3-Day Residential Refresher Conference on the Foreign Exchange Management Act 1999 and its Rules / Regulations (‘FEMA’) with focus on practical aspects

(2nd to 4th December, 2022)

Paper I

Issues and challenges surrounding Resident Individuals and Non Resident Indians / Overseas Citizens of India (Including issues of inheritance and Trust)

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ABBREVIATIONS

Authorised Dealer (AD)

Capital Account Transaction (CAP)

Current Account Transaction (CAT)

Foreign Currency Non Resident Account (FCNR)

Foreign Direct Investment (FDI)

Foreign Exchange (FE)

Foreign Exchange Management Act (FEMA)

Foreign Investment Facilitation Portal (FIFP)

Government of India (GOI)

Income-tax Act (ITA)

Liberalized Remittance Scheme (LRS)

Notification No.(Ntf.)

Person Resident Outside India (PROI),

Person Resident in India (PRII)

Non Resident External Account (NRE)

Non Resident Indian (NRI)

Non Resident Ordinary Account (NRO)

Overseas Citizen of India (OCI)

Overseas Direct Investment (ODI)

Overseas Portfolio Investment (OPI)

Person of Indian Origin (PIO)

Reserve Bank of India (RBI)

Resident Foreign Currency Account (RFC)

Joint Venture (JV)

Wholly owned Subsidiary (WOS)

1. <u>Overview of FEMA:</u>

1.1 <u>Introduction</u>

1.1.1. Foreign Exchange management Act, 1999 (FEMA) came into force on 1st June 2000. It is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. FEMA is attached at Annexure 1.

1.1.2. FEMA is administered by the Reserve Bank of India (RBI) and serious investigations under certain provisions are entrusted to the Enforcement Directorate (ED) including penalty and compounding in appropriate cases. It applies to whole of India and all branches, offices and agencies outside India, which are owned or controlled by person resident in India i.e. extra territorial jurisdiction.

1.1.3. FEMA has in total 49 sections in which sections 1 to 9 are substantive and the rest are procedural /administrative.

1.1.4. A number of Notifications are issued after the initial 25 Notifications, most of the time only to amend the existing one or more of the 25 Notifications. Master Directions are issued to explain each Notification in a lucid manner.

1.1.5. Press Releases and Notifications under the series G.S.R. are issued by the Government to announce Government Policy on Foreign Investments including consolidated Foreign Direct Investment Policy, announce rules relating to Overseas Investments including overseas direct investments and to amend the Current Account Transaction Rules from time to time.

1.1.6. Major policy amendments to FEMA were introduced by Finance Bill, 2015. The Financial Sector Legislative Reforms Commission (FSLRC) that was set up in the year 2013 had suggested that power to make rules for inward capital flows (FDI) should be with the Government and rules for outward flows (ODI) could be made by RBI. However, the Finance bill proposed even more powers for the Central Government. Prior to this amendment, Section 6 of FEMA provided that RBI may prescribe rules for Capital Account transactions. Sub-section (3) listed several capital account transactions – inflow of investment, outflow of investment, loans, guarantees, immovable property, etc. The Finance Bill proposed that RBI will have the powers to prescribe any transactions of capital account transactions involving only debt instruments. The Central Government will have the powers to prescribe any transactions of capital account transaction which do not involve debt instruments. The meaning of debt instruments will be determined by the Central Government. Thus, not just for inflow of funds, but even for outflow of funds, RBI will not have any powers, only the Central Government will have the powers. These differences between the Central Government and RBI took several years to resolve and Section 6 was finally amended w.e.f. 15.10.2019 whereby the Central Government now has the power to regulate capital account transactions other than debt instruments i.e. equity capital whereas the Reserve Bank has the power to regulate capital account transactions involving debt instruments.

The Finance Act, 2015 inserted new Section 37A in FEMA. It provides that if any person holds any foreign exchange, foreign security or any immovable property outside India (foreign assets) in contravention of section 4 of FEMA, the equivalent value of property in India can be seized. It also amended Section 13 to include the penalty / prosecution provisions arising out of the consequences from violations under Section 37A.

1.2 <u>Dealing in foreign exchange - Section 3</u>

1.2.1 Section 3 is the major substantive provision of FEMA which bestows power on RBI for giving general or special permission for dealing with the transactions involving foreign exchange or any receipt or payments between resident and non- resident only through authorised dealer.

1.2.2 As per Section 3, each and every transaction may be routed through Authorized Dealer Bank only. Section 3 states that:

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall —

i. Deal in or transfer any foreign exchange or foreign security to any person not being an authorised person.
ii. Make any payment to or for the credit of any person resident outside India in any manner.
iii. Receive otherwise (than) through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.
Explanation- For the purpose of this Section, 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 authorised 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 authorised person.
iv. 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 Section, "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.

1.2.3 It may pertinently be noted that Section 3 applies to -

i. All the persons in India whether they are residents or non-residents as non-residents are not permitted to sell their foreign exchange in India except to an Authorised Dealer. Even two non-residents cannot deal in rupees in India for settling transactions outside India;
ii. Rupee transactions in India between non-residents and residents which are not freely permitted as resident Indians are not permitted to pay any non-resident;
iii. Rupee transactions in India between two residents representing payment by order or on behalf of any non-resident unless it is through an Authorized Dealer and represented by way of corresponding inward remittance from outside India;
iv. All persons in India whether residents or non-residents for financial transactions in India towards acquisition, creation or transfer of any asset outside India.

1.3 Types of Transactions under FEMA

1.3.1 There are 2 types of transactions under FEMA:

i. Capital Account Transactions
ii. Current Account Transactions

Under FEMA, (a) Current Account transactions are permitted except what is prohibited and (b) Capital Account transactions are permitted to the extent specified and rest is not permitted or they may require prior Government approval or RBI approval as the case may be.

Although there is liberalisation, there is no total capital account convertibility and the dealings in Foreign Exchange as well as in Rupees between Resident and Non-Resident continue to be governed by FEMA and the Notifications & Circulars issued by the Reserve Bank of India from time to time. All the dealings in Foreign Exchange should be generally routed through the Authorised Persons who deal in Foreign Exchange. As per the scheme of FEMA, Capital Account Transactions are allowed only to the extent it is specifically permitted and Current Account Transactions are allowed generally unless it is prohibited. This may be inferred from

A.D. (M.A. Series) Circular No.11 dt. May 16, 2000 (attached as Annexure 2) which, inter alia, states that remittances for all other current transactions which are not specifically prohibited under the Foreign Exchange Management (Current Account Transactions) Rules, 2000 (“Rules”) or which are not included in Schedule II or III of the Rules may be permitted by authorised dealers without any monetary / percentage ceilings subject to compliance with the provisions of sub-section (5) of Section 10 of the Act. As regards regulations relating to Capital Account transactions, the said Circular states that Section 6 of the Act provides powers to Reserve Bank to specify in consultation with the Central Government the classes of permissible Capital Account transactions and limits up to which exchange is admissible for such transactions. Section 6 (3) provides powers to Reserve Bank to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations. Thus, Capital Account Transactions are allowed only to the extent it is specifically permitted by the various Notifications issued.

1.3.2 **<u>Capital Account Transactions</u>**:

1.3.2.1 According to 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

POSER: Guarantees are contingent liabilities. As per above definition, guarantee by PRII outside India is a capital account transaction but not so for guarantee by PROI. So, if guarantee by PROI is not a capital account transaction, participants are requested to discuss the implications under FEMA including under FEMA Ntf. 8.

1.3.2.2 Capital account transactions are generally prohibited unless permitted. They are regulated by RBI.

1.3.2.3 Prior to its omission w.e.f. 15.10.2019, Section 6(3) contained ten sub clauses covering a wide range of transactions. For each of such categories RBI has issued separate notifications.

No.	Transactions specified under Sec 6(3)	Ntf. No
1	Transfer/Issue of Foreign Security by a PRII	Notf.No.120
2	Transfer/Issue of any Security by a PROI	Notf.No.20(R)
3	Transfer/Issue of Security/Foreign security by branch, office or agency in India by PROI	Notf.No.2
4	Borrowing/Lending in Foreign currency in whatever form or by whatever name called	Notf.No.3(R)
5	Borrowing/Lending in Rupees in whatever form or by whatever name called between a PRII and a PROI	Notf.No.4
6	Deposits between PRII and PROI	Notf.No.5 (R)
7	Export, Import or holding of currency or currency notes	Notf.No.6 (R)
8	Transfer of Immovable property outside India, other than a lease ≤ 5 years, by PRII	Notf.No.7 (R)
9	Acquisition/Transfer of Immovable property in India, other than a lease ≤ 5 years by PROI	Notf.No.21 (R)

10	Giving of a guarantee/surety in respect of any debt, obligation or other liability incurred: 1)By PRII owed to PROI or 2) By PROI	Notf.No.8

It may be noted that Section 6(3) of FEMA has been omitted by the Finance Act, 2015 w.e.f. 15.10.2019. Instead, Section 6(2A) has been inserted by the Finance Act, 2015 to provide that the Central Government may, in consultation with the Reserve Bank, prescribe any class or classes of capital account transactions, not involving debt instruments, which are permissible. Simultaneously, Section 6(2)(a) has been amended by the Finance Act, 2015 w.e.f. 15.10.2019, by providing that the Reserve Bank may, in consultation with the Central Government, specify any class or classes of capital account transactions, involving debt instruments, which are permissible. Newly inserted Section 6(7) states that "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". Thus, the Central Government has the power to regulate capital account transactions other than debt instruments i.e. equity capital whereas the Reserve Bank has the power to regulate capital account transactions involving debt instruments.

The above-mentioned capital account transactions are also notified through Notification FEMA 1, segregating the transactions of residents and non-residents as Schedule I & Schedule II respectively as discussed in the upcoming paragraphs.

