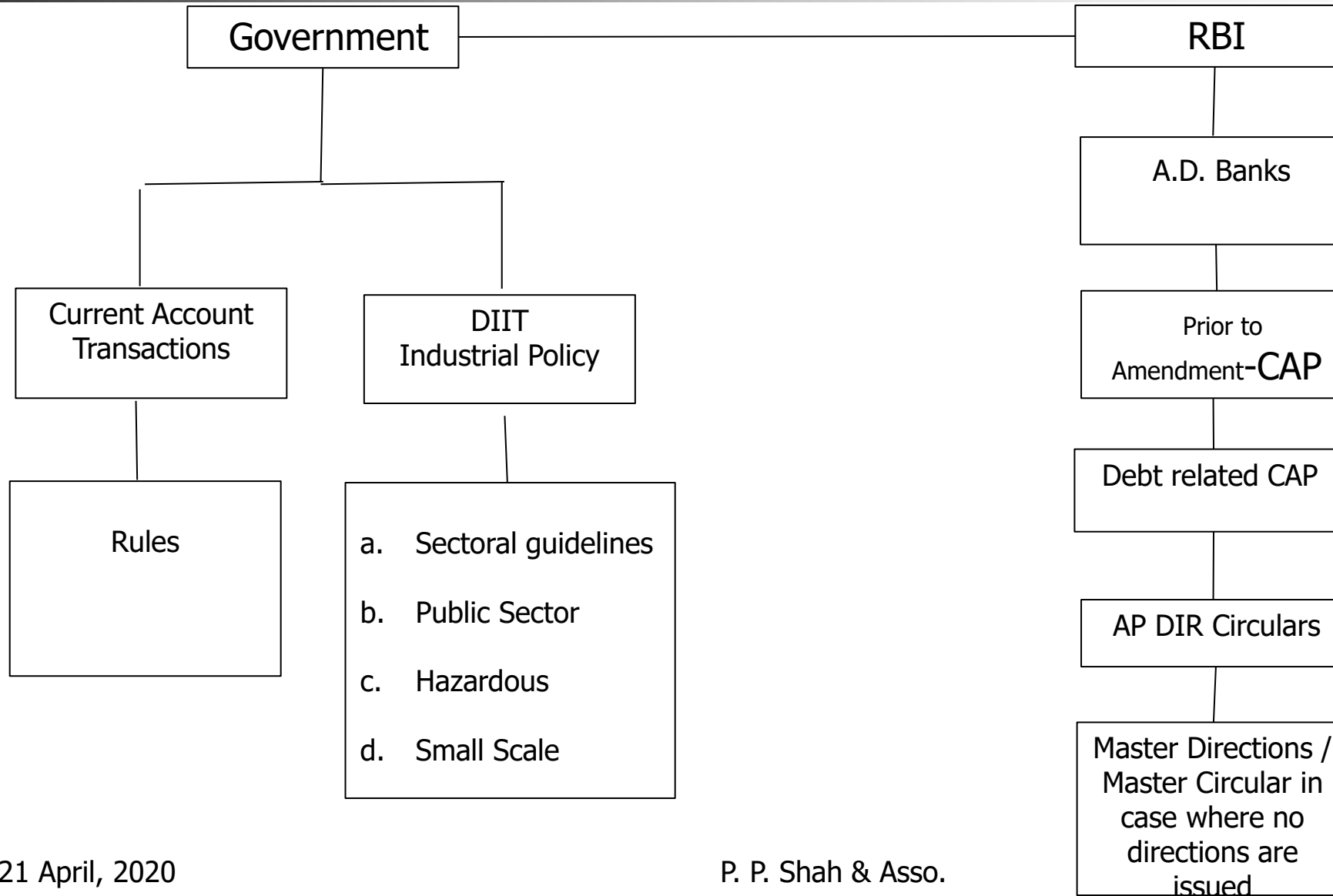
FEMA Practice



FEMA Practice



FEMA Practice



FEMA Practice

	PROI		
	Foreign Citizen	NRI	Other entities
Deposit- Notf.5(R) –Banking Accounts of PROI plus few cases in Notf. 10(R)	[Can open for limited purpose as mentioned in Notf.5(R) & 10(R)]	√ [Notf.5(R)]	√ [Notf.10 (R)]
Branch /Liaison - Notf. 22(R)	NA	NA	Prior approval through AD √ [except citizen of 8 countries]
Project office	NA	NA	Auto Route with conditions except 7 citizens
Immovable property in India- Foreign Exchange Management (Non-debt Instruments) Rules, 2019	X	√	√ [For branch, office or other place of business for carrying on in India any activity, excluding a liaison office]

FEMA Practice

	PROI		
	Foreign Citizen	NRIs	Other entities
Partnership business in India- Notf.24 [Now subsumed under Foreign Exchange Management (Non-debt Instruments) Rules, 2019]	X (Prior approval on Repatriation basis)	✓ (Auto Route on non repatriation basis ,Repatriation -Prior approval)	(Prior approval on repatriation basis)
Borrowings in rupees	Restricted only to rupee borrowings		
Notf 4		-From relative SBT End use restrictions.(Reg 8B) -Special provision for housing loan by AD in rupee to non resident and loan against security of shares and immovable property (Reg.8 and 7) -body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin(Regulation 8A) -Loan for acquiring share of Indian co. under ESOP (Reg.7) -loan granted to a non-resident by an authorised dealer, in accordance with Regulation 7 , may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative (Reg.7A)	

FEMA Practice

	PROI		
	Foreign Citizen	NRIs/ OCI	Other entities
Lending in FE		Close relative in Foreign exchange- Notf.3	ECB
Lending in rupee		Indian co- NCD- Notf.4 Notf.5 – against fund held in account	
Lending by way of Deposits		Schedule 6 & 7 of notf.5(R) , Loan from NRO account, Commercial paper	
Portfolio Investment	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 2,8	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 3 Foreign Exchange Management (Debt Instruments) Regulations, 2019	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 2,8 Foreign Exchange Management (Debt Instruments) Regulations, 2019
FDI	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,6,7,8	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,4, 6,7	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,6,7,8

FEMA Practice

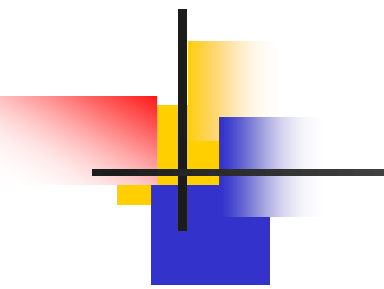
	PRII	
	Individual	Other entities
Current Account transaction		
FE Account	Notification 10(R),RFC,RFC(domestic), EEFC	
Export of goods and service- Notf. 23(R)	√	√
PEM- A.P. Dir cir 32 dt 20/10/03 A.P. Dir cir 118 20/6/2013 & 51 dt 20/09/13	√	√
Branch /Liaison /Project office outside India – FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016. FED No. 14 / 2015-16. Updated up to April 12, 2019	√	√
Overseas Investment – Notf. 120	√	√
	P. P. Shah & Asso.	

FEMA Practice

	PRII	
	Individual	Other entities
Borrowing in Foreign Exchange	Notf.3 – From close relative, from bank outside India for execution of turnkey project outside India, foreign currency credit from overseas supplier, Buyer's credit & ECB	Notf.3 – ECB as per Guidelines as to rate, end use, eligible lenders
Borrowing in rupee	Notf.4 – From NRI , PIO(to entities other than co's) (NRB) Notf.5(R) – Deposit on non- repatriation basis, Repatriation basis(Public)	Notf.3 – ECB as per Guidelines Notf.4 – NCD(Public)(NRB or RB)

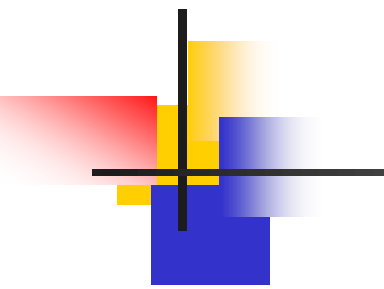
FEMA Practice

	PRII	
	Individual	Other entities
Lending in FE Lending in rupee	Notf.3- Out of EEFC for trade related purpose Notf.4 – to close relative (Regulation 8B) -loan granted to a non-resident by an authorised dealer, in accordance with Regulation 7, may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative.(Reg.7A)	Notf.3 – to its WOS or JV outside India, to its employee outside India Notf.4 -body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin(Regulation 8A) -Special provision for housing loan by AD in rupee to non resident and loan against security of shares and immovable property (Reg.8 and 7) -Loan for acquiring share of Indian co. under ESOP (Reg.7)
Immovable property abroad	Notf.7(R)	Notf. 120 for bonafide overseas Business activities
LRS	Any permitted CAT or CAP SBT restrictions & provision	



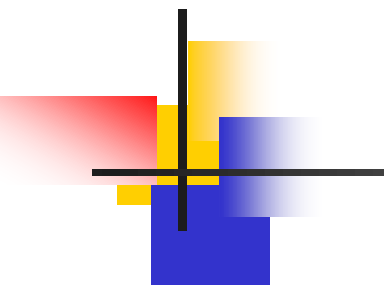
Case study - Overview

- I. Incorporation of WOS by an Indian company and deputation of Indian citizen to promote business of a Wholly Owned Subsidiary(Residential Status)
- II. Travel abroad – Private visit or business visit (CAT)
- III. Branch outside India and Project Export (Export of Goods and Services)
- IV. Real estate by NRI in India(Provisions and Purpose India-Notf 20,21 and FDI)
- V. Investment outside India for co-production of the Film(CAT, CAP, Borrowing etc-Notf (3R),4,120 and Current Account Transactions)
- VI. Guarantee by PRII in favour of Foreign Step Down Subsidiary(Overseas Investment-Notf 120)
- VII. Overseas Investment(Notf 120)
- VIII. Opening of project office in India (Notf 22(R))
- IX. Downstream Investment (Rule 23 Foreign Exchange Management (Non-debt Instruments) Rules, 2019)
- X. Borrowings by Indian company from Non resident promoter(Notf 3(R), 4,5(R) and 20)



Case study –I Overseas Employment

- **Incorporation of WOS by an Indian company and deputation of one Indian citizen to promote business of Wholly Owned Subsidiary**
- India Ltd. is planning to incorporate a wholly owned subsidiary in U.K. and proposing deputation of one of its chief executive Mr. Lewis an Indian Citizen to pursue promotion of business of Wholly Owned Subsidiary (WOS). Number of option deliberated on proposed deputation of Mr. Lewis to U.K. were as under:-
 - To relocate the employment of Mr. Lewis to U.K.
 - To request Mr. Lewis to look after operations in India & U.K., simultaneously as duties may not require aggregate travel of about 100 days to U.K. for few years
 - To relocate the employment of Mr. Lewis to U.K. and request him to travel to India from time to time for Indian operations.

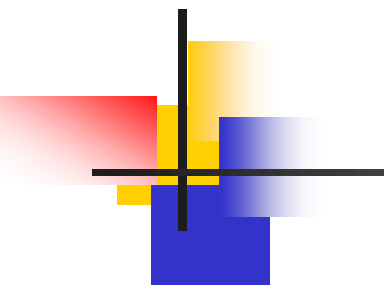


Case study –I Overseas Employment

Question for consideration

Mr. Lewis requested you to advise him:-

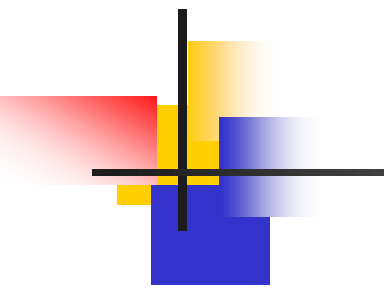
- i. on his Residential Status in above situations under FEMA.
- ii. Advise Mr. Lewis on
 - a. possibility of dual employment, both in India & U.K. under FEMA & under I.T. Act' 1961. and
 - b. his Non-Resident status under FEMA, on account of his desire to migrate his family to U.K. & for higher studies of his children and various investment proposition outside India as he is earning more than INR 15 lakhs in India out of various sources in India
- iii. India Ltd. also has WOS in Tax Heaven near U.K. Discuss the employment potential with such a Tax Heaven company and residential status under FEMA, and his plan to migrate his family to U.K. & investment proposal outside India?
- Leads to solution: a. Under FEMA Intention based definition do not require stay of 181 days in India. b. Under Tax Laws India does require a person to be a Tax Resident of any other country in order to be a Non Resident



Case study –I

Overview of Legal framework

- Under FEMA residential status is of two types :
 - A. Person resident in India
 - B. Person resident outside India
 - According to Sec 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 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 per sec 2 (w) " person resident outside India" means a person who is not resident in India;



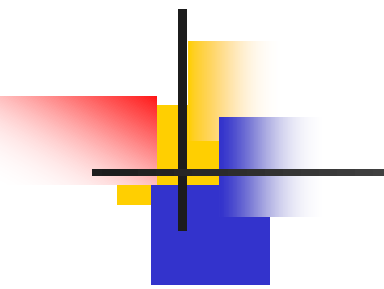
Case study –I

- Residential status for I.T.Act is determined u/s 6 as under :

Sec. 6(1) An individual will be treated as resident in India in any previous year if he fulfils any 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 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.

Explanation 1
- (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 less than 182 days, he will be treated as non-resident for that year and his foreign income would not attract tax liability.
- (b) An Indian citizen or a person of Indian origin who being outside India 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] **and in case of the citizen or person of Indian origin having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, for the words “sixty days” occurring therein, the words “one hundred and twenty days” had been substituted.**
- **New Insertion 1A - Notwithstanding anything contained in clause (1), an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature;**

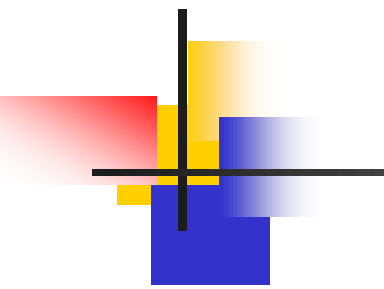


Case study –I

- 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 either of the following four conditions as laid down under section 6(6) of the Income-tax Act, 1961 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); or
- (ii) He should have been in India for a period or periods amounting in all to 730 days (i.e. **on an average 104 days per year**) or more during the seven years preceding that previous year.