POSER: Whether a transaction is capital account "qua transaction" or 'qua person"? Participants may discuss the implication in following examples

(a) Gift of foreign shares by one Resident to another Resident

As per the definition of capital account transaction, it may appear that due to the Gift transaction, the assets outside India of the donor who is resident in India are being altered. Similarly, the assets outside India of the donee, also a resident in India, are being altered. Hence, this is a capital account transaction.

Normally, in cross-border transactions, there would be a party resident in India and another that is resident outside India. However, in the instant case, both the parties are resident in India. Definition of capital account transactions refers to alteration of assets and liabilities of 'persons' resident in India (two or more persons resident in India who are party to a transaction). Participants may discuss the question whether the gift alters assets outside India of 'persons' resident in India in a transaction of transfer of foreign security.

Can it be said that there is no alteration of assets of 'persons' resident in India? When considered individually, there may be an alteration but the definition refers to 'persons' resident in India thereby leading to a possible interpretation that the scheme of FEMA considers all residents on one side of the transaction and non-residents on the other side in the application of the various rules & regulations for a transaction.

Thus, in cases where no foreign exchange implications are present, as in the present case of Gift, the above interpretation may find merit.

(b) Resident beneficiary in an irrevocable offshore discretionary trust without any remittance

FEMA prescribes regulations for permissible methods of acquisition of foreign assets. When a resident acquires foreign assets, it is a change in his assets outside India and hence it is a capital account transaction which is permissible only in the form and manner that is expressly allowed. However, when a resident is made a beneficiary in an offshore trust, there is no remittance from India and he acquires a right to the asset or its income only on distribution in future. In such as case, does the capital account transaction definition apply "qua transaction" or 'qua person"?

1.3.2.4 Section 6(4) of FEMA: 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.

> **POSER:** Section 6(4) permits PRII to hold assets outside India which were acquired by him when he was PROI. It further provides that in case of inheritance from a person who was resident outside India, the deceased donor should have been non-resident at the time of death. But in a case where deceased donor is resident at the time of death, what happens to inheritance of such assets acquired during the period the deceased was non-resident?
>
> Generally, Gift / Inheritance of an asset outside India from a PROI to PRII is freely permitted. Gift of asset outside India from PRII to another PRII is always regulated.

1.3.2.5 Section 6(5) of FEMA: 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.

> **POSER:** In case of inheritance from a person who was resident in India, the apparent meaning is that the deceased should be resident at time of death. But in case the deceased is non-resident at the time of death, what happens to such inheritance of assets situated in India?
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> Generally, Gift / Inheritance of an asset in India from PRII to PROI is freely permitted. Gift of an asset in India from PROI to PROI is always regulated.

1.3.2.6 Notification No. FEMA 1 /2000-RB dated 3rd May 2000 “Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000”.

Permissible Capital Account Transactions are as under:

a. Transactions, specified in **Schedule I**, of a person resident in India.
b. Transactions, specified in **Schedule II**, of a person resident outside India.

Schedule I - Classes of capital account transactions of persons resident in India (PRII)

i. Investment by a PRII in foreign securities.
ii. Foreign currency loans raised in India and abroad by a PRII.
iii. Transfer of immovable property outside India by a PRII.
iv. Guarantees issued by a PRII in favour of a person resident outside India.
v. Export, import and holding of currency/currency notes.
vi. Loans and overdrafts (borrowings) by a PRII from a PROI.
vii. Maintenance of foreign currency accounts in India and outside India by a PRII.
viii. Taking out of insurance policy by a PRII from an insurance company outside India.
ix. Loans and overdrafts by a PRII to a PROI.
x. Remittance outside India of capital assets of a PRII.
xi. Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a PRII.

Schedule II - Classes of capital account transactions of persons resident outside India (PROI)

i. Investment in India by a PROI, that is to say: a) Issue of security by a body corporate or an entity in India and investment therein by a PROI; and b) Investment by way of contribution by a PROI to the capital of a firm or a proprietorship concern or an association of persons in India.
ii. Acquisition and transfer of immovable property in India by a PROI.
iii. Guarantee by a PROI in favor of, or on behalf of, a person resident in India.
iv. Import and export of currency/currency notes into/from India by a PROI.
v. Deposits between a PRII and a PROI.
vi. Foreign currency accounts in India of a PROI.
vii. Remittance outside India of capital assets in India of a PROI.

Thus, only these transactions specified in Schedules I & II are permissible Capital Account transactions under broad heading, any transaction not in accordance with the above lists cannot be undertaken by Resident or Non-resident as the case may be.

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

(i) in the business of chit fund, or
(ii) as Nidhi Company , or
(iii) in agricultural or plantation activities or
(iv) in real estate business, or construction of farm houses or
(v) in trading in Transferable Development Rights (TDRs).

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

1.3.3 **Current Account Transactions:**

1.3.3.1 According to section 2(j) Current account transaction means a transaction other than a capital account transaction. Such transaction includes:

i. Payments due in connection to foreign trade, other current business, services and other short-term banking 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.
iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

POSER: Participants are requested to discuss whether activity of export, short-term advances are current account transactions. If they are current account transactions, are various stipulations and restrictions on exports under FEMA Ntf. 23(R) justified?

Leads: The change from FERA to FEMA was operationalised by A.D. (M.A. Series) Circular No.11 dt. May 16, 2000 which states that *"Remittances for all other current transactions which are not specifically prohibited under the Rules or which are not included in Schedule II or III may be permitted by authorised dealers without any monetary/percentage ceilings subject to compliance with the provisions of sub-section (5) of Section 10 of the Act."*

Thus, Current Account transactions are permitted except what is prohibited, yet various stipulations and restrictions are imposed by FEMA Ntf. 23(R). Please discuss.

1.3.3.2 As provided under Section 5 of FEMA, any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction; Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

1.3.3.3 Current Account transactions are freely permitted, unless prohibited. They are regulated by Central Government and the same is discussed in the upcoming paragraphs.

1.3.3.4 As per Rule 3 of FEM (CAT) Rules, 2000, drawal of foreign exchange by any person for the following purpose is prohibited, namely:

a. Transaction specified in the Schedule I; or
b. Travel to Nepal and/or Bhutan; or
c. Transaction with a person resident in Nepal or Bhutan;

Provided that the prohibition in clause (c) may be exempted by RBI subject to such terms and conditions as it may consider necessary to stipulate by special or general order.

1.3.3.5 Current account transaction are divided into 3 Schedules under Current Account Transaction rules:

Schedule I -Transactions which are prohibited (Rule 3 of FEM (CAT) Rules, 2000)

Schedule II -Transactions which require prior approval of the Central Government (Rule 4 of FEM (CAT) Rules, 2000)

Schedule III- Transactions which require prior approval of the RBI (Rule 5 of FEM (CAT) Rules, 2000)

Schedule I -Transactions which are prohibited

i. Remittance out of lottery winnings.
ii. Remittance of income from racing/riding, etc., or any other hobby.
iii. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
iv. Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
v. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
vi. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
vii. Payment related to “Call Back Services” of telephones.
viii. Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

Schedule II -Transactions which require prior approval of the Central Government (Approval is not required if payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter)

No.	Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
1.	Cultural Tours	Ministry of Human Resources Development (Department of Education and culture)
2.	Advertisement in foreign print Media for the purposes other than promotion of tourism, foreign Investments & International bidding (exceeding USD 10,000) by a state government & its public sector undertaking	Ministry of Finance, (Department of Economic Affairs)

3.	Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport, (Chartering Wing)
4.	Payment of import through ocean transport by a Govt. Department or PSU on c.i.f basis	Ministry of Surface Transport (Chartering Wing)
5.	Multi Modal transport operators making remittance to their agents abroad	Registration certificate from the Director General of Shipping
6.	Remittance of hiring charges of transponders by a) T.V. Channels b) Internet Service Providers	a) Ministry of Information & Broadcasting b) Ministry of Communication & Information Technology
7.	Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8.	Omitted	
9.	Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US$ 100,000	Ministry of Human Resources Development (Department of Youth Affairs & Sports)
10.	Omitted	
11.	Remittance of Membership of P& I Club	Ministry of Finance (Insurance Division)

POSER: In the context of Item No. 7 in table above, participants may discuss as to what can be remitted towards container detention charges if no limit is prescribed by Director General of Shipping

Schedule III - Transactions which require prior approval of the RBI (Approval is not required if payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter)

Facilities for individuals—

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

(i)		Private visits to any country (except Nepal and Bhutan).
(ii)		Gift or donation.
(iii)		Going abroad for employment.
(iv)		Emigration.
(v)		Maintenance of close relatives abroad.

(vi)		Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.
(vii)		Expenses in connection with medical treatment abroad.
(viii)		Studies abroad.
(ix)		Any other current account transaction:

Provided that for the purposes mentioned in item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (hereinafter referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

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

Provided also that for a person who is resident but not permanently resident in India and—

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

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

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

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

POSER: The language employed on immigration related remittances under LRS Scheme restricts any remittance related to Immigration Visa / Residence Permit / Acceptance of citizenship of any foreign country. But Proviso 1 to Schedule III above reads that if country of immigration requires higher amount in excess of LRS limit, same is allowed. Participants are required to discuss as to whether such language employed under LRS Scheme is at variance with Schedule III

1.3.3.6 Thus, individuals can draw foreign exchange up to US$ 250,000 and if such amount is not sufficient, then for the purposes of emigration, studies abroad and medical & allied cost, additional foreign exchange can be drawn irrespective of the amount not exceeding the actuals based on the estimate of the Institute abroad. It may also be mentioned that non-individuals, say Companies, if required to depute their employees for foreign travel, then above limit applicable to individuals of US$ 250,000 shall not apply and the company can remit any amount during the year as required by it for the purposes of its business.

Author's Note: It is not clear as to why proviso related to Non-individual is included here in FEM (CAT) Rules, 2000

1.3.3.7 Also, individuals who are resident of India can undertake any current account transactions of any value and request for the drawal of the foreign exchange from AD Bank for remittance abroad if it is not covered in any of the above Schedules to the FEM (CAT) Rules, 2000.

1.3.3.8 Rule 6 of FEM (CAT) Rules, 2000 provides that the restrictions of Rules 4 & 5 i.e. Schedules II & III respectively, do not apply to drawal made out of funds held in Exchange Earners' Foreign Currency (EEFC) account of the remitter except where the remittance is for Membership of P& I Club (Item No. 11 in Schedule II)

1.3.3.9 Further as provided by Rule 7 of FEM (CAT) Rules, 2000, the restrictions contained in Rule 5 i.e. Schedule III does not apply to the use of International Credit Card ("ICCs") for making payment by a person towards meeting expenses while such person is on a visit outside India. Resident individuals maintaining a foreign currency account with an Authorised Dealer in India or a bank abroad, as permissible under extant Foreign Exchange Regulations, are free to obtain International Credit Cards (ICCs) issued by overseas banks and other reputed agencies. It is clarified that the applicable credit limit will be the limit fixed by the card issuing banks. There is no monetary ceiling fixed by the RBI for remittances, if any, under this facility. The LRS limit shall not apply to the use of ICC for making payment by a person towards meeting expenses while such person is on a visit outside India.

Further, residents can use ICCs on internet for any purpose for which exchange can be purchased from an Authorised Dealer in India, e.g. for import of books, purchase of downloadable software or import of any other item permissible under Foreign Trade Policy (FTP). However, ICCs cannot be used on internet or otherwise for purchase of prohibited items, like lottery tickets, banned or proscribed magazines, participation in sweepstakes, payment for call-back services, etc., since no drawal of foreign exchange is permitted for such items/activities. There is no aggregate monetary ceiling separately prescribed for use of ICCs through internet.

International Debit Cards (IDCs) / Store Value Cards / Charge Cards / Smart Cards, etc. can be used by a resident for drawing cash from ATM terminals or making payment to a merchant establishment overseas during his visit abroad. No prior permission from the Reserve Bank is required for issue of such cards. However, the use of such cards is limited to permissible current account transactions and subject to the prescribed limits under the FEM (CAT) Rules, 2000, as amended from time to time.

1.4 Residential Status under FEMA

1.4.1 Under FEMA, residential status is of two types:

i. Person Resident in India
ii. Person Resident Outside India

1.4.2 As per sec 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.

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.

1.4.3 Thus, in a case where a person goes abroad for one of the purposes as stated in i)(A) above, he will become PROI from the day he has accepted / exercised such employment and vice versa, becomes PRII when he comes to India or such purposes as stated in i)(B) above.

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

1.4.5 If a person has stayed in India during the preceding financial year for 182 days or more, he would generally be regarded as 'person resident in India', in the current financial year. For example, if a person's stay in India during the financial year 2021-2022 is for more than 182 days he would be generally regarded as resident in India during the financial year 2022-2023 unless his intention was not to reside in India for an uncertain period and he had not taken up any employment in India or he did not carry on any business or vocation in India.

1.4.6 By this reckoning, a student who has gone abroad for studies and resides there for more than 182 days in the financial year, would be 'person resident outside India', from the succeeding financial year. The RBI has considered in case of students who have gone abroad for studies as "Resident" under FEMA as their stay abroad is for a definite period till the completion of their studies. However, such students often extend their stay for various reasons including accepting part-time job, entering into financial transactions resulting into uncertain period of stay. In these circumstances it is clarified by RBI that, such student's residential status will be considered as PROI as provided by AP (DIR) Circular No. 45 dated 8-12-2003 (attached as Annexure 3).

1.4.7 Under Income-tax Act, the residential status of a person is mostly determined only on the basis of his stay (number of days he stays) in India whereas under FEMA, it is not so. Residential status under Income-tax Act and under FEMA are to be determined independently, because in most cases person will have dual/split status under FEMA for a financial year, whereas he cannot have two statuses under IT Act as ITA will determine the Residential Status on the last day of the financial year for the whole year to apply it to any person who is liable to pay taxes on the basis of Residential Status for that financial year as a whole.

POSER: An office, branch or agency in India of a Foreign company is a resident of India. Transactions of residents or between residents in INR are generally not subject matter of FEMA.

Yet, for a branch / liaison office / project office in India of a foreign company, various stipulations and restrictions are specified 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 under FEMA Ntf. 22(R).

Participants are requested to discuss whether such stipulations and restrictions under FEMA Ntf. 22(R) are justified?

POSER: Similarly as above, foreign branch of an Indian Company is also a Resident. Accordingly, its transactions are outside the purview of Schedules I, II & III of FEM (Current Account) Rules.

Participants are requested to discuss whether such stipulations and restrictions are justified?

CASE STUDY 1

Incorporation of WOS by an Indian company and deputation of Indian citizen to promote business outside India

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

<u>Questions for consideration</u>

Mr. Patel informed that his other income is more than Rs. 15 lacs and requested advice 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 with him & for higher studies of his children and various investment proposition outside India

- India Ltd. also has WOS in Tax Heaven near U.K. Discuss the employment potential with such a Tax Heaven company.

Leads to Case study:

- Mr. Patel is given with three options:

a) To relocate the employment to U.K.
b) To request Mr. Patel to look after operations in India & U.K., simultaneously from India

c) To relocate the employment of Mr. Patel to U.K. and request him to travel to India from time to time

Under FEMA, there is no stipulation of stay in India for a Person to be PROI in a case he goes outside India for employment or for uncertain duration.

A person is regarded as Resident of U.K. if his stay in U.K. exceeds 90 days in a tax year with maintenance of dwelling house in U.K.

Analysis Under FEMA: Sec. 2 (v) of FEMA for the purpose of given case:

Person to be resident in India, has to stay 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 Under ITA:** for the purpose of given case: From combined reading of sec. 6 and explanation to sec. 6 (1), we can conclude that if a person goes outside India for employment then Exp. to 6(1)(c) will apply and if his stay in india is less than 182 days in the year of departure ,he may be regarded as NR. From 2nd year, he will become ‘a person visiting India’ and therefore, Explanation (b) will be applicable.

  In that case if his stay in India on a visit exceeds 119 days but lower than 182 days, then he would be a resident but not an ordinary resident however if his total income in India is less than 15 lakhs, then he would still be regarded as non-resident.

  If Mr. Patel leaves India before 28th September with income of Rs. 15 lacs or more then following situation emerges -

  i. If he stays more than 119 days, he will be treated as resident as per Explanation 1 to Section 6(1) (c). Question remains to be answered as to whether days of stay in India prior to 28th September from 1st April be considered as being on a visit to India in the year of departure on 28th September and he does not visit India during that financial year.

  ii. If his stay is lower than 120 days, but he is not a tax resident in any other country, he will still be a resident of India regardless of his stay in India as per Explanation A to Sec 6 as newly inserted.

2. Emigrating Indians

This is a case where Person resident in India desires to migrate abroad for an uncertain period and hence consequently, one needs to ensure as to (a) whether he will be entitled to continue his activities in India as he used to do, and (b) what kind of variations will come up in his day to day activities once he is non-resident.

2.1 Change of Residential Status

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

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

ii. For

a. Taking up employment outside India, or

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

c. For any other purpose

Applying these tests, Residential Status under FEMA for travel for the following purposes can be determined.

PURPOSE		STATUS UNDER FEMA WITH REASON
i)	Employment abroad	Non-Resident from the date of going abroad – Gone abroad for taking up employment without any certainty as to his return to India.
ii)	Taking care of daughter's post maternity care	Resident – Will return to India after the 'post maternity care' of daughter. Definite period of stay. Not an uncertain period of stay abroad. Number of days stay less than 182 days.
iii)	To sign collaboration agreement	Resident – Gone for specific purpose of signing collaboration agreement. Intention is to return to India thereafter.
iv)	For trying luck as a model abroad	Non-Resident – Gone to become a Model, Intention to stay abroad for an uncertain period.

2.2 Implications on Assets / Investments in India of emigrating Indian

As discussed earlier, Section 6(5) of FEMA provides that 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.

In view of the above, the implications under FEMA on Assets / Investments in India and steps to be taken in respect of each of them is outlined as under:

Investment – Assets/Activity	FEMA – Provisions – Steps to be taken
1. Bank Accounts, Fixed Deposits with Banks	The emigrating Indian should inform his bank regarding the change in his status as Non-Resident under the FEMA All the above accounts will be designated as Non-Resident Ordinary Account (NRO – A/cs) except the account of Family Trust and Discretionary Trust. Mr. Resident can continue to operate the above accounts, Legitimate dues such as Dividend, interest, sale proceeds of shares, rent etc. receivable in India in rupees, can be credited to the NRO accounts.
2. a) Shares Debentures, Convertible Debentures in Private & Public Limited Companies	Inform the companies concerned about change of status as "PROI" under FEMA PROI can hold Indian security [S.2(za) of FEMA] as provided u/s.6(5) of FEMA
b) Fixed Deposits with Companies	Fixed Deposit with companies is permitted under Reg.6(2) of the Ntf. 5(R) of the FEMA on non-repatriation basis.
3. Units & Govt. Securities, PPF	No permission is required as securities can be held by PROI as provided u/s. 6(5) of the FEMA. Further, he can continue with the PPF Account as now provided under PPF Act.
4. Holding of Insurance Policies	No permission is required. Allowed to pay the premium on LIC policies as per Ntf. 12(R) of the FEMA, out of NRE/NRO account of the policy holder
5. Credit Cards	Can continue to hold Domestic Cards and International Credit Cards as well. Pay for Domestic Cards from NRO / NRE accounts. Pay for International Credit Cards from NRE account or from remittance from abroad. Local expenses in rupees can only be debited through International Credit Card.