If he does not fulfill any one of the above conditions, he will be treated as “not ordinarily resident” or

- **(iii) citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year , who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or**
- **(iv) a citizen of India who is deemed to be resident in India under clause 6(1)(A)**

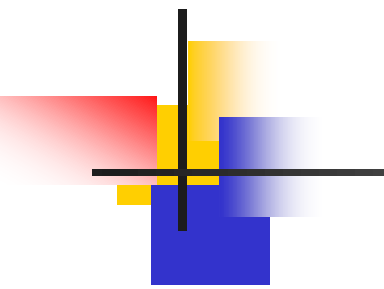


Case study –I

- section 5 defines the scope of income liable to tax.
- (1) 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) Person who is resident but not ordinarily resident is liable to tax same way as that of resident except that the income which accrues or arises outside India is only taxable in India if it is derived from a business controlled in or a profession set up in India.
- (3) 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.



Case Study –I

Applicability to Case study:

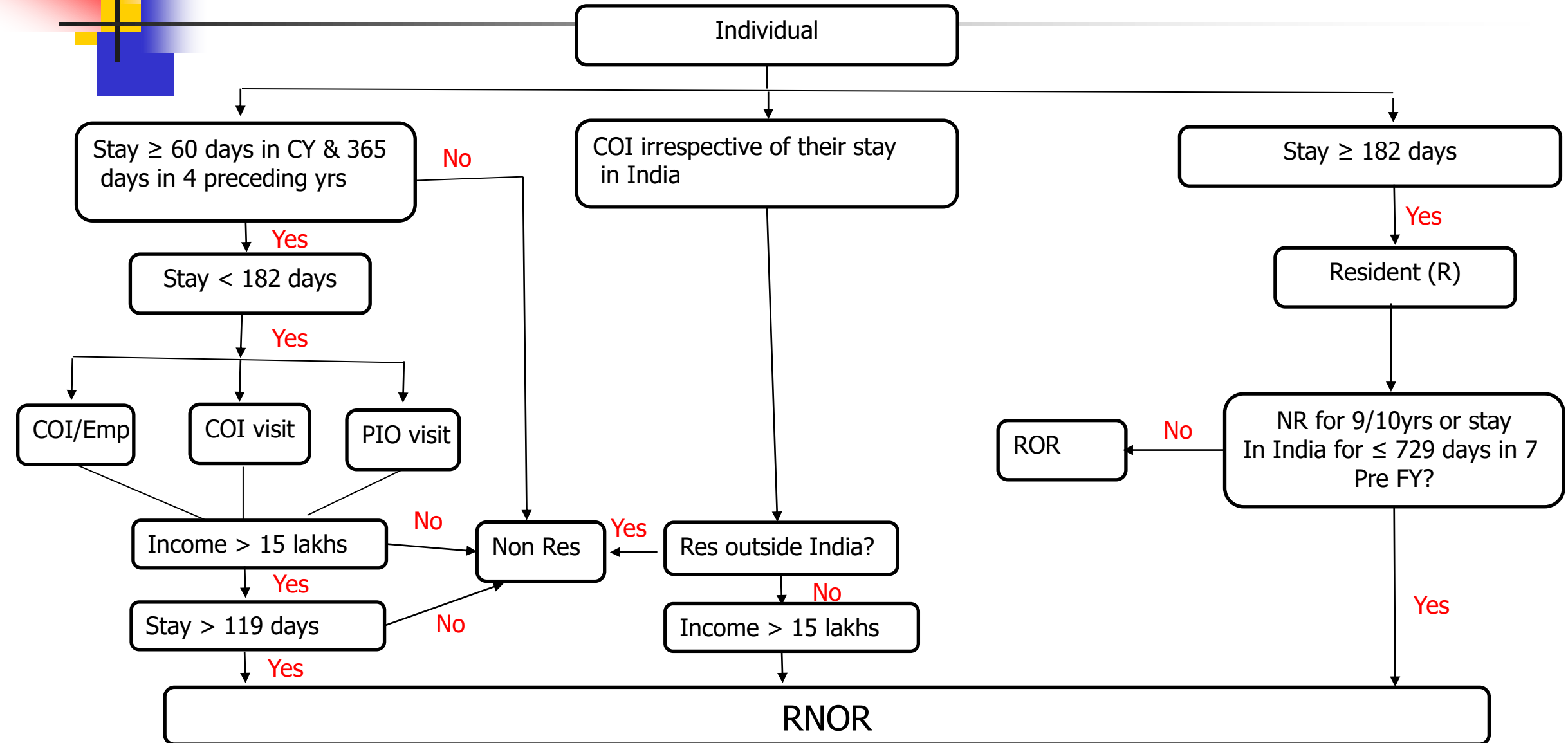
- Mr. Lewis is given with three options:
 - i) To relocate the employment of Mr. Lewis to U.K.
 - ii) To request Mr. Lewis to look after operations in India & U.K., simultaneously as duties may not require aggregate travel of about 100 days to U.K., for few years.
 - iii) To relocate the employment of Mr. Lewis to U.K. and request him to travel to India from time to time for Indian operations
- Analysis of the definition of person resident in India as given in sec. 2 (v) of FEMA for the purpose of given case:

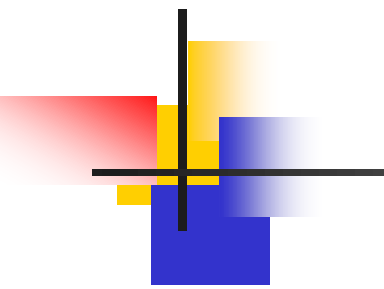
Person to be resident in India , has to reside for more than 182 days during the previous financial year .

However exclusion to this is - if a person goes out of India for employment , for vocation or for any other purpose for uncertain period , then even if he has resided in India for more than 182 days he will become person resident outside India.
- Analysis of the sec. 6 of Income Tax Act 1961 for the purpose of given case: From combine reading of sec. 6 and explanation to sec. 6 (1) , we can conclude that if a person goes outside India for employment then the second condition of sec. 6(1) i.e. more than 365 days stay in 4 years does not apply. Thus, only the first condition of more than 181 days (182 days or more days)will be applicable.

From second year, he will become 'a person visiting India' and therefore, expln (b) will be applicable, which is that if his stay in India exceeds 120 days and Total Income in India exceeds 15 lakhs then he would be a not ordinary resident, but if his total income in India is less than 15 lakhs and stay in India is less than 182 days then he would be a non-resident

Definition of Resident – Sec 6





Case study – I

Thus if Mr Lewis leaves India before 28th September, the position will be different

- Incase of Total Income in India exceeding INR 15 lakhs:
 - i. If person stays more than 119 days, he will be treated as resident
 - ii. If he is not a tax resident in any other country he will be a resident of India regardless of his stay in India

Discussion:

Q.1 Advise on residential status under given option to Mr. Lewis under FEMA

i) To relocate the employment of Mr. Lewis to U.K.

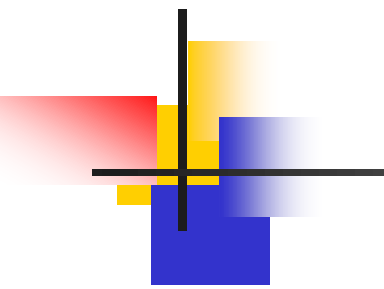
Mr .Lewis can do so but it is a burden on him to establish that he has gone abroad for the purposes of his employment however he may be Resident under ITA 1961.

ii) To request Mr. Lewis to look after operations in India & U.K., simultaneously with dual Employment

Mr.Lewis can do so with a designation as Group MD, employed with a Company where Head office Function is located outside India say UK/Jersey. Mr.Lewis could be Resident or a Non Resident depending upon his stay/visit in India.

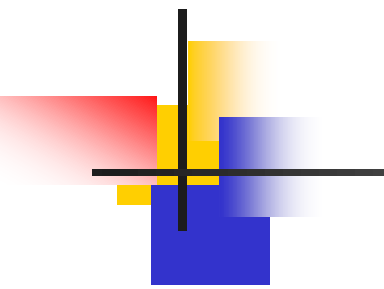
iii) To relocate the employment of Mr. Lewis to U.K. and request him to travel to India from time to time for Indian operations/overseas operations

As discussed Mr.Lewis will be person resident outside India as he goes out of India for employment.



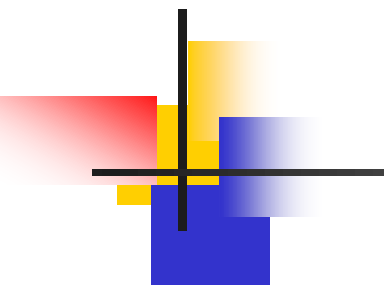
Case study –I

- **Incidental benefits to be a PROI:** Apart from various investments opportunities in India, there are several other advantages to the PROI, which are outlined below:
- Can freely acquire immovable properties Abroad
- Can Retain all his Assets Abroad, even after returning to India
- Can set up a business outside India
- Can set up family trusts/ Asset protection trust
- PIO returning to India as non tourist/ on visit to India can bring gold on payment of concessional duty
- Foreign income is not liable to tax in India. Certain income in India is exempt from tax
- Can seek Advance ruling from Advance Ruling Authority on taxability (income tax) of transactions.
- Double Tax Avoidance Agreements – Concessional rate of tax and tax exemption benefits available
- There are special reserve seats for children of NRIs for Engineering/Medical/MBA courses in certain institutions in India provided the fees are paid in foreign exchange.



Case study –I

- Advantages to NRI (cont'd..)
- can avail the benefits of the Double Tax Avoidance Agreements (DTAAs) entered into by India with several countries which attempt to minimize double tax on the same income (i.e. if tax is payable in India by NRIs on their income in India, credit for tax payable is available against tax payable in foreign country on such income). Also tax on dividends, royalty, fees for technical services earned in India by NRIs are offered concessional tax treatment under most DTAAs. Further, in few cases, tax may not be payable at all on such income if the NRI is a tax resident of a treaty country.
- There are special reserve seats for children of NRIs for Engineering/Medical/MBA courses in certain institutions in India provided the fees are paid in foreign exchange.



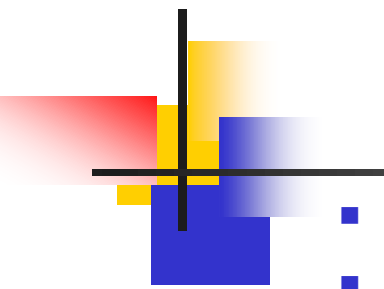
Case study – II (Travel Allowance)

- **Travel abroad**

- Kindly advise Mr. Traveller from India to a place(other than Nepal and Bhutan) outside India, as to what is the maximum amount he can spent on his private visit to a tourist destination or a business visit outside India?

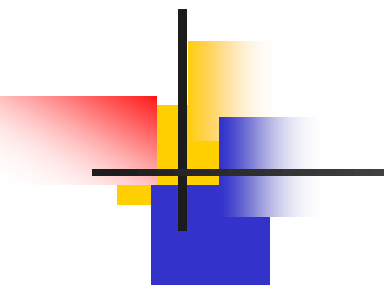
Lead to the Solution:

- Allownce for Private Visit in Foreign Currency,
- Allowance for debit to the Credit Card of the PRII,
- RFC Account,
- RFC (D) Account,
- Export of INR.
- In case of a Business visit – US\$ 2,50,000 (US\$25,000 without supporting documents).
- Payment to Indian tour operator
- Hospitality abroad
- Branch abroad



Case study – II (Travel Allowance)

- Overview of legal provision
- Sec 2(e) of Foreign Exchange Management Act defines capital transaction as capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6
- Sec 2 (j) of Foreign Exchange Management Act defines current transaction as " 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) payments 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



Case study – II

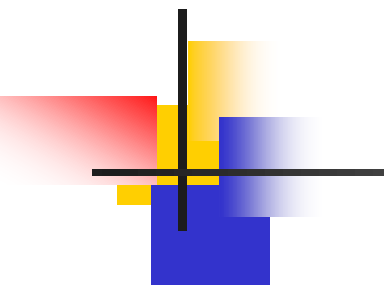
- **Section 5 of FEMA states that**

- Any person may sell or draw foreign exchange to or from an authorized 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, impose such reasonable restrictions for current account transactions as may be prescribed.

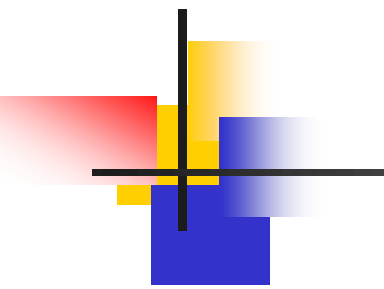
Accordingly restriction on current transaction is divided into three categories:

- Schedule I of FEM(CAT)Rules- deals with the transaction which are prohibited
- Schedule II of FEM(CAT)Rules- deals with the transaction which requires prior approval of Central government
- **Schedule III of FEM(CAT)Rules- deals with the transaction which required prior approval of RBI if the amounts exceeded the amounts specified in the schedule, However it is subsumed in the overall LRS limit except for few items**



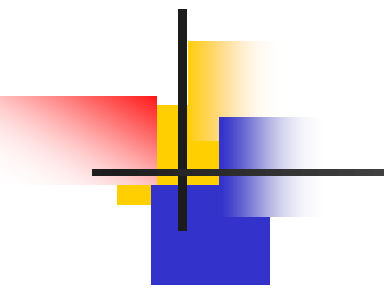
Case study – II

- As per **rule 5** of FEM(CAT)Rules -No person shall draw foreign exchange for a transaction included in the Schedule III without prior approval of the Reserve Bank :
- **Provided** that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.
- As per **rule 6** (1)Nothing contained in rule 4 or rule 5 shall apply to drawal made out of funds held in Exchange Earners' Foreign Currency (**EEFC**) account of the remitter.
- Rule 6 (2) Notwithstanding anything contained in sub-rule (1), restrictions imposed under rule 4 or rule 5 shall continue to apply where the drawal of foreign exchange from the Exchange Earners' Foreign Currency (**EEFC**) account is for the purpose specified in items_10 and 11 of Schedule II, or items 3, 4, 11, 16 and 17 of Schedule III as the case may be.
- As per **rule 7** of FEM(CAT)Rules - Nothing contained in rule 5 shall apply to the use of **International Credit Card** for making payment by a person towards meeting expenses while such person is on a visit outside India.



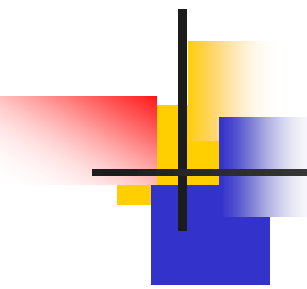
Case study – II

- Schedule III FEM (CAT) Rules is now subsumed in the LRS Limit of US\$ 2,50,000, Hence AD can release Foreign exchange up to the above mentioned for transactions mentioned in Schedule III
- However expenses for medical treatment Abroad, emigration expenses and education abroad is on Actual basis (i.e. limit can exceed US\$ 2,50,000)
- Further in terms of Regulation 3 of Notification 6 - any person resident in India may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000 per person;
- RFC Account Rules Reg 4(B)(2) of the Notf 10 states that the funds in a Resident Foreign Currency Account opened or held or maintained in terms of sub-regulation (1) of Reg 4(B)(2) shall be free from all restrictions regarding utilisation of foreign currency balances including any restriction on investment in any form, by whatever name called, outside India - **Utilisation from account is free from all the restrictions**
- **EEFC account Reg 4(A) of Notf 10(R) and Schedule I [Paragraph 3(i)] permits withdrawal for any CAT without any limit**
- **RFC Domestic Reg 5A of Notf 10(R) permits withdrawal for private or business visit or for permitted CAT.**



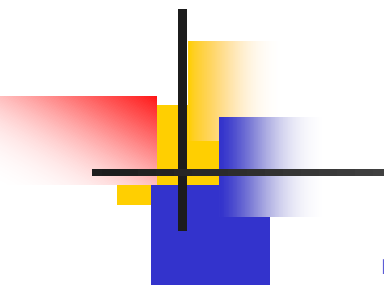
Case study – II

- As per Regulation 7 of Notification 6(R)- any person may take or send out of India, -
Cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000;
 - foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder ;
 - currency in the safes of vessels or aircrafts which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank ;
- any person may take out of India, -
 - foreign exchange possessed by him in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 ;
 - unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 ;



Case study – II

- Foreign branch or H.O. or subsidiary abroad can also finance the expenses incurred by person in case it is a Business visit
- Non resident (Friends and relative outside India) can extend hospitality to person resident in India who is on visit outside India.
- As per Item No 2 of Sch. III of CAT Rules, the following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:
 - i. Donations by corporates exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for specified purposes such as reputed educational / technical institutions
 - ii. Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
 - iii. Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India
 - iv. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.



Case study – III Export of goods

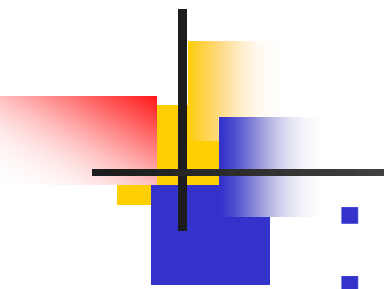
Branch Outside India

- A Ltd. is engaged in export of goods to branch outside India.
 - A Ltd is informed of various circular, Notification 47/2001, A.P. Dir cir 39 dt 20/4/2002 , A.P. Dir cir 18 of 4/12/2006, Notification No 10(R), FED No. 14 / 2015-16. Updated up to April 12, 2019 dealing with Initial remittance for set up (15% of TO of last two financial year or 25% of Net worth whichever is higher) and recurring expense (10% of TO of last two financial year)
 - Question arose as to
 - A. Whether branch is required to receive export proceeds in accordance with Notf. 23 for all the exports made.
 - B. Whether A Ltd. is required to receive net of expenses or gross amount of export from its branch
 - C. Export of software with on – site development are allowed to bring in Foreign Exchange net of expense on completing the project
- Whether in similar manner A Ltd. Can also plan its transaction?

Leads: Residential status,

Sec.7 of FEMA read with applicability of sec. 2(j)(i)- CAT,

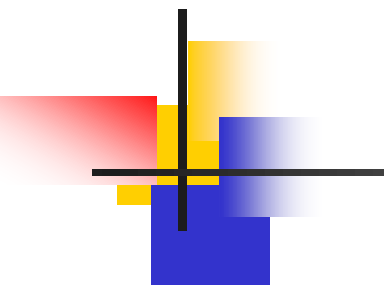
Notf. 23(R) regulates CAT to ensure documentation and FE entitlement and its receipt by PRII



Case study – III

- Nature and Status of a Branch of an Indian company and its export
- Section 2(I) Export with all its grammatical variations and cognate expressions, means
 - i) the taking out of India to place outside India any goods,
 - ii) provision of services from India to any person outside India
- Sec 2 (v) Person Resident in India means-
 - (i) a person residing
 - (ii) any person or body corporate
 - (iii) an office, branch or agency in India
 - (iv) an office, branch or agency outside India owned or controlled by a person resident in India.

All the provisions applicable to PRII will therefore be applicable to overseas branch unless stated otherwise

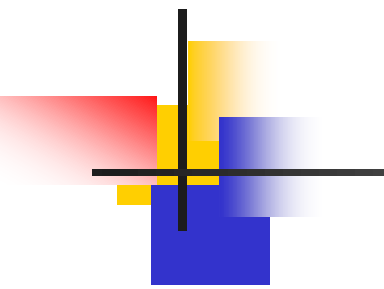


Case study – III

Thus sec. 7 authorises RBI to make regulation in respect of PRII who is exporter.

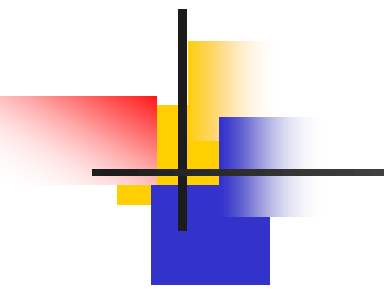
Notf. 23(R) is issued to regulates activity of the exporter who is PRII so far as export value and its repatriation is concerned.

- Regulation 9 deals with the realisation period of export and states that- Full Export value of goods or software exported shall be realised and repatriated in India within 9 months from the date of export. [However, goods exported to a warehouse established outside India shall be repatriated as soon as it is realized and in any case within 15 months from the date of shipment of goods]
- Thus : a) Goods taken out by a PRII is to be treated as export irrespective of the fact that it is exported to Branch. However it may not be so in case of service as in that case what is required is provision of service from India to any person outside India .[Branch is person resident in India]
- b) Since it is export full value to be realised within 9 months unless period is extended by RBI .(Recently RBI has increased the period to 15 months on account of the current pandemic)
- c) “Full value” is referred to be repatriated. So, sale value net of expense can not be considered.



Case study – III A Export of Project

- **Project export**
- Turnkey Project Ltd. an Indian company has bagged a contract to set up a sugar mill in Uganda for a lumpsum price of US \$ 10 mn. The contract includes supply of Plant & Machinery from India, services of Indian company in installation and commissioning of plant at site. A part of machinery is also to be outsourced from third country for about US \$ 2,00,000 to be installed at site. It also requires various local services for installation estimated at US \$ 8,00,000.
- Indian company has been funded by the nationalised bank to execute the turnkey project including the provision of services.
- Indian company seeks your advise to execute the transaction from stand point of FEMA'1999 and secure arrangement to receive payment from foreign customer, who is willing to deal through the banker.



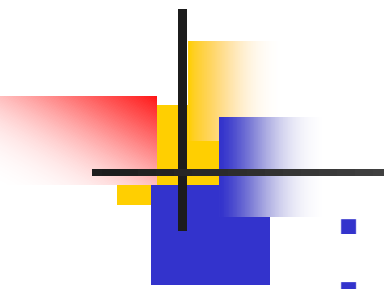
Case study III A – Export of Project

- **Issue:** Deferred payment contract
- Purchase of goods without import into India
- Purchase of Overseas service
- Payment through bank

Leads :

- **Documents for Export of goods:** Delivery of title to the goods can be exchanged by overseas Bank on acceptance of Letter of credit by the overseas customer
- **Service export:** Title to the design, drawings, could be a milestone to ensure payment mobilisation, advance, Performance guarantee, Neutral Certification agency approved by Bank
- **Other issue:** Income tax on provision of service
- Service tax on provision of service

Comprehensive solution: Project export through AD/Exim bank, Form DPX and the procedure



Case study III A Export of Project

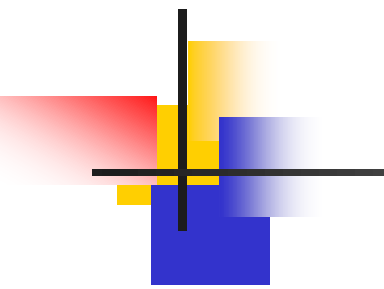
- **Project Export**

- Indian exporters offering deferred payment terms to overseas buyers in respect of export of goods and those who have been awarded turnkey, civil construction contracts by overseas parties have to secure prior approval at post award stage for credit terms to be offered, third country imports etc, from Authorised Dealer / Exim Bank which shall consider the proposal in accordance with the guidelines issued by RBI under 'PEM - Memorandum of Instructions on Project Exports and Service Exports'.
- After entering into contract, the exporter should submit to his bankers an application in form DPX-1 (in respect of turnkey and deferred payment supply contracts) or in form PEX-1 (in respect of civil construction contracts), as the case may be, in six copies along with six copies of the contract.(Cir 118 dt 26.6.2013)

By virtue of A.P. Dir cir 51 dt 20.9.2013, the above requirement of cir. 118 is dispensed with if fund based or non fund based facility is availed from the AD/Exim Bank. However information to ECGC will be required if insurance cover is taken.

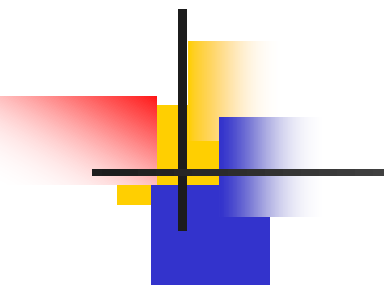
Authorised dealers / Exim Bank may grant post-award clearance to the project proposal without any monetary limit. If the authorised dealer desires participation of Exim Bank in the financial arrangements and /or guarantee facilities, concurrence of Exim Bank should be obtained before granting post award clearance.

- Conditions necessary for Clearance of proposals by Authorised Dealers / Exim Bank laid down in para B.5 in PEM of July 2014



Case study III A

- Third Party purchase
While granting package approval for turnkey/civil construction contracts involving purchase of machinery/equipment/materials from third country sources, the authorised dealer or Exim Bank will indicate the extent upto which such purchases may be made. If the part of proposed BOE is not required and AD will inform accordingly to RBI
- Service Export: Payment will be made by AD for service provider if that is part of information in Form DPX
- Project/ Service exporters may avail of facilities such as opening of foreign currency accounts, temporary site offices, payment of agency commission and availing of temporary overseas borrowings subject to the conditions as may be stipulated by the Exim Bank on behalf of the Working Group on project exports or Exim Bank/authorised dealer under the powers delegated to them
- Overseas Branch/Project office for Export

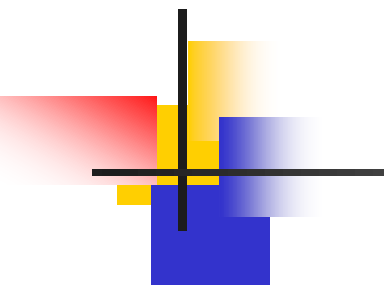


Case study III A

- Manner of receipt and payment

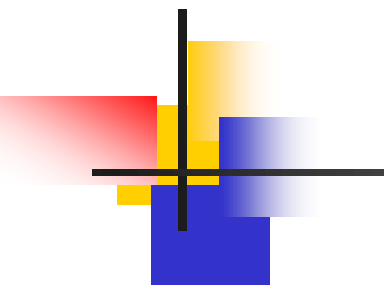
As per para A.3 of Master Direction on Export of goods and services

- The amount representing the full export value of the goods exported shall be received through an AD Bank in the manner specified in the Foreign Exchange Management (Manner of Receipt & Payment) Regulations, 2000 notified vide Notification No. FEMA.14 (R)/2016-RB dated May 2, 2016 in the following manner:
 - a. Bank draft, pay order, banker's or personal cheques.
 - b. Foreign currency notes/foreign currency travellers' cheques from the buyer during his visit to India.
 - c. Payment out of funds held in the FCNR/NRE account maintained by the buyer
 - d. International Credit Cards of the buyer.



Case study - IV

- **Investment in Real estate by NRI/OCI in India .**
- Discuss the various alternative available to Mr. NRI in India to explore real estate business/ Purchase and sale of Immovable property in India
- Discuss various distinguished provisions under FEMA for properties being
 - i. residential house/commercial property
 - ii. dealing with immovable properties and
 - iii. construction business



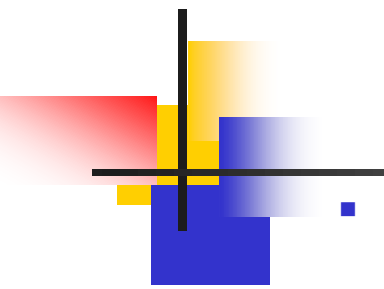
Case study – IV

- **Overview of legal provision:**

- 1. As per Foreign Exchange Management (Non Debt Instruments) Regulations, 2019 FDI or “Foreign Direct Investment” means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company
- 2. As per schedule 4 of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – a NRI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians may purchase and sale shares/Convertible debentures, warrants or units on Non- repatriation basis which will be deemed to be domestic investment at par with the investment made by residents.