5.	Loans given or loans taken	Reg. 8 of Ntf. 3(R) permits continuation of the loans given by resident to another resident, before the lender becomes PROI. In respect of loans taken from Authorised Dealer/bank, the same can continue as provided in Reg. 8 of Ntf. 3(R). Lending by Resident to Non-Resident is generally not allowed to be continued as per Ntf. 3(R) except allowed specifically and hence emigrating Indian requires RBI approval to continue with loan taken from another Resident.
6.	Jewelry	No permission is required for continuing to hold it in India as what is sought to be regulated by FEMA is Securities, Currencies and Immovable Property.
7.	Holding of Immovable Properties in India (and not dealing in them)	No permission of RBI is required [Section 6(5) of the FEMA] to continue holding the same.

2.3 Implications on Business Ventures in India of emigrating Indian

The implications under FEMA on existing Business Ventures in India and steps to be taken in respect of each of them is outlined as under:

Business Venture		FEMA Provisions
1.	a) Continuation of proprietary business in India b) As a partner of a firm c) As co-venturer in Real Estate Development	These are permitted Capital Account Transactions under Schedule IV of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("NDI Rules"), therefore Mr. Resident can continue with the bank account and the business.
2.	a) Continuing as a Director of a Company b) Continuing as a Member of Association of Persons c) Continuing as a	No permission of RBI is required as same is not prohibited

	trustee d) Having interest in Trust	
3.	Partner of a firm dealing in Real Estate	Should retire from the firm as RBI does not allow real estate dealings by Non-Residents including NRIs [NDI Rules]
4.	Real estate development	Activity is permitted by RBI [Notification No. FEMA 1 & NDI Rules]
5.	Agricultural activities and holding of Agricultural land and acquiring additional Agricultural land	Agricultural activities are not permitted; however, holding of Agricultural land is permitted including acquiring additional Agricultural land for non-agricultural purposes. Sale of Agricultural land is permitted as per NDI Rules read with Section 6(5) of FEMA.

2.4 Proprietary Export Business

There can be a situation where a proprietary export business that was started by a person when he was resident in India is continued by him with the help of staff after emigrating to a foreign country.

POSER: Participants are requested to discuss the implications of the above situation under FEMA, including declaration required under Export Declaration Form.

2.5 Implications on Guarantees and Collateral Securities in India of emigrating Indian

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

In case of bank continuing the grant of loan to the resident on the security of collateral shares of person who has become non-resident, it is not prohibited. The Authorised Dealer Bank can continue the loan to relative of emigrating Indian or third party on the collateral security of shares provided by the emigrating Indian.

2.6 Implications on Karta of HUF who is an emigrating Indian

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

2.7 Sale of immovable property by emigrating Indian after becoming non-resident

The emigrating Indian after becoming non-resident can sell his immovable property without RBI permission to Resident in view of the provisions of NDI Rules whereby sale of immovable property (house property) by non-resident to resident is freely permitted. However, sale proceeds are not repatriable because the property was not acquired out of foreign exchange brought into India. He can remit in each financial year the amount up to US $ 1 mn. under Notification 13(R)/2016-RB dated 1st April, 2016 of FEMA and if he requires to remit in excess of US $ 1mn. then he can apply to RBI under the conditions of hardship as provided in the notification.

> **POSER:** In case entire family is migrating, participants are requested to discuss how they can remit their wealth from India to settle outside India.

2.8 Export of INR and Foreign Currency

As provided in Regulation 3(1)(a) of FEMA Notification 6(R), a 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.25000/- per person.

Regulation 5 of FEMA Ntf. 6(R) provides that no person shall, without the general or special permission of the Reserve Bank, export or send out of India any foreign currency.

2.9 Do's and Dont's for emigrating Indian (Illustrative only)

2.9.1 General purpose:

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

ii. In case there is "Emigration Clearance Required" is stamped on the passport, he should go to the (POE) office of the "Protector of Emigrants" and get the endorsement from the office of the POE on the passport, after submitting proper form of contract from the employer duly endorsed by the Indian Embassy in the other country

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

iv. Obtain foreign exchange for travel, from the bank or dealer in Foreign Exchange and get the same endorsed on the Passport.

v. Not to carry prohibited articles.

vi. Always keep the telephone number and address of the Indian Embassy.

vii. For taking out jewelry or valuables etc. get the export certificate from Customs at Airport so that there is no duty on your return.

2.9.2 Compliance under FEMA

i. Intimate bankers about the change in the status as "Non-Resident" under FEMA.

ii. Give Power of Attorney to the trusted friend or relative to do things on his behalf during his stay abroad.

iii. Intimate the companies, firms where he is a shareholder, partner and deposit holder, Demat Participant about the change in his status as Non-Resident under FEMA.

iv. Retire from the firm if it is carrying on real estate business.

v. Open Non-Resident (External) Account / take necessary form for opening the account from the bankers.

vi. Carry up to Rs. 25,000/- [Regulation 3 of FEMA Ntf. 6(R)].

vii. One can take remittance up to US$ 250,000 as provided under LRS by way of Debit Card & Cash allowed under the FEDAI regulations.

3. Facilities for Non-Resident Indian / Overseas Citizen of India

3.1 Non-resident Indians / Overseas Citizens of India

“NRI” or “Non-Resident Indian” means an individual resident outside India who is a citizen of India;

“OCI” or “Overseas Citizen of India” means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under section 7A of the Citizenship Act, 1955 (57 of 1955);

With effect from 12.05.2015, “PIO” or “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 deemed to be ‘Overseas Citizen of India’ cardholders. From 30.09.2018, PIOs were required to compulsorily convert their status to OCI card holders or else they were required to re-apply for OCI card afresh.

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

i. 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

ii. who was eligible to become a citizen of India on 26.01.1950; or

iii. who belonged to a territory that became part of India after 15.08.1947; or

iv. who is a child or a grandchild or a great grandchild of such a citizen; or

v. who is a minor child of such persons mentioned above; or

vi. who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or

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

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

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

It may be noted that erstwhile PIO definition, though specified under erstwhile FEMA Ntf. 5 (relating to deposits in India), FEMA Ntf. 13 (relating to remittance of assets in India), FEMA Ntf. 20 (relating to transfer or issue of security in India), FEMA Ntf. 21 (relating to immovable property in India) and FEMA Ntf. 22 (relating to Branch / Liaison / Project office in India) was not identical as the law sought to differentiate the nature of PIO based on country of citizenship for different purposes under FEMA. Although PIO definition still exists in FEMA Ntf. 5(R) and in FEMA Ntf. 13(R), the same is now aligned with the definition of OCI and in fact states that PIO includes OCI.

POSER: Participants are requested to discuss the case of a PIO who has not converted his status to OCI by 30.09.2018 and the implications on different kinds of transactions which have a separate dispensation for OCIs under FEMA

3.2 FEMA and Non-resident Indians

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

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

i. NRIs can acquire moveable and immovable properties abroad out of the earnings abroad. Acquisition of the properties abroad is subject to the local laws abroad. e.g. (a) Non-Resident can invest anywhere in the world, (b) he can buy the shares of the companies, quoted in New York Stock Exchanges, London Stock Exchange and other Stock Exchanges in the world, (c) he can set up a company / trust, be Trustee and / or beneficiary in Trust abroad, (d) he can be a partner in any firm abroad, (e) he can start any business abroad, (f) he can retain foreign assets /security even after his return to India as provided in Section 6(4) of FEMA. NRI is not required to take permission of the AD-Bank / RBI (g) he is not required to inform about his assets outside India to RBI.

ii. NRIs can bring 1 kg. of gold (on payment of concessional duty) and 10 kgs. of silver (on payment of concessional duty) once in six months on his visit to India.

iii. Foreign income of NRIs is not liable to tax in India provided he is also non-resident under the Income-tax Act.

iv. NRIs can set up joint ventures abroad with the foreign exchange earned abroad.

v. Children of NRIs can get priority for Engineering / Medical / MBA courses in certain Institutions in India provided the fees are paid in Foreign Exchange.

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

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

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

ix. There are benefits under Double Tax Avoidance Agreements (DTAAs). The non-residents can avail of the benefits of DTAAs entered into by India with several countries. Under the DTA Agreements, if some tax is payable by non-residents in India on their income in India, credit for tax payable in India is available against tax payable in foreign country on such incomes. Effectively, there will be no double tax on the same income.

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

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

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

    It may be noted that due to amendments under the ITA by Finance Bill 2020, in some situations, Non-resident can be treated as 'Not Ordinarily Resident' under the ITA hence benefits available to Non-resident under the ITA may be lost.

3.3 Avenues available for investment in India to Non-resident Indians

Avenues for investment available to NRIs/PIOs for investment into India are briefly summarized below. Further details of each avenue are covered in depth later in Paragraphs 4 to 8.

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

a) Non-Resident (External) Rupee (NRE) Accounts (Principal / Interest Repatriable) which may be in the form of Savings Accounts and Term Deposits

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

Deposits of funds in the account may be accepted in any permitted currency with effect from October 19, 2011. 'Permitted currency' for this purpose would mean a foreign currency which is freely convertible as defined in terms of Regulation 2(v) of FEMA 14/2000-RB dated May 3, 2000, as amended from time to time. The rate of interest may be fixed or floating and maturity of deposits is 1-5 years.

c) NRO Accounts (Current earnings repatriable)

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

ii. Other Investments on repatriation basis

- Equity Instruments i.e. Equity Shares, Share warrants, Fully Compulsorily and mandatorily Convertible Debentures ('CCDs') and Fully Compulsorily and mandatorily Convertible Preference shares ('CCPs') of Indian companies under FDI scheme (including automatic route & government or FIFP route) subject to entry routes, sectoral caps and attendant conditionalities in terms of Schedule I of the NDI Rules read with FDI policy of GOI.

  Such Equity Instruments of listed Indian Company may also be purchased on a stock exchange in India under Schedule I of NDI Rules provided the PROI has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control.

- Equity Instruments i.e. Equity Shares, Share warrants, Fully Compulsorily and mandatorily Convertible Debentures ('CCDs') and Fully Compulsorily and mandatorily Convertible Preference shares ('CCPs') of listed Indian companies on stock exchange in India under Portfolio Investment Scheme in terms of Schedule III of the NDI Rules.

  The total holding by any individual NRI or OCI shall not exceed 5 percent of the total paid-up equity capital on a fully diluted basis / of each series of debentures or preference shares or share warrants and the total holdings of all NRIs and OCIs put together shall not exceed ten percent of the total paid-up equity capital on a fully diluted basis / of each series of debentures or preference shares or share warrants. Such aggregate ceiling of 10 percent may be raised to 24 percent if a special resolution to that effect is passed by the General Body of the Indian company

  Challenges / Issues in acquisition of shares of a listed company: On purchase of listed shares, in case NRI shareholding exceeds 5% individually or 10% in aggregate, then the acquisition is permissible only in terms of Schedule I of NDI Rules i.e. as FDI whereby the acquirer should already be in control of the listed company in accordance with the SEBI Takeover Regulations.

- Units of domestic mutual funds which invest more than 50% in equity (Schedule III of the NDI Rules).
- Shares in Public Sector Enterprises being dis-invested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids (Schedule III of the NDI Rules).
- National Pension Scheme governed and administered by Pension Fund Regulatory and Development Authority (PFRDA). The annuity/ accumulated saving is repatriable (Schedule III of the NDI Rules).
- Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or

equal to 50 percent in equity (Schedule I of the Foreign Exchange Management (Debt Instruments) Regulations i.e. DI Regn.).

- Bonds issued by a Public Sector Undertaking (PSU) in India (Schedule I of the DI Regn.).
- Bonds issued by Infrastructure Debt Funds (Schedule I of the DI Regn.).
- Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 6 of DI Regn. (Schedule I of the DI Regn.).
- Debt instruments issued by banks, eligible for inclusion in regulatory capital (Schedule I of the DI Regn.).

iii. Other Investments on non-repatriation basis

a. By NRI/OCI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs (As per Schedule IV of NDI Rules)

- Equity instrument issued by a company without any limit either on the stock exchange or outside it;
- Units issued by an investment vehicle without any limit, either on the stock exchange or outside it;
- The capital of a Limited Liability Partnership without any limit;
- Convertible notes issued by a startup company in accordance with these Rules

Notes: The investment detailed at sub-para iii above will be deemed to be domestic investment at par with the investment made by residents.

Investment under this Schedule IV cannot be made in capital instruments or units of a Nidhi company or a company engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights. Real Estate business excludes development of townships, construction of residential or commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

b. By NRI/OCI only

- Units of domestic mutual funds without limits on non-repatriation basis which invests more than 50% in equity in case of NRI /OCI (Schedule IV of NDI Rules).
- Contribution by NRI / OCI to the capital of a firm or a proprietary concern in India provided such firm or proprietary concern is not engaged in any agricultural or plantation activity or print media or real estate business (Schedule IV of NDI Rules).
- Government securities (other than bearer securities), treasury bills, units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or equal to 50 percent in equity, or National Plan/ Savings Certificates (Schedule I of DI Regn.).
- Listed non-convertible / redeemable preference shares or debentures issued in terms of Regulation 6 of DI Regn. (Schedule I of DI Regn.).
- Subscribe without limit to the chit funds authorised by the Registrar of Chits or an officer authorised by the State Government in this behalf (Schedule I of DI Regn.).
- Deposits with a company registered under the Companies Act, 1956 including NBFC registered with RBI, or a body corporate created under an Act of Parliament or State Legislature, a proprietorship concern or a firm out of rupee funds which do not represent inward remittances or transfer from NRE/FCNR(B) Accounts into the NRO Account (Notification 5(R) of FEMA).
- Commercial Paper issued by an Indian company (Notification 5(R) of FEMA).

iv. Investment in immovable Property [Rules 24 to 33 of NDI Rules]

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

In respect of such investments NRIs are eligible to repatriate -

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

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

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

v. Investment via FPI route (Schedule II of NDI Rules)

- Investment by a single FPI in listed entities should be less than 10% of the post issue paid-up share capital of the Indian investee company and less than 24% on a collective basis of all the FPIs. The collective limit of 24% may be increased up to the sectoral limit

- NRI / OCI in individual capacity cannot be registered as FPI. However, a foreign entity, such as a company or trust, may register itself as FPI provided -

  (a) Contributions by NRI/ OCI in the FPI should be below 25% of the assets under management (AUM) from a single investor and in aggregate below 50% of AUM, and

  (b) NRI/ OCI should not be in control of the FPI.

  However, an Investment Manager (IM) which is controlled and/or owned by NRI / OCI may control the FPI provided (i) the IM is appropriately regulated in its home country and is registered with SEBI as a non-investing FPI, or (ii) the IM is incorporated or set-up under Indian laws and appropriately registered with the SEBI

- KYC requirements under Prevention of Money-laundering (Maintenance of Records) Rules, 2005 must be complied with. (SEBI Circular attached at Annexure 4)

vi. Investment in LLPs (Schedule VI of NDI Rules)

PROI including NRIs / OCIs (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity incorporated in Pakistan or Bangladesh), not being a Foreign Portfolio Investor (FPI) or a Foreign Venture Capital Investor (FVCI), are permitted to contribute to the capital of an LLP operating in sectors or activities where foreign investment up to 100 per cent is permitted under automatic route and there are no FDI linked performance conditions.

vii. Investment via Investment Vehicle (Schedule VIII of NDI Rules)

- All Persons resident outside India (which includes NRI / OCI in individual capacity or through foreign entity / company owned and controlled by NRI / OCI) may directly invest on repatriation basis in Investment Vehicle which is defined as entity registered and regulated by SEBI and includes the following -

  a. Domestic Mutual Funds which invest more than fifty percent in equity,
  b. Alternative Investment Funds (AIFs) – Category I, II and III (under Schedule II of NDI Rules, FPI may invest only in AIF-Category III)

c. Real Estate Investment Trusts (REITs)
d. Infrastructure Investment Trusts (InvIts)

- Investment made by an Investment Vehicle into an Indian entity shall be reckoned as indirect foreign investment for the investee Indian entity if the Sponsor or the Manager or the Investment Manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India

- AIF Category III which has received any foreign investment shall make portfolio investment in only those securities or instruments in which an FPI is allowed to invest under the Act or rules or regulations made there under.

CASE STUDY 2
PMLA KYC and holding of shares by NRIs/OCIs through FPIs

Facts:
XYZ Pte. Ltd., a company incorporated under the laws of Singapore and beneficially owned by NRIs, has made certain investments in funds in Bermuda which in turn have invested in units in various Mauritius fund structures which are independently managed / controlled by different Investment Managers. These Mauritius funds are registered as FPIs in India and have accordingly invested in Indian listed shares which is individually below the maximum limit permissible for FPIs in any listed company. However, it is possible that these different funds may have invested in the shares of the same Indian listed company. As discussed earlier, investment in shares of an Indian company cannot exceed 10% in case of FPI (i.e. either singly by FPI or by the FPI investor group if any) and 5% in case of NRI as stipulated in Schedule II and III of the NDI Rules respectively. These limits apply at the 1st level investing entity and not at the ultimate beneficial owner level unless the FPI is under common management and control.

KYC requirements:
SEBI issued a Circular dt. 10.04.2018 (attached as Annexure 4) regarding changes to KYC requirements of FPIs whereby it required identification and verification of Beneficial Owners ('BOs') in accordance with Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 (hereinafter referred as PMLA Rules – attached as Annexure 4).

Prior to the aforesaid SEBI Circular, clubbing of investment limit for FPIs was on the basis of common ownership or control of more than 50 percent, as mentioned in Operational Guidelines for Designated Depository Participants. Post SEBI Circular, this effectively means that the current clubbing provisions will also be applicable where BOs are identified on the basis of control.

Accordingly, SEBI stipulated that BOs of FPIs which are either company or trust should be identified on controlling ownership interest (also termed as ownership or entitlement) and control basis. The BOs in case of partnership firm and unincorporated association of individuals should be identified on ownership or entitlement basis. The materiality threshold for identification of BOs of FPIs on controlling ownership interest (or ownership/ entitlement) basis shall be same as prescribed in PMLA Rules i.e. 25% in case of company and 15% in case of partnership firm, trust & unincorporated association of persons. The aforesaid materiality threshold to identify the beneficial owner should be first applied at the level of FPI and next look through principle shall be applied to identify the beneficial owner of the material shareholder/ owner entity i.e. at FPI level if owner is company or trust then BO should be identified if such Company or Trust owns more than 25% or 15% respectively. Only beneficial owner with holdings equal & above the materiality thresholds in the FPI need to be identified through the aforesaid look through principle. The said SEBI Circular is attached as Annexure 4.

In view of the above changes to KYC requirements, participants are required to discuss whether the above structure of XYZ Pte. Ltd. complies with the NDI Rules read with revised SEBI KYC requirements based on PMLA Rules. Paragraph No. 3(v) above regarding investment via FPI route may also be referred for this purpose.

It may be noted that by a subsequent Circular dt. 13.12.2018, SEBI decided that BO criteria in PMLA Rules, 2005 should be made applicable for the purpose of KYC only and not for clubbing of investments of FPIs. Accordingly, so far as clubbing of investment limits for FPIs is concerned, it will be on the basis of common ownership of more than 50% or based on common control.

3.4 Banking accounts of Persons resident outside India

3.4.1 Acceptance of Deposits from PROI is a capital account transaction referred to in section 6(3)(f) and sub-section (2) of S. 47 of the Foreign Exchange Management Act, 1999 and is governed under the Foreign Exchange Management (Deposit) Regulations, 2016 issued vide Notification No. FEMA 5(R)/2016-RB

3.4.2 Under the Notification, RBI has put restrictions on acceptance of any deposit from, or make any deposit with, a person resident outside India if the same is not permitted under the Notification or specifically approved or exempted by it.