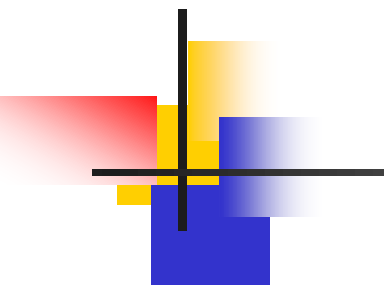
However, no purchase of shares or convertible debentures, etc of an Indian company shall be made under this Scheme if the company concerned is a Nidhi company or is engaged in agricultural/plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

- Explanation: For the purpose of this paragraph, "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. Further, earning of rent income on lease of the property, not amounting to transfer, will not amount to “real estate business”. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) regulations 2014 shall also be excluded from the definition of “real estate business”



Case study – IV

- 3.As per para 10 of Schedule 1 of Foreign Exchange Management (Non Debt Instruments) Regulations, 2019– 100% FDI under automatic route is allowed in Construction Development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships) subject to conditions specified in the policy. Conditions relating to lock-in period of 3 years do not apply to investment by NRIs.
- 4.Further as per Chapter IX of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 A person resident outside India who is a citizen of India may -
 - a) acquire immovable property in India other than an agricultural property, plantation, or a farm house:
 - Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.
 - Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause'.
 - b) transfer any immovable property in India to a person resident in India.
 - c) transfer any immovable property other than agricultural or plantation property or farm house to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India



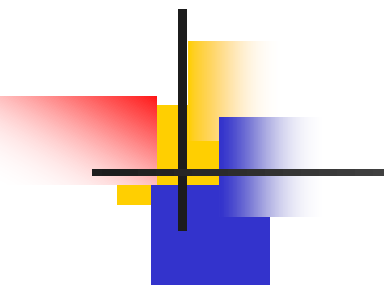
Case study – IV

- Bonafide Branch Activities of Foreign companies in India, Foreign Embassies in India and Long Term Visa Holders in India and Joint Ownership of the spouses of the OCI card holders
- **Repatriation of sale proceeds**
- In the event of sale of immovable property other than agricultural land/farm house /plantation property in India by a non-resident Indian or Overseas citizen of India, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
- Among other Cond(iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Case study – IV

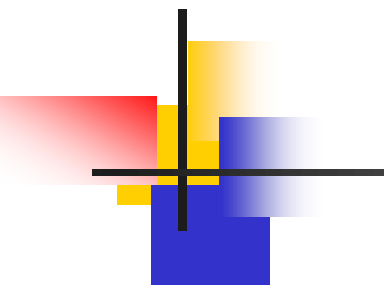
■ Summary of the provisions applicable to NRIs and OCIs under Chapter IX of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 :

Particulars	NRI	OCI
Purchase (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI	Resident/ NRI
Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from	Resident / NRI/ OCI	Resident/ NRI/ OCI
Acquire (any IP) as inheritance from a person resident outside India who had acquired such property	(a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these rules (b) from a Resident	
Sell (other than agricultural land/ farmhouse/ plantation etc) to	Resident / NRI/ OCI	Resident/NRI/OCI
Sell (agricultural land) to	Resident	Resident
Gift (other than agricultural land) to	Resident / NRI/	Resident / NRI/
Gift (agricultural land) to	Resident	Resident
Gift residential/ commercial property to	Resident / NRI/ OCI	Resident / NRI/ OCI



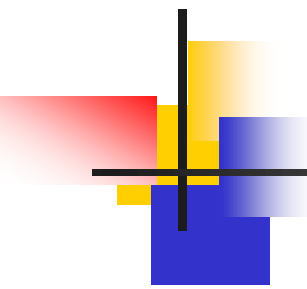
Case study – V

- **Investment outside India for co-production of the Film**
- A U.K. company engaged in production of International film, proposed its next production during F.Y. 2019-20 to be completed and released by 30th April 2020. The film is budgeted at a cost of GBP 1mn which is partly (equally) financed by Indian co-producer. On release of the film by UK Co, Indian Co will have all the right in relation to Indian territory and U.K. company will have world wide rights except that of India. The film contemplates:-
 - 30% of shooting in India at a cost of GBP 100,000.
 - 50% of principal star cast from India for a consideration of GBP 2,00,000.
 - Various pre productions & post production activities in U.K. at a cost of GBP 7,00,000 which includes payment to storywriter, choreography, supporting artists, cameraman, production co-ordinator, technicians & directors.
- Indian co-producer is a company with paid up capital & reserves of equivalent to GBP 75,000 contemplating the funding of its share of contribution of GBP 5,00,000 to part finance the film.
- Indian company is seeking immediate solution to finalise the structuring of the co-production finance as it did not have time to approach RBI for prior approval if any, kindly advise Indian company.



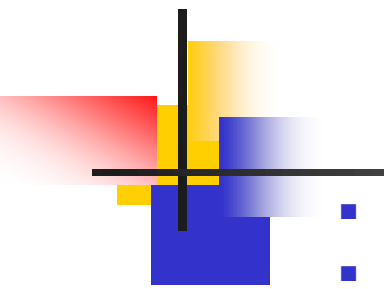
Case study – V

- **Overview of legal framework**
- Section 6(3)(a) of Foreign Exchange Management Act deals with "Transfer or issue of any foreign security by a person resident in India". Regulation relating to this transaction is notified by RBI as Notification No. 120 dt 7.7.2004.
- As per regulation 6 of FEMA Notification no. 120 an Indian party may make direct investment in a Joint Venture or Wholly Owned Subsidiary outside India. According to regulation 2(k) "Indian party" means 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) as defined under clause (ma) of Regulation 2 of this Notification making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank.
- Further as per regulation 6(2) The total financial commitment of the Indian Party in Joint Ventures / Wholly Owned Subsidiaries shall not exceed 400%, or as amended 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 and as per regulation 2(o) Net worth' means paid up capital and free reserves.
- Other conditions of regulation of 6(2)



Case study – V

- Regulation 6(6) deals with investment outside India in **existing company** that is required to be valued by a Category I Merchant Banker Registered with Securities and Exchange Board of India (SEBI), or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country, where investment is more than USD 5 (Five) million; and
- (ii) in all other cases, by a Chartered Accountant or a Certified Public Accountant.



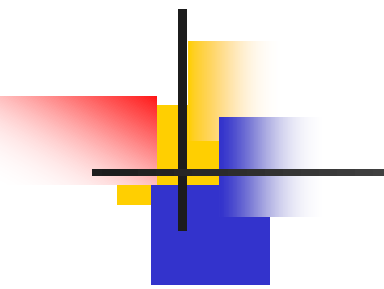
Case study – V

- **Conclusion**

- Case(a)

- Thus, Indian party can invest upto 400% of net worth (i.e. capital and reserve) in JV or WOS outside India without prior approval of RBI.
- In the given case Indian Party is Indian company and net worth of the company is GBP 75,000 and investment to be made is also GBP 5,00,000 (which is exceeding 400% of its net worth). Thus it needs to take prior approval of RBI subject to condition specified in the regulation i.e.
 - (i) The direct investment is made in an overseas JV or WOS engaged in a bonafide business activity.
 - (ii) The Indian Party is not on the Reserve Bank's Exporters caution list /list of defaulters to the banking system circulated by the Reserve Bank or under investigation by any investigation /enforcement agency or regulatory body.
 - (iii) The Indian party has submitted its Annual Performance Report in respect of all its overseas investments in the format given in Part II of the Form ODI
 - (iv) The Indian Party routes all transactions relating to the investment in a Joint Venture/Wholly Owned Subsidiary through only one branch of an authorised dealer to be designated by it.

B. Further, valuation by CA of Foreign company will be required since it is an existing company, which may take "considerable time".

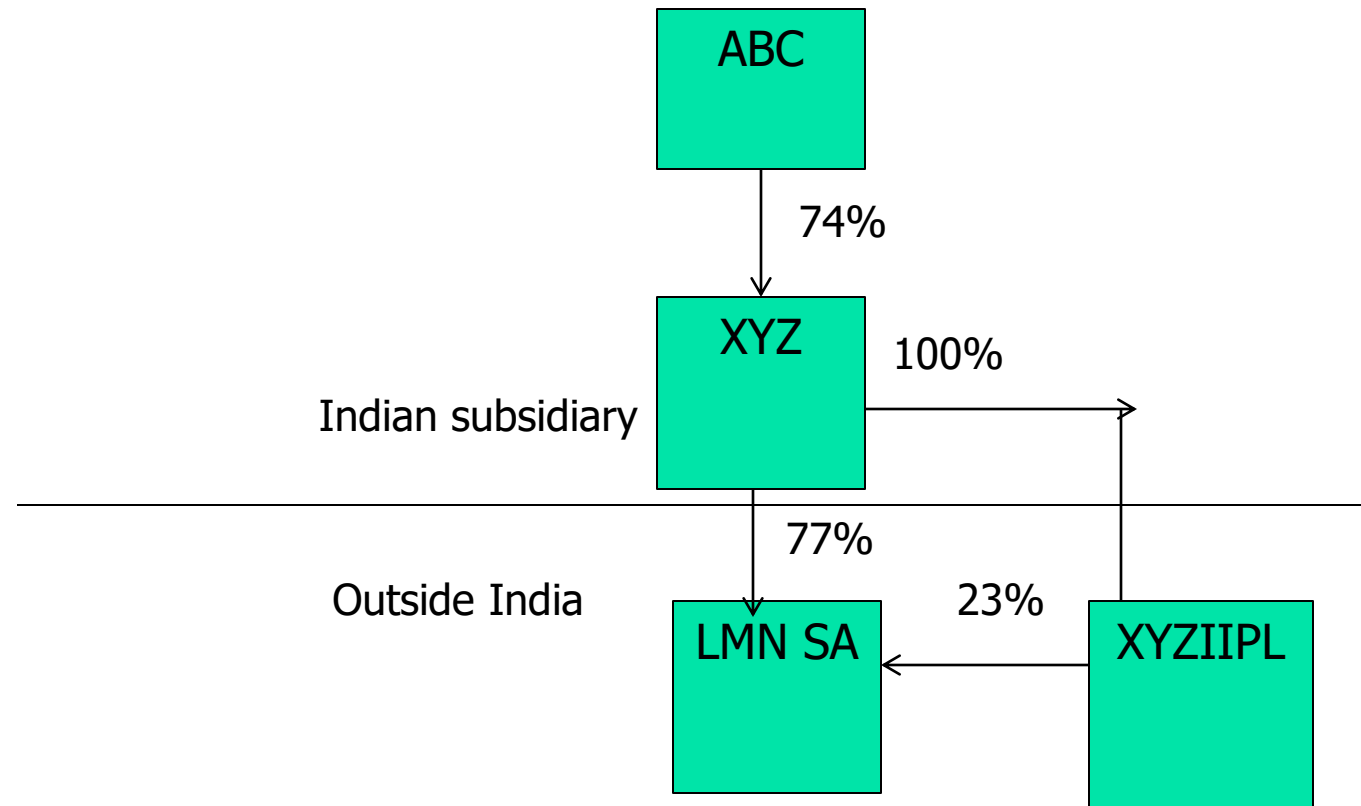


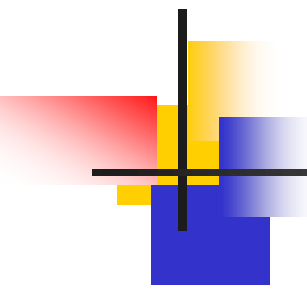
Case study - VI

Guarantee By PRII in favour Of Foreign Step Down Subsidiary **Background**

- XYZ Limited (XYZ) is an Indian subsidiary of ABC Ltd. (ABC). ABC holds 74% stake in XYZ.
- LMN SA, Spain ('LMN') is a subsidiary of XYZ, where XYZ holds 77%. The balance 23% is held by XYZ International PTE Ltd (XYZIPL), Singapore which is a wholly owned subsidiary of XYZ.
- AAA Bank India, had sanctioned a Euro 10 mn Non fund based (SBLC) facility at the request of XYZ in favour of AAA Bank Spain, who in turn had provided a Working capital facility of Euro 10 mn to LMN SA. The said facility was secured by way of a corporate guarantee by ABC.
- Due to RBI raising certain objection to the above arrangement, AAA Bank India has now sanctioned the Euro 10 mn Non fund based (SBLC) facility directly to LMN, Spain.
- The said facility is to be secured by way of a letter of Comfort from XYZ & a Corporate guarantee by ABC

Case study – VI



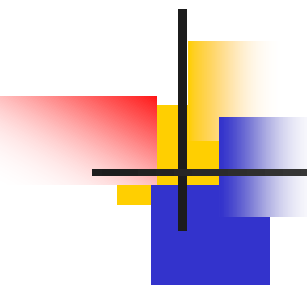


Case study – VI

Question for consideration

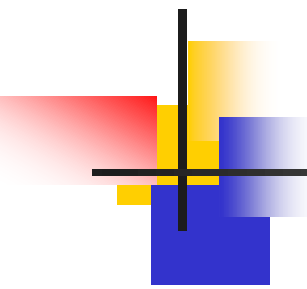
Based on discussions with the ABC, the clarification is sought

- A. Whether ABC can extend corporate guarantee for the arrangement?
 - If No, Can you suggest a minimal requirement to do so?
- B. Whether LMN is a first level step down subsidiary or a second level step down subsidiary for Indian party that intends to issue a corporate guarantee to AAA Bank, India for the purpose of providing the facility for Euro 10mn to LMN?
- Leads: Notf. 8 on Guarantee
 - Notf. 120 on overseas investment
 - Definition of Indian Party



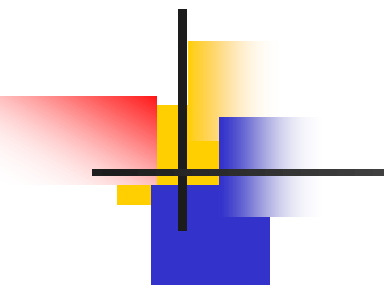
Case study – VI

- **Overview of Legal framework on Guarantees:**
- Issue of guarantees by a PRII is regulated by RBI under Foreign Exchange Management (Guarantees) Regulations, 2000 issued under Notification No. FEMA 8/2000-RB dated 3rd May 2000 ('FEMA 8') as amended from time to time.
- Regulation 5(b) of FEMA 8 permits a company in India which is promoter of a JV / WOS outside India to give a guarantee to or on behalf of the JV / WOS in connection with its business subject to the terms and conditions stipulated in Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2000.