3.4.3 Non-Residents are permitted to invest their money in India with banks, companies, firms or proprietary concerns subject to certain conditions. Acceptance of deposits by an authorized dealer/bank from persons resident outside India would be under the following three bank deposit accounts in operation called Non-Resident Ordinary (NRO) Account, Non- Resident External (NRE) Account and Non-Resident Foreign Currency (Bank's Scheme) -FCNR(B) Account.

3.4.4 The comparative provisions of such bank accounts are given in table below:

Particulars	Non-Resident (External) Rupee Account Scheme [NRE Account]	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
(1)	(2)	(3)	(4)
Who can open an account	NRIs and PIOs himself Individual/entities of Pakistan and Bangladesh shall require prior approval of the Reserve Bank of India		Any person resident outside India himself for putting through bonafide transactions in rupees. Individuals/ entities of Pakistan nationality/ origin and entities of Bangladesh origin require the prior approval of the Reserve Bank of India. Post Offices in India may maintain savings bank accounts in the names of persons resident outside India and allow operations on these accounts subject to the same terms and conditions as are applicable to NRO accounts maintained with an authorised dealer/

			authorised bank.
Joint account	May be held jointly in the names of two or more NRIs/ PIOs. NRIs/ PIOs can hold jointly with a resident relative on 'former or survivor' basis (relative as defined in Companies Act, 2013). The resident relative can operate the account as a Power of Attorney holder during the life time of the NRI/ PIO account holder.		May be held jointly in the names of two or more NRIs/ PIOs. May be held jointly with residents on 'former or survivor' basis.
Currency	Indian Rupees	Any permitted currency i.e. a foreign currency which is freely convertible	Indian Rupees
Type of Account	Savings, Current, Recurring, Fixed Deposit	Term Deposit only	Savings, Current, Recurring, Fixed Deposit
Period for fixed deposits	From one to three years, However, banks are allowed to accept NRE deposits above three years from their Asset-Liability point of view	For terms not less than 1 year and not more than 5 years	As applicable to resident accounts.
Permissible Credits	Credits permitted to this account are inward remittance from outside India, interest accruing on the account, interest on investment, transfer from other NRE/ FCNR(B) accounts, maturity proceeds of investments (if such investments were made from this account or through inward remittance). Current income like rent, dividend, pension, interest etc. will be construed as a permissible credit to the NRE account. Care: Only those credits which have not lost repatriable character Foreign Currency and travelers cheque can be deposited only by account holder during his temporary visit to India subject to Currency Declaration Form.		Inward remittances from outside India, legitimate dues in India and transfers from other NRO accounts are permissible credits to NRO account. Rupee gift/ loan made by a resident to a NRI/ PIO relative (as defined in Section 2(77) of the Companies Act, 2013) within the limits prescribed under the Liberalised Remittance Scheme may be credited to the latter's NRO account.
Permissible Debits	Permissible debits are local disbursements, remittance outside India, transfer to other NRE/ FCNR(B) accounts and investments in India.		The account can be debited for the purpose of local payments, transfers to other NRO accounts or remittance of current income abroad. Apart from these, balances in the NRO account cannot be repatriated abroad except by NRIs and

		PIOs up to USD 1 million, subject to conditions specified in Foreign Exchange Management (Remittance of Assets) Regulations, 2016. Funds can be transferred to NRE account within this USD 1 Million facility.
Repatriablity	Repatriable	Not repatriable except for all current income. Balances in an NRO account of NRIs/ PIOs are remittable up to USD 1 (one) million per financial year (April-March) along with their other eligible assets.
Taxability	Income earned in the accounts is exempt from income tax and balances exempt from wealth tax	Taxable
Loans in India	AD can sanction loans in India to the account holder/ third parties without any limit, subject to usual margin requirements. These loans cannot be repatriated outside India and can be used in India only for the purposes specified in the regulations. In case of loans sanctioned to a third party, there should be no direct or indirect foreign exchange consideration for the non-resident depositor agreeing to pledge his deposits to enable the resident individual/ firm/ company to obtain such facilities. In case of the loan sanctioned to the account holder, it can be repaid either by adjusting the deposits or through inward remittances from outside India through banking channels or out of balances held in the NRO account of the account holder. The facility for premature withdrawal of deposits will not be available where loans against such deposits are availed of. The term "loan" shall include all types of fund based/ non-fund-based facilities.	Loans against the deposits can be granted in India to the account holder or third-party subject to usual norms and margin requirement. The loan amount cannot be used for relending, carrying on agricultural/ plantation activities or investment in real estate. The term "loan" shall include all types of fund based/ non-fund-based facilities.
Loans outside India	Authorised Dealers may allow their branches/ correspondents outside India to grant loans to or in favour of non-resident depositor or to third parties at the request of depositor for bona fide purpose against the security of funds held in the NRE/ FCNR (B) accounts in India, subject to usual margin requirements. The term "loan" shall include all types of fund based/ non-fund-based facilities	Not permitted

Rate of Interest	As per guidelines issued by the Department of Banking Regulations		
Operations by Power of Attorney in favour of a resident	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local payments or remittance to the account holder himself through normal banking channels,but not to any other account outside India or to another NRE Account or any Gift to Resident.		Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local payments in rupees, remittance of current income to the account holder outside India or remittance to the account holder himself through normal banking channel but not to any other account outside India or to another NRE Account or any Gift to Resident. While making remittances, the limits and conditions of repatriability will apply.
Change in residential status from non-resident to resident	NRE accounts should be designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts, at the option of the account holder, immediately upon the return of the account holder to India for taking up employment or on change in the residential status.	On change in residential status, FCNR (B) deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by the account holder. Authorised dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder.	NRO accounts may be designated as resident accounts on the return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period. Likewise, when a resident Indian becomes a person resident outside India, his existing resident account should be designated as NRO account.

3.4.5 Thus, for PROI, all the transactions whether Capital or Current, can be carried out only as per their bank account in India.

3.5 Foreign Direct Investment (FDI) in India by NRI / OCI

3.5.1 Foreign direct investment ("**FDI**") is the investment by persons resident outside India in Indian company (i.e. in an unlisted company or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company) and in Indian LLP. FDI in India is regulated by the Reserve Bank of India ("**RBI**"), Department for Promotion of Industry and Internal Trade ("**DPIIT**") in the Ministry of Commerce & Industry, along with the relevant sectoral regulators by issuing Press Notes/ Press Releases which were thereafter notified by the Reserve Bank of India as amendments to the FDI Policy.

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

a. FDI provides an external source of financing for the country (including during economic hardships).
b. FDI leads to transfer of resources, know-how and capital from developed countries; and
c. FDI provides a track for economic development, job creation, literacy growth and improves the competitiveness of domestic producers/ service providers.

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

a. The Foreign Exchange Management (Non-debt Instruments) Rules, 2019 dt. 17.10.2019 issued by the Department of Economic Affairs, Ministry of Finance, Govt. of India in supersession of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("**FEMA 20(R)**") issued by the RBI on 08.11.2017 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018;

b. Consolidated FDI Policy Circular that is issued by the DPIIT, under the aegis of the Ministry of Commerce and Industry, which consolidates all the Press Notes or Press Releases that are notified by RBI. The latest Consolidated FDI Policy No. 5(2)/2020-FDI Policy is dated 15 October 2020 ("**FDI Policy**");

c. Master Direction on Foreign Investment in India issued by RBI which consolidates all the direction issued by RBI throughout the year. The latest Master Direction on Foreign Investment in India was issued on 4 January 2018 (last updated as on 22 March 2022) ("**MD-FI**")

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

3.5.5 FDI investment procedure depends on the sector in which the investment is made as explained in Para 1 of Schedule I of NDI Rules stipulates that any investment made by a person resident outside India shall be subject to the entry routes, sectoral caps or the investment limits, as the case may be, and the attendant conditionalities for such investment as laid down in the Schedule.

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

3.5.6 The regulations contained in the said Notifications are in regard to sale and purchase of equity instruments by non-residents including persons of non-Indian origin.

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

Schedule – 1 [Vide Regulation 6(a) of NDI Rules]

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

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

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

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

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

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

   i) The company should not be engaged in any activity which is included in Para 2 of Schedule I of NDI Rules such as Lottery, Gambling / Betting / Casinos (including foreign technology collaboration / licensing for franchise, trademark, brand name in these areas), Chit funds (except NRIs / OCIs on non-repatriation basis), Nidhi company, Trading in Transferable Development Rights (TDRs), Real estate business or construction of farm houses (excluding development of townships, construction of residential or commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014), cigars/cigarettes of tobacco / tobacco substitutes, activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations .

ii) The entry routes and sectoral caps for the total foreign investment in an Indian entity are as specified in Para 3 of Schedule I of NDI Rules

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

iv) In sectors/ activities not specified in table in Para 3 of Schedule I of NDI Rules or not prohibited under Para 2 of Schedule I of NDI Rules, foreign investment is permitted up to 100 percent on the automatic route, subject to applicable laws/ regulations, security and other conditionalities.

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

xi) Payment for shares or debentures should be received by inward remittance through normal banking channel or by debit to NRE /FCNR Account.

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

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

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

3.6 Gift of Shares / Debentures by NRI / OCI to relatives

General permission is available to NRIs to transfer, by way of gift, capital instruments of Indian companies held by them on repatriation basis either to Resident Indians or PROIs (including NRIs / OCIs). [Rule 13(1) of NDI Rules].

In case of an NRI / OCI holding capital instruments of an Indian company or units on a non-repatriation basis under Schedule 4, he may transfer the same by way of gift to an NRI / OCI who shall hold it on a non-repatriable basis under Schedule 4 [Rule 13(4) of NDI Rules]. In case such gift is being made to a PROI (not being NRI/OCI) then certain conditions as specified in Rule 13(3) of NDI Rules have to be met in order to be eligible under the automatic route.