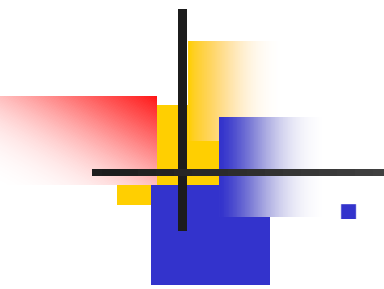
Case study – VI

- **Overseas Investments:**
- Direct Investments outside India are regulated by RBI under Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2000 issued under Notification No. FEMA 120/2000-RB dated 7th July 2004 ('FEMA 120') as amended from time to time. The procedural instructions are issued by the RBI vide A.P. (DIR Series) Circulars from time to time. Various existing instructions are consolidated vide Master Directions No. 15/2015-16 dated Jan. 01, 2016, last updated on 4th Jan, 2018 on Direct Investments by Residents in Joint Ventures and Wholly Owned Subsidiaries abroad.
- **Relevant provisions regarding Financial Commitment under FEMA 120:**
- Regulation 6 specifies the conditions for Overseas Direct investments under the automatic route.
- In terms of Regulation 6(2) of the Notification, an Indian party has been permitted to make total financial commitment in overseas Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS), not exceeding 400 per cent of the net worth as on the date of its last audited balance sheet



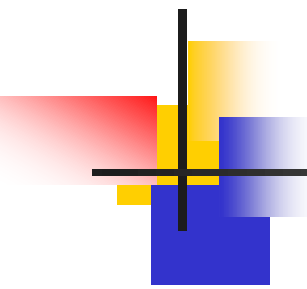
Case study – VI

- **Relevant provisions of the Master Direction: [Also Reg. 6(2)(i)]**
- 'Financial Commitment':
- As consolidated by the aforesaid Master Direction in its Para B.1 (3), for the purpose of determining the 'total financial commitment' within the limit of 400% as specified above, the following shall be reckoned, namely:
 - 100% of the amount of equity shares;
 - 100% of the amount of compulsorily and mandatorily convertible preference shares;
 - 100% of the amount of other preference shares;
 - 100% of the amount of loan;
 - 100% of the amount of guarantee (other than performance guarantee) issued by the Indian party;
 - 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian party provided the bank guarantee is backed by a counter guarantee / collateral by the Indian party.
 - 50% of the amount of performance guarantee issued by the Indian party provided that the outflow on account of invocation of performance guarantee results in the breach of the limit of the financial commitment in force, prior permission of the Reserve Bank is to be obtained before executing remittance beyond the limit prescribed for the financial commitment.



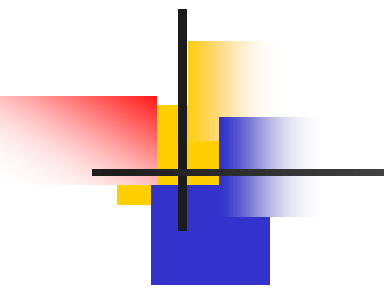
Case study – VI

- As provided in the Explanation to Regulation 6(3), an Indian Party may offer to a person resident outside India any form of guarantees, that is, corporate or personal / primary or collateral / guarantee by promoter company in India / guarantee by group company, sister concern or associate company in India, provided that:
 - a) total 'financial commitment' including all forms of guarantees remains within the overall ceiling stipulated for overseas investment by an Indian Party and
 - b) no guarantee is 'open ended'
- Definition of Net worth:
- Net worth has been defined in Regulation 2(o) of the said Notification as paid-up capital and free reserves.
- Indian Party has been defined in Regulation 2(k) as under:
- "Indian party" means 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) as defined under clause (ma) of Regulation 2 of this Notification making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank;
- Provided that when more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian party".



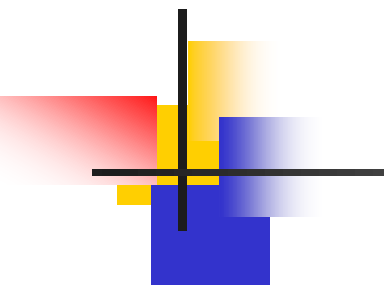
Case study – VI

- Issue of Guarantee by Indian Party to step down subsidiary of JV / WOS:
- As provided in regulation 6(4) of FEMA Notf. 120, (i) An Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture / Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian Party has made investment by way of contribution to the equity capital of the Joint Venture.
- Notwithstanding the above regulation, the following shall also be permitted.
- **(ii) An Indian Party may extend corporate guarantee on behalf of its first generation step down operating company within the prevailing limit for overseas direct investment.**
- Explanation: Issue of corporate guarantee on behalf of second level or subsequent level step down operating subsidiaries will be considered under the Approval Route, provided the Indian Party indirectly holds 51 per cent or more stake in the overseas subsidiary for which such guarantee is intended to be issued."



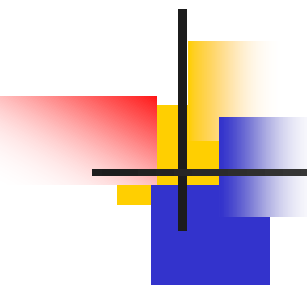
Case study – VI

- **Applicability to the case study:**
- As provided in Regulation 2(k) of FEMA 120, when more than one Indian company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party". Accordingly, when more than one Indian company has participated in the investment in a foreign entity, all such Indian companies jointly constitute "Indian party". If 100% ownership of the foreign entity is held by such multiple Indian companies comprising the "Indian Party", the foreign entity will be in the nature of a wholly-owned subsidiary of the "Indian Party" and not a joint venture between the companies comprised in the "Indian Party". Thus FEMA does not seek to distinguish between the various entities located within India or the group structure in India but is concerned with the structure of the entities set up outside India. Under FEMA, the concept of JV / WOS and step down entities refers only to foreign entities and not to a wholly owned subsidiary in India which is part of the Indian Party.
- e.g. If Co. A is the holding company of Co. B in India and they both invest in a foreign entity Co. C, then, keeping in view the definition of "Indian Party" both Co. A and Co. B shall be the "Indian Party" and Co. C shall be its wholly-owned subsidiary abroad ('WOS'). Since Co. C is an WOS, it cannot be considered as first level step down subsidiary under FEMA even though it is a step down subsidiary for Co. A as per company law.



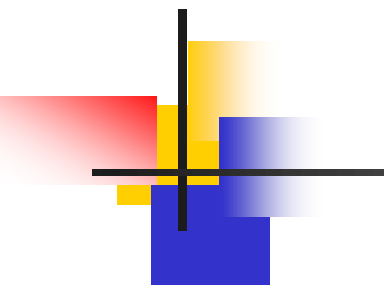
Case study – VI

- In the instant case, XYZ, the Indian Party, is the holding company of LMN, which it has promoted along with XYZIPL. As LMN has direct investment from XYZ, it is a JV / WOS of the Indian Party and not a first level step down subsidiary. In case LMN had received entire investment from XYZIPL, it would have been construed as a first level step down subsidiary of XYZ. However, given the shareholding pattern of LMN, there is no issue whatsoever that it is a JV / WOS of Indian Party and not a first level or second level step down subsidiary.
- As regards extending corporate guarantee on behalf of LMN, it would be permissible under Regn. 6(2)(i)(c) of FEMA 120 within the financial commitment of 400% of the net worth of the Indian Party. As this is a direct case of Indian Party extending guarantee on behalf of its JV / WOS, it does not fall under provisions regulation 6(4)(ii) of FEMA notf. 120 that is applicable to first level and second level step down subsidiaries. Thus the Indian Party can extend the said guarantee under Regn. 6(2)(i)(c) without attracting the provisions relating to first or second level step down subsidiaries.



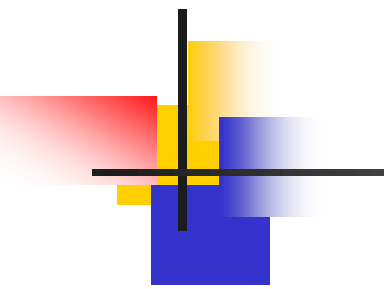
Case study – VI

- **Applicability to case study:**
- Q. (a) Whether guarantee can be issued by ABC Ltd.
- Ans. (a) Since ABC is an India party, guarantee can be extended by it. However in view of the language used in the Notf. about who can provide loan or guarantee, it is advisable to make a small investment by ABC along with XYZ in to LMN ,in order to avoid any issue of contravention in future



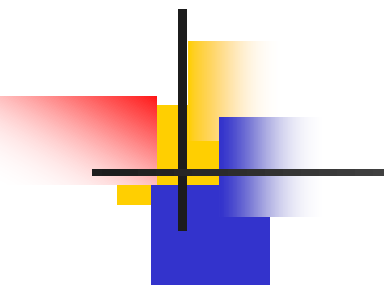
Case study – VI

- **Applicability to case study:**
- Q. (b) Whether LMN is a first level step down subsidiary or a second level step down subsidiary for Indian party that intends to issue a corporate guarantee to AAA Bank, India for the purpose of providing the facility for Euro 10mn to LMN?
- A. (b) As discussed in detail , LMN has received direct investment from the Indian Party, it shall be regarded as an JV / WOS of such Indian Party and not a step down subsidiary and guarantee can be extended under Regn. 6(2)(i)(c) of FEMA 120 within the limit of 400% of net worth without attracting the provisions & restrictions relating to step down subsidiaries. Further, even If LMN was an 100% subsidiary of XYZIPL, only in that case it would be considered as 1st level step down subsidiary of the Indian Party and guarantee could be extended by such Indian Party under the automatic route as provided under regulation 6(4)(ii)of Notf. 120. Thus in no case is LMN a second level subsidiary which would have necessitated RBI approval for guarantee by Indian Party.



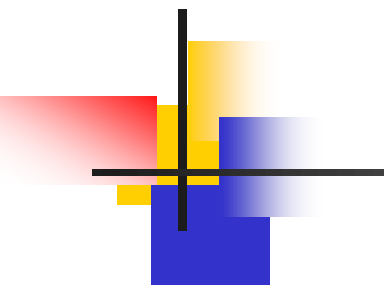
Case Study – VII -A

- A. ODI- Investment by Individual under Liberalised Remittance Scheme
- Mr. A desires to make investment in shares of a foreign company. He seeks guidance on the relevant provisions and routes available to him under FEMA as to how the various provisions are distinguished as to the flexibility of the various aspects of the investment.
- Leads:
 - Liberalised Remittance Scheme (LRS) under A.P.(Dir) Circular No. 64 dt. 04.02.2004
 - Overseas Direct Investment under Regn. 20A read with Schedule V of FEMA Ntf. 120



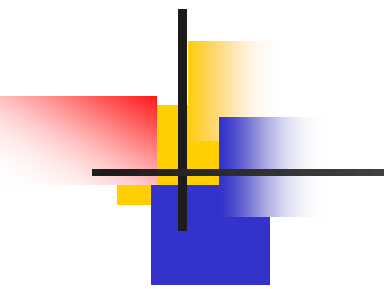
Case Study – VII -A

- **Overview of legal framework:**
- Under LRS, resident individuals can freely remit up to USD 2,50,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both
- Permissible capital account transactions by an individual under LRS includes:
 - making investments abroad - acquisition and holding shares of both listed and unlisted overseas company or debt instruments; acquisition of ESOPs; investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
 - setting up Wholly Owned Subsidiaries and Joint Ventures (with effect from August 05, 2013) outside India for bonafide business subject to the terms & conditions stipulated in Notification No FEMA.263/RB-2013 dated March 5, 2013 which got amended Notification No FEMA 120 relating to Overseas Direct Investments
- Under FEMA 120, "Direct investment outside India" means investment by way of contribution to the capital or subscription to the Memorandum of Association 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 (emphasis applied)**



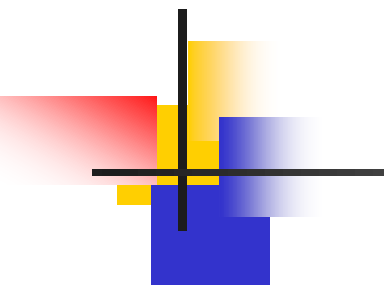
Case Study – VII -A

- **Discussions:**
- From the definition of Direct investment outside India, it is evident that investment in the nature of portfolio investment does not fall under the same and hence is outside the purview of provisions specified in Ntf. FEMA 120
- The term 'portfolio investments' is not defined in FEMA or in any of its regulations. The Advance Law Lexicon defines the term 'portfolio investment' as "the purchase of foreign financial asset with the purpose of deriving returns from the security without intervening in the management of the foreign operations".
- Hence, in common parlance, portfolio investments may be considered as "hands-off" investments which are made only with the intention to earn returns and do not include control/ participation in decision making of an offshore entity by the resident individual.
- Therefore, the route available to Mr. A depends on whether his investment in foreign company is for undertaking business with participation / control in decision making by him or is "hands-off" i.e. in nature of portfolio investment.
- Issue arises as to whether investment in unlisted securities can be considered as portfolio investment if it does not involve management participation or control because, as per common parlance, only listed investments are generally considered as portfolio investments



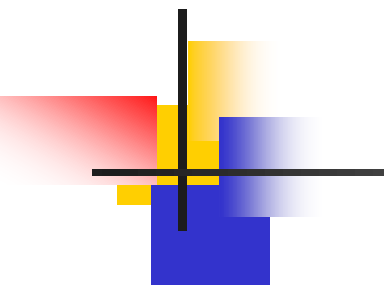
Case Study – VII -A

- **Discussions:**
- The maximum amount of investment in foreign shares by resident individual is limited to the LRS limit of US\$ 250,000 whether through LRS or through ODI route
- If Mr. A's case falls under ODI route, it is subject to conditions specified in Schedule V of FEMA Ntf. 120. The following conditions are more restrictive in case of ODI by individual compared to ODI by a company / registered partnership firm / LLP:
 - The JV or WOS, to be acquired / set up by a resident individual under Schedule V, shall be an operating entity only and no step down subsidiary is allowed to be acquired or set up by the JV or WOS
 - The financial commitment by a resident individual to / on behalf of the JV or WOS, other than the overseas direct investments as defined under Regulation 2(e) read with Regulation 20A of this Notification, is prohibited. As per said definition, investment is permissible only by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity; hence it may not be possible for Mr. A to grant loan to or issue guarantee on behalf of his JV / WOS abroad
 - In case an individual invests in JV / WOS along with Indian company as part of Indian Party, issue arises whether the above mentioned restrictive provisions relating to step down subsidiaries, loans & guarantees would apply to such ODI.



ODI under LRS: Case Study – VII -A

- **Kindly examine the following issues:**
- Is it possible to make payment for incorporation of foreign company to service provider before the incorporation?
- Is purchase of minimum shares from a company agent treated a purchase of shares of an existing company?
- Portfolio Investment is permitted under LRS?
- Such a combination of Individual with company is in order

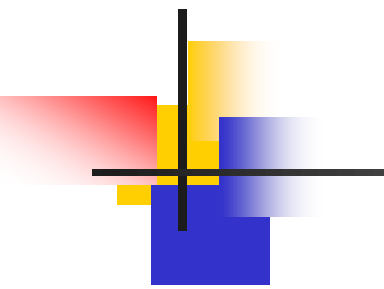


Case Study – VII -B

- **ODI- Recognition of investment in Overseas subsidiary – FEMA 120**
- **A)** ABC is a company incorporated under Indian Companies Act.
 - XYZ is a company incorporated in Singapore on 1st October 2011.
 - Upon incorporation 1 share of S\$ 1, representing 100% capital of the company was allotted to a resident of Singapore.
 - The shares was transferred by resident shareholder to ABC Ltd. on 25th October 2011 but yet no remittance has been made to resident shareholder towards the purchase consideration.

Questions for consideration

- The queriest seeks clarification on recognition of investment in it's Books of Accounts, made outside India by way of purchase, pending the payment of consideration to the seller and compliance with the Foreign Exchange Management Act (FEMA)

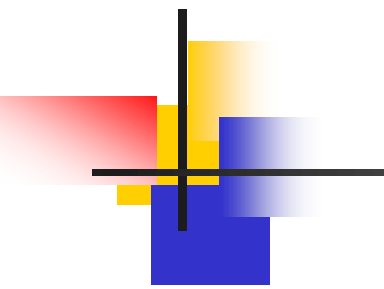


Case study – VII – B

- **B.FEMA 120 - ODI- Recognition of investment in Overseas subsidiary**
- Investment in the securities of a company outside India is governed by Notification No. FEMA 120/2004-RB dt. 07/07/2004
 - According to sub regulation (vi) of Regulation 6, Indian Party may invest outside India on filing of form ODI and related documents
 - There is no obligation under FEMA to record the transaction of investment outside India unless there is remittance from India or any contractual obligation undertaken by the queriest.

Applicability to case study

- Under the provisions of FEMA there is no obligation on ABC to record the investment in XYZ in its books until the remittance is made to shareholder resident in Singapore or unless there is any commitment made by way of any resolution or other wise as per the normal corporate governance norms of the Indian Company. However considering various new requirements in the form ODI. It will be advisable to file form ODI and recognize the liability of S\$ 1 created by the Indian Party

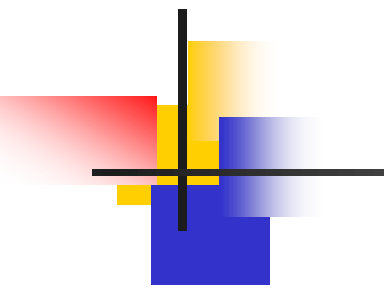


Case Study – VII -C

- C)A ltd. has Overseas Venture engaged into marketing of the products of A Ltd. in the overseas territory. Number of payments are made by A Ltd. on behalf of Overseas Venture in India and outside India. These are in the nature of facility management, travelling, payments made on behalf of overseas venture to its supplier/s, etc.

A ltd. has approached participants at BCA conference to advise them on the nature of transaction and its validity under FEMA.

- A. Is it a loan transaction from A ltd. to Overseas Venture ?
- B. Is it a temporary advance?
- C.Is it Capital account or Current account transaction?
- Kindly discuss



Case study VII–C

- **C. Overview of legal framework**

- There are two type of transaction under FEMA, Current Account Transaction and Capital Account Transaction.

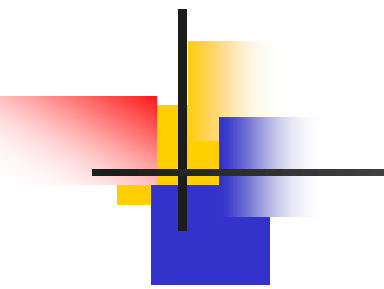
- Capital Account transaction under FEMA is defined as under

As per Sec.2(e) of Foreign Exchange Management Act -capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6;

- Current Account transaction under FEMA is defined as under

As per Sec. 2(j) of Foreign Exchange Management Act - " current account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,-

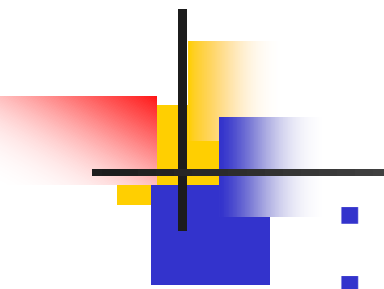
- (i)payments due in connection with foreign trade, other current business, services, and short- term banking and credit facilities in the ordinary course of business,
- (ii)payments due as interest on loans and as net income from investments,
- (iii)remittances for living expenses of parents, spouse and children residing abroad, and
- (iv)expenses in connection with foreign travel, education and medical care of parents, spouse and children;



Case study VII - C

- **C. Applicability to case study**

It may be noted from the wording of Section 2(j)(i) as reproduced here that the transactions of A Ltd. with its overseas venture may be covered as Current Account transaction and therefore they may be settled periodically within 12 months time from time to time.

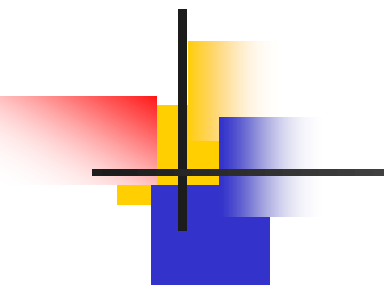


Case study – VII -D

- D) Capitalisation of export proceeds
- A large export house (Ex group) has two distinct registration as a trading house with DGFT (Director General of Foreign Trade) one as a company and another as a proprietary business. Both the concern has huge outstanding export realisation from various of its overseas customers. It faces problems of realising its export value in time in accordance with the provisions of FEMA although its average realisation period is lower than the stipulated period under FEMA. Ex group is considering the proposal to incorporate wholly owned subsidiary to avoid the mismatch of realisables without any remittance of cash from India.

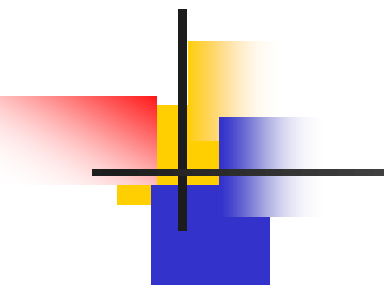
Advise Ex-group as to -

- How it can accomplish this under FEMA and
- Whether proprietary business should consider the proposal or company be preferred to incorporate WOS and why?
- Issue involved in annual reporting to Reserve Bank of India
- (b)(i) Is it possible for a firm of Chartered Accountant from India to capitalise its foreign fees to incorporate WOS for its international business?
- (b)(ii) Is it possible for the firm to incorporate joint venture in Mauritius, by capitalising fees receivable from Chartered Accountant firm of U.K. with 10% stake?



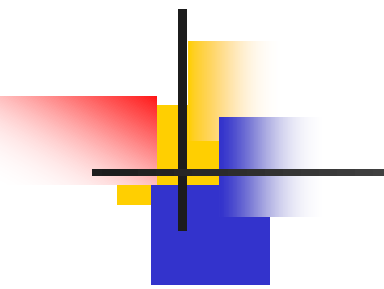
Case study – VII -D

- Legal Framework: As per regulation 11 an Indian Party may make direct investment outside India in accordance with the Regulations in Part I by way of capitalisation in full or part of the amount due to the Indian Party from the foreign entity towards: -
 - i. payment for export of plant, machinery, equipment and other goods/software to the foreign entity;
 - ii. fees, royalties, commissions or other entitlements due to the Indian Party from the foreign entity for the supply of technical know-how, consultancy, managerial or other services
- Provided that where the export proceeds have remained unrealised beyond the prescribed period of realization from the date of export, and fees, royalties, commissions or other entitlements of the Indian party have remained unrealised from the date on which such payment is due, such proceeds shall not be capitalized without the prior permission of the Reserve Bank.



Case study – VII - D

- As per regulation 19 - a sole proprietary concern can accept shares in lieu of fees due to it for professional services rendered with prior approval of RBI
- As per Regulation 19A - a proprietorship concern or an unregistered partnership firm in India, satisfying the criteria for Overseas Direct Investment as prescribed by the Reserve Bank from time to time, may set up / acquire a Joint Venture (JV) / Wholly Owned Subsidiary (WOS) outside India with the prior approval of the Reserve Bank
- As per Regulation 20 - a resident individual may acquire shares of a foreign entity in part / full consideration of the professional services rendered to the foreign entity or in lieu of director's remuneration within the LRS limit
- As per Regulation 20A – a resident individual (single or in association with another resident individual) 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 as per Schedule V of Notification 120

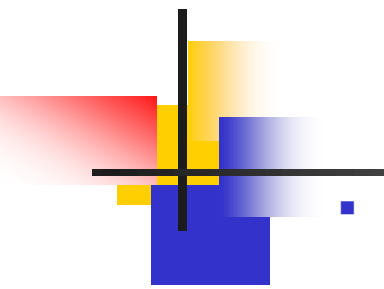


Case study – VII - D

D.Applicability to case study :

In the given case Ex group, registered as trading house with DGFT is considering the proposal of setting up WOS abroad as it is facing problem in realising its export proceeds and it wants to do the same without any cash remittance from India. Further, it has two distinct registration as a trading house with DGFT (Director General of Foreign Trade) one as a company and another as a proprietary business.

- How it can accomplish its objective?
- Whether proprietary business should consider the proposal or company be preferred to incorporate WOS and why?
- Ans. By virtue of Regulation 6(1) of Foreign Exchange Management (Transfer or issue of any foreign security) an Indian party may make direct investment outside India in JV or WOS. Further regulation 6(2) discusses about financial commitment which shall not exceed 400% of the net worth of Indian party. Regulation 6(3) discuss about modes of funding ,which amongst other includes capitalization of export proceeds as per regulation 11.As per regulation 11 proceeds shall not be capitalized without the prior permission of the Reserve Bank if have remained unrealised beyond the prescribed period of realization.
- Thus, EX group can incorporate WOS by capitalising export proceeds by virtue of regulation 6 & 11 also it does not need to take prior approval from RBI as its average realisation period is lower than the stipulated period under FEMA.
- For this company should be considered as in this case it does need to take RBI approval whereas in case of proprietary business as per regulation 19A of Notf. 120 approval is required.



Case study – VII - D

- Q.I Issue involved in annual reporting to Reserve Bank of India
APR to be filed every year on before the specified date in part III of form ODI.

(b)(i) Is it possible for a firm of Chartered Accountant from India to capitalise its foreign fees to incorporate WOS for its international business?

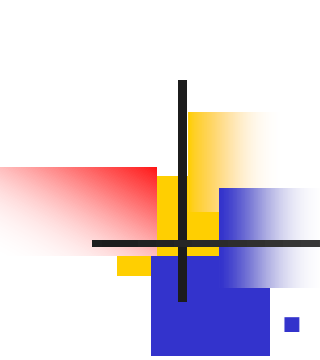
ii) Is it possible for the firm to incorporate joint venture in Mauritius, by capitalising fees receivable from Chartered Accountant firm of U.K. with 10% stake?

Ans. According to regulation 19 A proprietary concern in India may apply to the Reserve Bank through the authorized dealer in *Part I of the Form ODI* for permission to accept shares of a company outside India in lieu of fees due to it for professional services rendered to the said company subject to condition specified in the said regulation.

i) Thus, a firm of Chartered Accountant from India can not capitalise its foreign fees to incorporate WOS for its international business, but it can only acquire share of the company to which fees are due.

- ii) It is possible to establish JV in Mauritius by capitalising fees receivable from CA firm of U.K. as the proviso clause of the regulation clearly states that
- (a) the value of the shares accepted from each company outside India shall not exceed fifty per cent of the fees receivable by the Indian concern from that company; and,
- (b) the Indian concern's shareholding in any one company outside India by virtue of shares accepted as aforesaid shall not exceed ten per cent of the paid-up capital of the company outside India, whose shares are accepted .
- It just need to make sure that value of share does not exceed 50% of the fees receivable.

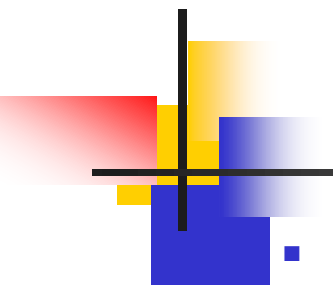
(Note: The wordings are from each company in clause a and shareholding in any one co. outside India in clause b)



Case study – VIII – Advance remittance of imports of goods & services

- **Background :**

- XYZ International Co. Ltd. is a Company incorporated in UAE and has factories in Hamriyah Free Zone and Fujairah. It is into large scale EPC Contracts for more than two decades and specializes in Oil & Gas Sector. Recently, it is in final negotiations with an Ind. Co., a Private Ltd. Co., for an EPC Contract involving:
 - i. Design, Fabrication and Supply of equipment valued at US\$ 30mn. Delivery of the final fabricated equipment is to be made ex-works at UAE. Ind. Co. to arrange for transport to India and installation of equipment at its site in India.
 - ii. Provision of Services by XYZ to Ind. Co. in nature of Pre-commissioning and Trials valued at US\$ 1mn
 - iii. 10% Advance on Execution of Contract to be paid by Ind. Co. to XYZ against Advance Payment Bank Guarantee(s). Such Advance to be adjusted in full against milestone payments
 - iv. XYZ to provide performance bank guarantee of 10% to total contract price at inception of contract.
 - v. Periodic interim payments by Ind. Co. to XYZ based on milestones towards Design, Procurement, Fabrication, Load out and final 10% on Pre-commissioning.