3.7 Investment in Immovable Property by NRI / OCI, letting out the same, loans for the same, etc.

a. Purchase & Sale of Residential Premises by NRI / OCI

i. NRIs and OCIs do not require permission to acquire immovable property in India as general permission is available to such persons to purchase immovable property in India for their bona fide residential purpose. They are, therefore, not required to obtain separate permission from Reserve Bank.

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

ii. The purchase consideration should be met either out of inward remittances in foreign exchange through normal banking channels or out of funds from NRE/FCNR/NRO accounts maintained with banks in India. [Rule 24(a) of NDI Rules]

iii. Sale of immovable properties

General permission is also available for sale of immovable property to a person resident in India [Rule 24(d) of NDI Rules]. Further, if such property is not agricultural land/ farm house/ plantation property, it can be transferred to an NRI / OCI [Rule 24(e) of NDI Rules].

iv. Repatriation of sale proceeds

Repatriation in respect of properties other than agricultural farm house and plantation property purchased by NRI / OCI is allowed to be remitted provided the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account. In the case of residential property, the repatriation of sale proceed is restricted to not more than two such properties [Rule 29(2) of NDI Rules]

v. No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years. However, this prohibition shall not apply to an OCI. For the purpose of this regulation the term "citizen" shall include natural persons and legal entities [Rule 31 of NDI Rules].

b. Acquisition of Immovable Property by NRI / OCI by way of Gift

As permitted under Rule 24(b) of NDI Rules, an NRI / OCI may acquire any immovable property in India other than agricultural land or farm house or plantation property by way of gift from a PRII or from an NRI or from an OCI, who in any case is a relative as defined in clause (77) of section 2 of the Companies Act, 2013.

c. Letting-out of properties in India by NRI / OCI

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

d. Housing loans availed by NRI / OCI to acquire property in India

General permission is available to authorised dealers and housing finance institutions approved by National Housing Bank, providing housing finance to grant housing loans to NRI / OCI for purchase of residential accommodation, subject to the following conditions.

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

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

c) The loan shall be fully secured by equitable mortgage of the property proposed to be acquired, and if necessary, also by lien on the borrower's other assets in India.

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

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

[Regulation 7(B) of Notification No. FEMA 3(R)]

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

POSER: Can an NRI/OCI acquire property from another NRI/OCI from outside India by directly remitting funds from his foreign bank account to the seller NRI's foreign bank account? Participants may discuss if such transaction is permitted and its implications.

Lead: As per Rule 24 of NDI Rules, an NRI/ OCI may acquire immovable property in India other than an agricultural land or farm house or plantation property: Provided that the consideration, if any, for transfer, shall be made out of :

(i) funds received in India through 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, rules or regulations framed thereunder:

Provided further that no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;

POSER: Rules 24 to 33 of NDI Rules permit acquisition of immovable property in India by PROIs. Further Section 6(5) of FEMA permits PROIs to acquire, hold, etc. immovable property in India when resident in India or inherited from a person who was resident in India. Participants are requested to discuss the inter-play and nuances that arise in such situations as to what happens if inheritance is from a non-resident

CASE STUDY 3

FDI In Real Estate Projects

Under the NDI Rules, PROIs are permitted to acquire immovable property in India under two methods (i) as FDI under the sectoral policy under Schedule I of the NDI Rules and (ii) acquisition and transfer of immovable property under Rules 24 to 33.

While focussing on FDI for real estate projects, this Case Study also aims to bring out the nuances and differences between acquisition of immovable property for business purposes under FDI and for personal purposes under Rules 24 to 33 of the NDI Rules.

Sectoral Policy for Construction Development: PROIs including NRIs/OCIs are permitted to hold 100% shareholding under the Automatic route for Construction-development projects (which includes development of townships, construction of residential/ commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships).

The PROI is subject to a lock-in period of three years calculated with reference to each tranche of foreign investment except in case of transfer to another PROI. However, condition of lock-in period shall not apply to investment by NRIs / OCIs in Hotels and Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes.

Facts of the Case:

Mr Ramesh a Non-resident of India and a PIO is very actively considering to return to India for good after attending the last annual NRI conference organised by GOI every year in January, 2022. He is engaged in USA, in various real estate related projects namely construction of apartments, large commercial infra-mall structure and portfolio investment funds representing property investments. He is contemplating having a similar business in India and desires to purchase two residential houses for his own use and his Iranian daughter's use, married to PIO since last one year. He has also been in touch with Indian banks for the purpose of leveraging his properties including purchase of residential houses if such houses are purchased in the company's name. Since he wants to explore India for good he is not worried about whether investment is done on repatriation or non-repatriation basis, however he has not closed any of his businesses in USA and within commercial reality if the Indian investment can be held on repatriation basis then that will be a preferred option.

Question

Mr Ramesh has approached the participants of CTC Residential Refresher Conference to resolve the following questions:

The entity structure and related procedure involved in:

a) Carrying out the business of large commercial mall infrastructure, its acquisition and earning long term lease revenues.
b) A small construction project involving an investment of USD 500,000 with his close friend in India to develop a residential apartment building to be completed within a period of 2 years in all its respect.
c) Consolidating purchase of residential units in a potentially viable redevelopment project for construction
d) Purchase of 2 residential houses as mentioned above.
e) To participate into a large portfolio of properties to de-risk and mutualise the yield to be managed by the professional managers

3.8 Various routes of investment under NDI Rules for PROIs including NRIs / OCIs (tabulated representation):

Schedule No. →	I	II	III	IV	VI	VII	VIII	IX	X
Type of Investor →	PROI (repatriation)	FPI (repatriation)	NRI / OCI (repatriation)	NRI / OCI (non-repatriation)	PROI (repatriation)	FVCI (repatriation)	PROI (repatriation)	PROI (repatriation)	FPI / NRI / OCI (repatriation)
Instrument									
Equity Shares (incl. partly paid-up; 25% consideration up-front & balance within 12 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Share Warrants (25% consideration up-front & balance within 18 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Debentures (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Preference Shares (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Convertible Note				Y		Y			
Units in Investment Vehicle				Y		VCF, Cat-I AIF, Startups	Y (see Note)		
Capital in LLP				Y	Y				
Capital in Firm or proprietorship				Y					
Depository Receipts								Y	
Indian Depository Receipts									Y (see Note)

Convertible Note: an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument

Investment Vehicle: Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (Invits), Alternative Investment Funds (AIFs) and Mutual Funds (MFs) which invest more than fifty percent in equity

Depository Receipt: means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible Indian securities; **Indian Depository Receipts**: means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorised by a company incorporated outside India making an issue of such depository receipts

3.9 Lending by NRI / OCI to Residents

3.9.1 The Regulations under FEMA provide framework for borrowing by PRIIs in INR and Foreign currency from PROIs including NRI / OCI. This includes portfolio investments into Indian INR debt instruments for the following category of investors:

- All SEBI registered FPIs
- NRIs / OCIs on repatriation basis
- NRIs / OCIs on non-repatriation basis
- Foreign Central Banks, Multilateral Development Banks or any other entity permitted by RBI

3.9.2 The following Table identifies the relevant Regulations dealing with the respective categories of foreign borrowings:

Table – Regulatory framework for foreign borrowings		
Category of Foreign Borrowing	**Relevant Regulations**	**Notification reference**
ECBs & Trade Credits	• FEM (Borrowing and Lending) Regulations, 2018	• FEMA 3(R)/2018-RB
Portfolio investments in Debt instruments	• FEM (Debt Instruments) Regulations, 2019	• FEMA 396/2019-RB
Deposits	• FEM (Deposit) Regulations, 2016	• FEMA 5(R)/2016-RB
Other Loans in INR & Fx	• FEM (Borrowing and Lending) Regulations, 2018	• FEMA 3(R)/2018-RB

3.9.3 The following Table provides a snapshot of the permissible debt instruments category wise under the FEM (Debt Instruments) Regulations and FEM (Deposit) Regulations:

Table 8 – Permissible debt instruments				
Sr. No.	**Debt Instruments**	**All FPIs**	**NRI & OCIs (Repatriation basis)**	**NRI & OCIs (Non-Repatriation basis)**
1	Dated Government securities / treasury bills	Yes	Yes (except bearer securities)	Yes (except bearer securities)
2	Non-Convertible Debentures / Bonds issued by an Indian Company	Yes	Bonds issued by PSUs	Bonds issued by PSUs
3	Commercial Paper issued by Indian Company	Yes	-	Yes - FEM 5(R)
4	Units of domestic Mutual Funds or Exchange-Traded Funds (ETF) which invest less than or equal to 50% in equity	Yes	Yes	Yes
5	National Plan / Savings Certificates	-	-	Yes

6	Security Receipts ('SR') issued by Asset Reconstruction Companies	Yes	-	-
7	Debt instruments issued by banks, eligible for inclusion in regulatory capital	Yes	Yes	-
8	Credit enhanced bonds	Yes	-	-
9	Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 6 of FEM (DI) Regulations i.e. issue out of general reserves by way of distribution as bonus to the shareholders resident outside India in case of merger or demerger or amalgamation of Indian companies approved by NCLT	Yes	Yes	Yes
10	Securitised debt instruments, including (i) any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s with banks, Financial Institutions or NBFCs as originators	Yes		
11	Rupee denominated bonds / units issued by Infrastructure Debt Funds (IDF)	Yes	Yes	-
12	Municipal Bonds	Yes	-	-
13	Subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA)	-	Yes	-
14	Subscribe to chit funds authorised by the Registrar of Chits or an officer authorised by the State Government	-	-	Yes
15	Fixed Deposits by a company or a body corporate, a proprietary concern or a firm in India	-	-	Yes - FEM 5(R)

Note: The above instruments / avenues for investment are available through DI Rules other than those which are available through FEM 5(R) as indicated above.