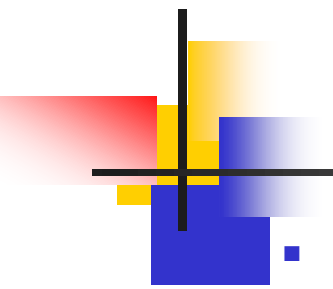
Case study – VIII

- **Key Issues:**

- As the contract value for supply of equipment is US\$30mn and 90% of the payment would be made on milestones before the receipt of the equipment by Ind. Co., it is evident that all such milestone-based payments by Ind. Co. to XYZ are in nature of advance remittances against imports which being in excess of US\$ 5 mn require RBI approval.
- XYZ is not interested in receiving its revenue in INR in India but direct USD in UAE as over 95% of the contract would be executed in UAE in nature of manufacture and balance 5% of the contract is onsite which does not require presence of its personnel for more than 30 days.

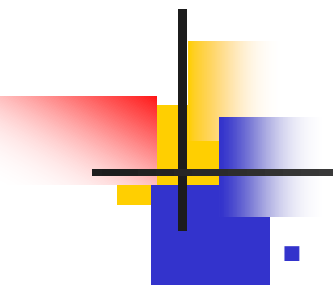
- **Questions for consideration:**

- Whether Advance remittance in excess of USD 5 mn. can be made by the Ind. Co. to the overseas EPC contractor i.e. XYZ, UAE?
- Whether any RBI approval is required for the proposed contract irrespective of the value of advance remittance as goods would not be delivered within 6 months of advance remittance?



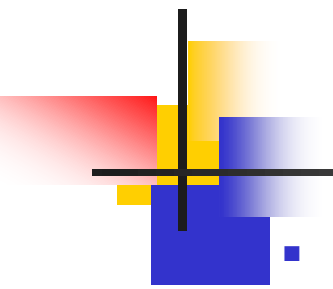
Case study – VIII

- **Overview of Legal framework:**
 - Import of Goods and Services into India are allowed in terms of Section 5 of the Foreign Exchange Management Act 1999 ('FEMA Act'), read with Notification No. G.S.R. 381(E) dated May 3, 2000 viz. Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time.
 - Master Direction No. 17/2016-17 dated Jan. 1, 2016 issued by Reserve Bank of India ('RBI') on Import of Goods and Services consolidates the existing instructions on the subject of "Import of Goods and Services" at one place.
 - Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of Commerce, Government of India. As per the said Master Direction, Authorised Dealer Category – I (AD Category – I) banks should ensure that the imports into India are in conformity with the Foreign Trade Policy in force and the said Foreign Exchange Management (Current Account Transactions) Rules, 2000



Case study – VIII

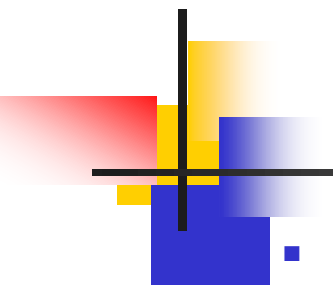
- **Advance remittance for import of goods and services:**
- Para C.1.1. of the Master Direction stipulates that AD Category – I bank may allow advance remittance for import of goods without any ceiling subject to the following conditions:
 - a. If the amount of advance remittance exceeds USD 200,000 or its equivalent, an unconditional, irrevocable standby Letter of Credit or a guarantee is obtained from an international bank of repute situated outside India or a guarantee of an AD Category – I bank in India is obtained, if such a guarantee is issued against the counter-guarantee of an international bank of repute situated outside India.
 - b. In cases where the importer is unable to obtain bank guarantee from overseas suppliers and the AD Category – I bank is satisfied about the track record and bonafides of the importer, the requirement of the bank guarantee / standby Letter of Credit may not be insisted upon for advance remittances up to USD 5,000,000 (US Dollar five million) subject to their own internal guidelines on dealing with such cases as per a suitable policy framed by the bank's Board of Directors.



Case study – VIII

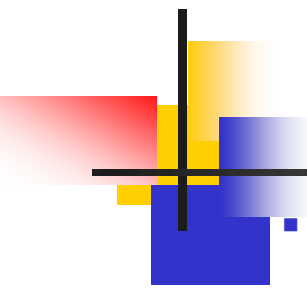
- **Advance remittance for import of goods and services (cont'd):**
 - Para C.1.4. of the Master Direction stipulates that AD Category – I bank may allow advance remittance for import of services without any ceiling subject to the following conditions:

Where the amount of advance exceeds USD 500,000 or its equivalent, a guarantee from a bank of international repute situated outside India, or a guarantee from an AD Category – I bank in India, if such a guarantee is issued against the counter-guarantee of a bank of international repute situated outside India, should be obtained from the overseas beneficiary.
 - From the above, it is clear that as regards to the value-limit of advance remittances by Ind. Co. to XYZ, it is permissible under the Automatic route under FEMA to the extent of:-
 - (i) \$ 5 mn. in case of advances made for purchase of goods provided the AD-Bank is satisfied about the track-record and bonafides of the importer (else up to \$200,000) and
 - (ii) \$ 500,000 in case of advances for services
 - If the advance exceeds the above limits, the same is also permissible under Automatic route provided an unconditional, irrevocable standby Letter of Credit or a guarantee from an international bank of repute situated outside India or a guarantee of an AD Category – I bank in India, if such a guarantee is issued against the counter-guarantee of an international bank of repute situated outside India, is obtained.



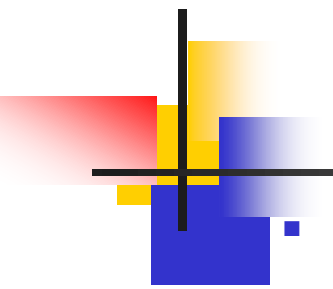
Case study – VIII

- **Time limit for settlement of import payments and advance remittances towards imports:**
 - Para B.5.1. of the Master Direction stipulates that remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc. The present contract is in compliance with such requirement as 100% of the import payment is payable by the time of delivery and pre-commissioning of the equipment.
 - As regards the time-limit for delivery of goods for which advance has been made, the Master Direction on Import of Goods & Services is silent on the matter except in case of import of Aircrafts/Helicopters and other Aviation Related Purchases (Para C.1.3.(3)(v) of Master Direction) where the period for import of goods into India is specified as six months (three years in case of capital goods).
 - So far as advance remittances for import of services are concerned, the said Master Direction stipulates that the beneficiary of the advance remittance shall fulfill its obligation under the contract or agreement with the remitter in India, failing which, the amount should be repatriated to India (Refer Para C.1.4.(c) of Master Direction).



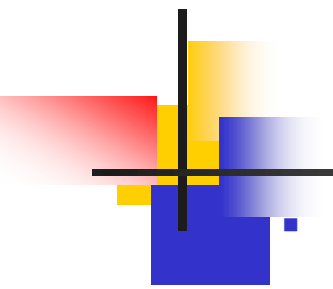
Case study – VIII

- **Time limit for settlement of import payments and advance remittances towards imports (cont'd):**
- Considering that the current contract is not about import of Aircrafts / Aviation products and the facts that-
 - (i) the directions as per various erstwhile Master Circulars stipulated 6 months for completion of import,
 - (ii) current law stipulates that payments for imports should be made within 6 months of import of goods thereby implying that an import transaction should be settled within 6 months,
 - (iii) in case of services, period of completion of import is left to the remitter and supplier as agreed by them, and
 - (iv) imports are current account transactions,it would be prudent to draw a conclusion that in case of advances made for imports of goods as in the present case, the time-limit of six months for completion of the import from date of advance remittance may be considered.
- As per the terms of the present contract, the final fabricated equipment is scheduled to be delivered at the end of 8-10 months from date of first remittance. Therefore, the stipulation that goods should be delivered within 6 months of advance remittance would not be complied with.
- **Hence, Ind. Co. would be required to take prior approval from RBI towards delayed receipt of equipment beyond 6 months from date of advance remittances. An application may accordingly be made through the AD-Bank accompanied by the proposed contracts which should specify clearly the time-limits for the various stages of work and payment thereof. The application to RBI may also simultaneously seek approval for permitting advance remittances in excess of US\$ 5 mn. without a counter-Letter of Credit or Guarantee from Quality's bankers.**



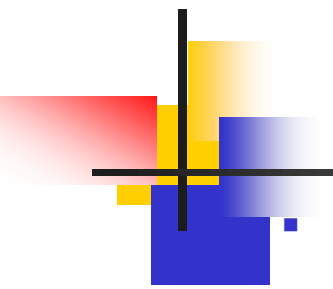
Case study – VIII

- **As RBI approval would take some time to be processed, in case of urgency of implementation, alternative methods of executing the transaction are discussed below:**
 - **Establishing Branch Office of Ind. Co. in U.A.E.**
 - This method has already been discussed in an earlier case study and the regulatory frame-work is not being reproduced here again
 - In case Ind. Co. is a new, start-up company and may not have the requisite sales / turnover and net-worth to make remittances to its overseas branch office aggregating US\$ 31mn which is the amount required for execution of the contract, this alternative may not be feasible.



Case study – VIII

- **Alternative methods of executing the transaction (cont'd):**
 - **Establishing Branch Office of XYZ in India**
 - Under this method, it is being examined whether a Branch office of XYZ in India can be set up whereby the transactions between Ind. Co. and XYZ would be domestic transactions that may not attract the afore-discussed restrictions of FEMA relating to advance remittances for imports and time-limit for receipt of imported goods.
 - Under the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 issued vide Notification No. FEMA 22 (R) /RB-2016 dt. March 31, 2016, a foreign company may set up a Branch Office in India subject to complying with specified terms & conditions. Such a Branch Office is permitted, inter alia, to export / import goods to / from India and render professional or consultancy services.
 - The eligibility norms for setting up a Branch office in India as well as various other terms & conditions are fairly onerous. For establishing a Branch Office in India, the foreign company should have a profit making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent. The foreign company is required to submit an application in Form FNC to an Authorised Dealer Category-I bank who may grant approval as per the directions and/or guidelines issued by the Reserve Bank in this regard.
 - The Indian Branch Office is also required to be registered under the Companies Act, 2013 and various formalities relating to companies are applicable to such Branch offices. Such applications & registrations can lead to delay in the time-frame for commencement and execution of the proposed contract.

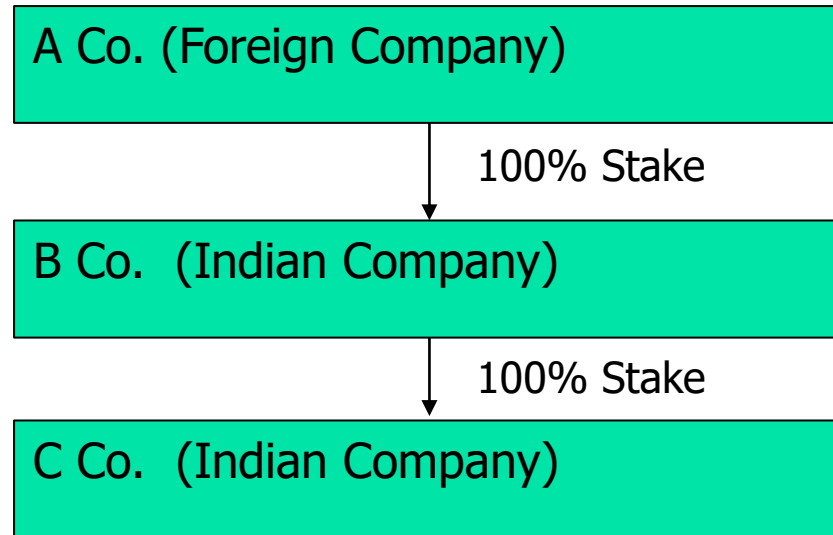


Case study – VIII

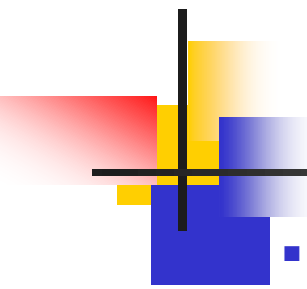
- **Alternative methods of executing the transaction (cont'd):**
- **Establishing Branch Office of XYZ in India (cont'd) -**
- Also, in order to remit any profit or surplus, the Indian Branch is required to produce audited Financial Statements and a Chartered Accountant's certificate certifying (i) the manner of arriving at the remittable profit; (ii) that the entire remittable profit has been earned by undertaking the permitted activities and (iii) that the profit does not include any profit on revaluation of the assets of the branch. These conditions would make it extremely difficult for XYZ to remit funds from India as per time schedule which would permit its manufacturing facility to procure material and fabricate the equipment within the agreed time period as we are informed that margin / surplus from the contract is in single digit as percentage of contract value.
- Similarly, there would be implications under Goods & Services Tax ('GST') and Income-tax for the Indian Branch. There may be possibility of the Branch being treated as a Permanent Establishment of foreign company in India which would attract tax @ 40%. Incidence of such taxes would disturb the commercials underlying the contract.
- In view of the foregoing limitations / restrictions, this alternative of Branch Office of XYZ in India needs to be carefully considered.

Case study- IX

■ Downstream Investment



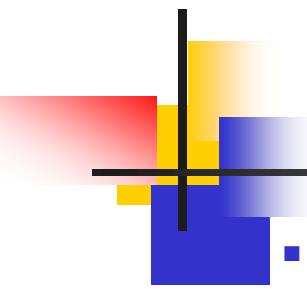
- All entities (i.e. A,B and C) are unlisted pvt companies.
- B Co. is an operating entity.
- It is now proposed to shift one segment of wholesale trading from B Co to C Co and for that B Co. will make an investment in Equity and Debt.
- B Ltd already has a debt equity ratio of 2:1



Case study- IX

- **Background :**

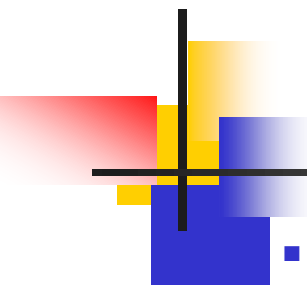
- A Co., Mauritius holds 100% equity in B Co., India which in turn holds 100% of equity in C Co., India
- All entities are unlisted, private limited companies
- B Co. is operating entity engaged in wholesale trading
- Now it is proposed that a new “Whole sale trading (“WT”) with support logistics and warehousing services” business will be done in C Co. and for that B Co. will either make an equity investment in C Co. or extend a loan to C. Co.



Case study- IX

- **Questions for consideration:**

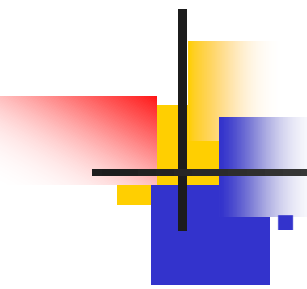
- What are the implications relating to downstream investment in Equity shares of C. Co. by B. Co. by way of subscribing to rights issue?
- Whether, in lieu of equity investment, it is permissible under the downstream regulations for B Co. to give a loan to C. Co. or subscribe to non-convertible debentures / preference shares of C. Co.?



Case study- IX

- **Overview of Legal framework:**

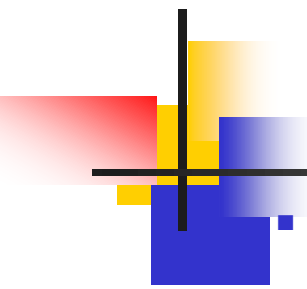
- Investment in equity instruments by Person Resident outside India (“PROI”) in resident entities through issue or transfer of security is a Capital account transaction and the Government of India and Reserve Bank of India (‘RBI’) regulate this under FEMA, 1999.
- Such investments, including downstream investments are governed by the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 dated 17.10.2019 (“NDI Rules”) which has superseded the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2017 issued under Notification No. FEMA 20(R)/2017-RB dated 07.11.2017
- The procedural instructions are issued by the RBI vide A.P. (DIR Series) Circulars from time to time



Case study- IX

■ Key definitions in NDI Rules:

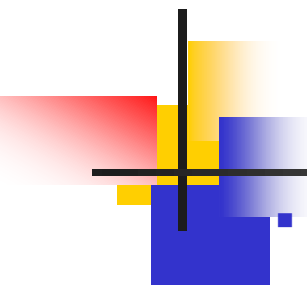
- “Equity instruments” means equity shares, convertible debentures, preference shares and share warrants issued by an Indian company. “Convertible debentures” means fully, compulsorily and mandatorily convertible debentures. “Preference shares” means fully, compulsorily and mandatorily convertible preference shares.
- “FDI” or “Foreign Direct Investment” means investment through equity instruments by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company;
- “foreign investment” means any investment made by a person resident outside India on a repatriable basis in equity instruments of an Indian company or to the capital of a LLP
- “downstream investment” shall mean investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity
- “indirect foreign investment” means downstream investment received by an Indian entity from another Indian entity (IE) which has received foreign investment and (i) the IE is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India;
- “total foreign investment” means the total of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis



Case study- IX

- **Important stipulations of Rule 23 relating to Downstream Investments:**

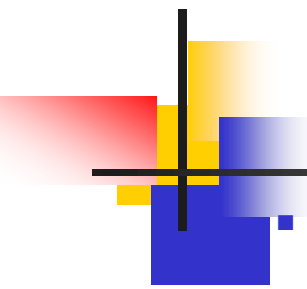
- Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment
- Downstream investment that is treated as indirect foreign investment for the investee entity shall be subject to the following conditions, namely :-
 - (a) downstream investment shall have the approval of the Board of Directors as also a shareholders' Agreement, if any;
 - (b) For the purpose of downstream investment, the Indian entity making the downstream investment shall bring in requisite funds from abroad and not use funds borrowed in the domestic markets and the downstream investments may be made through internal accruals and for this purpose, internal accruals shall mean profits transferred to reserve account after payment of taxes. Further raising of debt and its utilisation shall be in compliance with the Act, rules or regulations made there under



Case study- IX

Discussions:

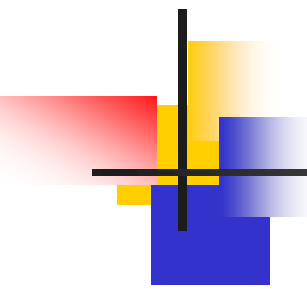
- From a plain, co-joint reading of the definitions of 'foreign investment', 'equity instruments', 'total foreign investment', 'indirect foreign investment' and 'downstream investment', it appears that the intent is to regulate investments in equity instruments by Indian entities with total foreign investment in other downstream Indian entities
- Accordingly, it follows that if B. Co. is keen on investment in equity instruments of C. Co., then downstream investment rules would apply and hence such investment may be made by B. Co. either from (i) funds received from abroad, or (ii) from internal accruals represented by profits transferred to reserve account after payment of taxes, and not from funds borrowed in the domestic markets
- Conversely, as downstream rules do not apply to debt instruments or investment in debt, B. Co. may fund C. Co. by way of giving loan or subscribing to non-convertible debentures / non-convertible preference shares of C. Co.
- Such funding may be sourced by B. Co. through any mode of liquidity including domestic borrowings. As it is a lending between two resident companies, one may take a view that FEMA rules & regulations relating to debt raising and funding do not apply to the lending by B. Co. to C. Co.
- However, B. Co. should take care about applicability of NBFC rules in case its financial assets (including the proposed loan / debt investment) exceeds 50% of total assets **and** income from such financial assets exceeds 50% of total income.



Case study- IX

Discussions:

- However, let us now strictly interpret the letter of the law and refer to the definition of 'downstream investment' which means investment by an Indian entity (which has total foreign investment in it) in the capital instruments or the capital of another Indian entity
- 'Capital instruments' or 'capital' is not defined in the NDI Rules or in FEMA. As is generally understood, 'capital' refers to money that is invested in business assets and therefore includes all sources of capital including debt. Investopedia also lists out four types of capital – equity capital, debt capital, working capital and trading capital thereby implying that debt raised for the business is part of 'capital'.
- If the above interpretation is adopted, the following emerges:
 - B. Co. has received total foreign investment (i.e. in its equity instruments) from PROI. It has not received any indirect foreign investment
 - B. Co. intends to make downstream investment in 'debt instruments' or 'loan' to C. Co. which is in nature of 'capital instruments' or 'capital'
 - Therefore, downstream investment rules would apply to B. Co. and it would be required to fund the loan / debt investment in C. Co. only from funds received from abroad or from internal accruals and not from domestic borrowings.



Case study – X

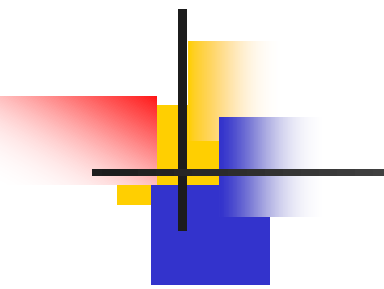
- **Borrowings by Indian company from Non resident promoter**

- Background**

XYZ India Pvt. Ltd. ('XYZ') is a 74:26 joint venture between the ABC World Group and Indian entrepreneurs. XYZ India seeks to borrow funds from its non-resident promoters / majority shareholder including NRIs and use the same to make repayment to group companies. Dilution or change in shareholding pattern of XYZ India is not acceptable in the immediate future.

- **Questions for consideration**

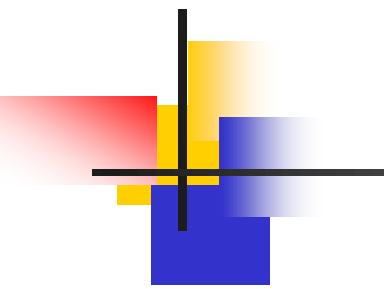
- Whether there are any issues under FEMA with regard to borrowing funds from non-resident promoter / majority shareholder in order to make repayment to group companies
- Whether there are any other options / methods for raising funds from non-resident promoters in a manner that does not lead to dilution of the equity shareholding of Indian promoters



Case study – X

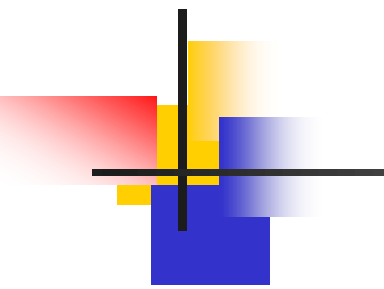
■ **Overview of legal provision**

- Borrowings in foreign exchange by persons resident in India from non-residents attract the provisions stipulated in Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 issued under Notification No. FEMA 3(R)/2000-RB dated 17th Dec 2018 as amended from time to time.
- As per Para 4B (1) of FEMA 3(R), such foreign currency loans are permitted under the Automatic Route Scheme subject to the terms & conditions specified in Schedule I to FEMA 3.
- Schedule I stipulates various requirements on such external borrowings with regard to eligibility of borrowers, quantum of loans, type of permissible lenders, end-use purpose, interest rate, maturity, security, etc. to be used for all purpose except negative use. List given in 3(R) which includes: Real Estate Activities, Equity Investment, Investment in capital Markets, Working capital loan (except if taken from foreign equity holder), Repayment of Rupee loans (except if taken from foreign equity holder), General corporate Purpose (except if taken from foreign equity holder),
On lending to entities for above mentioned activities
- Further, such borrowings are permitted, inter alia, for investment (such as import of capital goods, new projects, modernisation/expansion) in real sector - industrial sector. However, it is specifically stipulates that borrowings shall not be utilised for on-lending, investments in stock market & real estate business and repayment of Rupee Loans.
- As per the revised ECB framework, ECB proceeds can be used for general corporate purpose (including working capital), repayment of Rupee loans provided the ECB is raised from the direct / indirect equity holder or from a group company for a minimum average maturity of 5 years.
- In view of the above, as XYZ India's fund requirement is from its direct shareholder for repayment of rupee loans, it would be permissible to borrow funds from non-resident promoters.



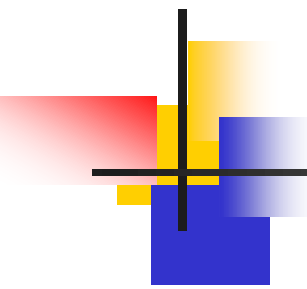
Case study – X

- Schedule II of FEMA 3(R) deals with Trade Credits not exceeding USD 50 million per import transaction. (Up to USD 150 million per import transaction for oil/gas refining & marketing, airline and shipping companies) Such Trade Credits can be availed of, inter alia, from overseas supplier for import of items permissible under the Foreign Trade Policy ('FTP') with a maturity period of one year from date of shipment and linked to Operating cycle for Non capital goods and three years from date of shipment for Capital goods. Whether logistics services to shipping industry, such as those provided by XYZ India, fall under items permissible for import under FTP is a debatable issue and it could be explored by way of an application to RBI. However, even if permissible, it would be available only at the stage of import and not to overdues as is currently the situation with XYZ India's payments to group companies. Hence, the route of availing Trade Credits from overseas suppliers for making repayment to group companies is not feasible for current overdue payments.
- Schedule III of FEMA 3 deals with External commercial Lending to Borrowers outside India. An AD may extend External commercial Lending in foreign exchange to a foreign entity in which the Indian entity has made Overseas Direct Investment. A PRII may lend in foreign exchange out of funds held in his/her EEFC account, for trade related purposes to his/her overseas importer customer subject to such terms and conditions as stipulated by the Reserve Bank of India. Indian companies may grant loans in foreign exchange to the employees of their branches outside India for personal purposes provided that the loan shall be granted in accordance with the lender's Staff Welfare Scheme / Loan Rules and other terms and conditions as applicable to its staff resident in India and abroad.



Case study – X

- Borrowing in Rupees from NRIs can be considered as per Reg. 5, in respect of NCD or schedule 7 in respect of public deposit scheme without any limit subject to new regulations.
- In lieu of borrowings from non-resident promoters, funds may be raised by way of issue of shares or foreign currency convertible bonds (FCCB) in accordance with the Foreign Direct Investment Scheme specified in Schedule I to Foreign Exchange Management (Non Debt Instruments) Regulations, 2019. As issue of equity capital would result in dilution in shareholding of Indian promoters, FCCB's may be issued. These FCCB's could be convertible into a different class of equity shares with differential voting rights so as to not result in any significant dilution. Issue of shares with differential voting rights is permissible under section 43 of the Companies Act, 2013 read with the Companies (Share Capital and Debentures) Rules, 2014.

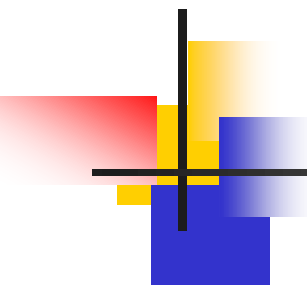


Case study – X

- **Applicability to case study**

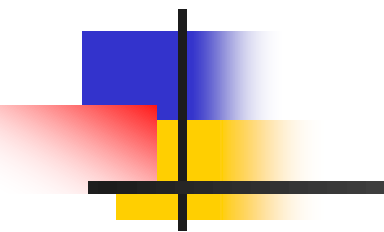
- The questions raised by XYZ India may therefore be replied as under:
- Q. (a) Whether there are any issues under FEMA with regard to borrowing funds from non-resident promoter / majority shareholder in order to make repayment to group companies
- A. (a) Borrowings from non-residents promoters(with direct shareholding of more than 25% and indirect shareholding of more than 51%)for repayment of rupee loans is allowed. As XYZ India's end-use purpose is for repayment to group companies, borrowings from non-resident promoters / majority shareholder is permissible

As regards Trade Credits from overseas suppliers, its permissibility for import of services is debatable. Even if permitted, Trade Credit can be availed only at the time of import and not for overdue payments.



Case study – X

- Q. (b) Whether there are any other options / methods for raising funds from non-resident promoters in a manner that does not lead to dilution of the equity shareholding of Indian promoters
- A. (b) Compulsorily Convertible Debentures may be issued that are convertible into a different class of equity shares with differential voting rights as this method would not lead to any significant dilution in shareholding in near future of Indian promoters.



Thank You