3.9.4 The Regulations permit other forms of personal borrowing and lending to and from PROIs including NRIs / OCIs.

3.9.4.1 Lending by NRIs / OCIs are as laid out in the following Table (FEM 3(R)):

Key parameters	Lending in Fx	Lending in INR
Eligible borrower	Resident Individual	PRII, not being a company

Eligible lender	NRI / OCI who is relative of resident borrower	NRI/Relatives who are OCI Cardholders outside India
Amount	Not exceeding USD 250,000	Not specified
Terms & conditions	As may be specified by RBI. (Prior to rescinding of FEMA Ntf.3, such borrowings by residents were required to be free of interest with maturity / tenure of minimum 1 year. Repatriation of principal & interest was permitted)	As may be specified by RBI. (Prior to rescinding of FEMA Ntf.4, such borrowings by residents were subject to interest cap of Bank rate + 200bps and with maturity / tenure of maximum 3 years. Repatriation of principal & interest was not permitted)
Restricted end use	Not specified	Funds should not be used for restricted end uses viz: a) Business of Chit fund or Nidhi Company; b) Investment in capital market including margin trading and derivatives; c) Agricultural or plantation activities; d) Real estate activity or construction of farm houses; and e) Trading in Transferrable Development Rights (TDR)

3.9.4.2 Borrowing by PROIs / NRIs / OCIs are as laid out in the following Table (FEM 3(R)):

Key parameters	Borrowing in Fx	Borrowing in INR
Eligible borrower	PROIs / NRIs / OCIs	NRI / OCI Cardholder
Eligible lender	(i) Foreign branches of the Indian banks extending foreign exchange loans to PROIs / NRIs / OCIs in the normal course of their banking business outside India. (ii) Indian companies to the employees of their branches outside India for personal purposes in accordance with the lender's Staff Welfare Scheme / Loan Rules	(i) AD Bank in India for meeting the borrower's personal requirements / own business purposes / acquisition of a residential accommodation in India / acquisition of motor vehicle in India / or for any purpose as per the loan policy laid down by the Bank (ii) NBFC / registered Housing Finance Institution or and other Financial Institution specified by RBI for providing housing / vehicle loan (iii) Indian entity may grant loan to its employee who is an NRI / OCI Cardholder in

		accordance with the Staff Welfare Scheme subject to RBI terms & conditions (iv) Resident individual may grant Rupee loan to an NRI / OCI Cardholder relative within the overall limit under the Liberalised Remittance Scheme subject to such terms and conditions as prescribed by the RBI from time to time. (Prior to rescinding of FEMA Ntf. 4, such borrowings by NRI / OCI were required to be free of interest with maturity / tenure of minimum 1 year; Loan to be utilised for meeting the borrower's personal requirements or for his own business purposes in India and not for restricted uses; Repatriation of loan amount was not permitted)
Restricted end use	-	Above borrowings should not be used for restricted end uses viz: a) Business of Chit fund or Nidhi Company; b) Investment in capital market including margin trading and derivatives; c) Agricultural or plantation activities; d) Real estate activity or construction of farm houses; and e) Trading in Transferrable Development Rights (TDR)

3.10 Hospitability to PROI by PRII

3.10.1 Under Notification No. FEMA 16/2000-RB, dated 3rd May 2000 which deals with 'Receipt from and payment to a person resident outside India', general permission is given to residents to spend on non-resident guest on account of boarding, lodging and services related thereto and or travel within India.

3.10.2 Indian firms and companies are allowed to pay for cost of to and fro passage fare of their Non-Resident directors, foreign technicians, etc. coming to India for official business purposes. Similarly, Indian companies are permitted to make payment in rupees to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India.

3.10.3 Loan by Resident individual in rupees is also permitted in favour of the NRI relative subject to compliance with Foreign Exchange Management (Borrowing and Lending) Regulations, 2018

(Notification No. FEMA 3(R)/2018-RB dated 17th December, 2018), as amended from time to time.

> **POSER:** Are there any Current Account Rules for non-residents? This situation may arise in case of transactions of a non-resident who sets up proprietary business in India.

3.11 Estate Planning for NRI

As we have studied that a person who is PRII but has ever been a PROI during some period or vice versa, then there are special provisions to hold assets cross border as under:

i. 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 – Section 6(5)

ii. 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. – Section 6(4) of FEMA

iii. General permission has been given to an NRI to inherit assets from a PRII or bequeath assets to PRII

3.11.1 Tools of Estate Planning

Wills and Private Trusts are the two tools used globally for estate planning. Will, as we all know, is an age-old concept and the most commonly used tool to bequeath assets to intended beneficiaries. Trust, on the other hand is a more advanced and structured tool usually preferred by wealthy families.

Wills and Trusts are not substitute of each other, instead they are complementary in nature. A combination of both works best for most families

3.11.1.1 Will

i. A Will is a written document through which the owner of the assets decides how and to whom his/her wealth should be distributed on his/her demise. There is no particular format for writing a Will; however, for the will to be valid, it must be signed by two witnesses with named executor of the Will.
ii. A Will can be challenged and may be required to get probated to establish the genuineness of the will
iii. Different countries have their own laws if a person dies intestate. In India the assets are distributed as per Hindu Succession Act. In UAE assets are distributed as per Sharia law.
iv. FEMA provisions need to be evaluated while inheriting cross border assets.

3.11.1.2 Private Trust

i. Unlike a Will which comes into effect only on the demise of an individual, a Trust could be created during one's lifetime. The assets forming part of a Trust are not subject to probate, hence are not susceptible to challenges as compared to a Will.

ii. A Trust is like a living Will i.e. a document to deal with the assets during lifetime of the owner settlor of the assets and thereafter even after his death.

iii. A revocable private trust has a limited application in real life and hence same is not discussed in this Paper.

3.11.2 Detailed provisions pertaining to Trust

a) Definition of Trust

i. As per Indian Trust Act, 1882; A Trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another & the owner

ii. Trust is an equitable obligation binding a person to deal with property over which he has control for the benefits of the persons of whom he may himself be one and any one of whom may enforce the obligation.

b) Purpose of Trust

i. Estate Planning - A private Trust is one of the important means for succession planning. It is like a living will where the assets are settled during the lifetime of the settlor

ii. Asset Protection – Protection of assets from undesirable events like against claims and creditors

iii. Use of assets vs Transfer of assets – The assets settled onto a trust may still be used by the settlor without no longer personally holding the asset

iv. Private Equity, Special Purposes, Taxation, Wealth Management are also the other uses of the Trust.

c) Parties of Trust

i. **Author/Settlor/Trustor/Donor/ Grantor** - Person who makes a settlement in a trust (forms a trust) by entrusting assets in a trust. Any asset can be placed into a trust

ii. **Trustee** - Trustees have a fiduciary duty to manage the assets in the estate for the benefit of the beneficiaries. He is person who is the “legal owner” of assets and is responsible for managing the trust assets and for legal compliance.

iii. **Beneficiaries** – Persons who will benefit from the assets held in the trust. The beneficiary may be identified or not. Beneficiary may exist on the date of trust formation or may come into existence in future.

iv. **Protector** - an individual who is appointed under a trust deed to be a protector is a person appointed under the trust instrument to direct or restrain the trustees in relation to their administration of the trust.

d) Types of Trust

i. Irrevocable - When the settlor does not retain or reserve the power to reassume the Trust property/income or to transfer it back to himself.

ii. Revocable - When the settlor retains or reserves the power to reassume the Trust property/income or to transfer it back to himself.

iii. Discretionary - if the Trust deed does not specify any beneficiary’s share but empowers someone (usually the Trustees) to determine such share, it is considered as a discretionary/ indeterminate Trust. Such discretion may be absolute or qualified.

iv. Non-Discretionary/specific - If the Trust deed provides a list of beneficiaries specifying their beneficial interest, it would be a specific Trust.

e) Trust Instruments

i. Declaration of Trust - a declaration of trust usually arises where a person declares themselves to be a trustee of property to which they hold legal title on behalf of a beneficiary. The declaration of trust contains details of the trustees, trust's purpose, its beneficiaries, and how it will be managed by the trustee

ii. Trust Deed - A trust deed or trust instrument is used when a person (settlor) wishes to transfer assets to a third party (trustee) who will hold and administer those assets for the benefit of certain beneficiaries in accordance with the terms of the trust. Trust deeds are legally binding documents that list the name of the trust, the trustee, the settlor, beneficiaries, specifications of how to administer the trust, and sometimes the assets to be held in trust

iii. Letter of Wishes - A letter written by the settlor of a trust to the trustees, to guide them as to how the settlor would like the trust to be administered. The trustees are not legally bound to follow a letter of wishes, but it is guidance that they must consider and in practice it is usually followed. It is mainly used because it is easy to change, unlike amending a will or trust deed, and will remain private among the trustees.

3.11.3 Taxation of Trust

A. <u>At the time of Settlement</u>

i. On the Settlor – Section 47(iii) contains a specific exemption for any capital gains that may be considered to arise to the settlor on transfer of capital to an irrevocable Trust. Therefore, the settlor is not liable to any tax on settlement of the irrevocable Trust.

ii. On the Trustees - The provisions of section 56(2)(x) does not to apply to the Trustees, as a Trustee receives the property with an obligation to hold it for the benefit of the beneficiaries. This obligation taken over should be good and sufficient consideration for receipt of properties by the Trustees, and therefore, the receipt of property cannot be said to be without/for inadequate consideration

iii. On the Beneficiaries – In case of Determinate Trusts, property is received by the trustee on behalf of and for the benefit of the beneficiary. Such receipt of the property by the beneficiary directly may have attracted (not strictly) the provisions of section 56(2)(x) of the Act and therefore, the term “in the like manner and to the same extent” may bring such income within the ambit of section 56(2)(x). However, in case the beneficiaries are relatives of the settlor within the definition prescribed for this purpose under the IT Act, no tax implications would even arise u/s. 56(2)(x) of the IT Act in such cases. In situations even when beneficiaries are not relatives, at the time of settlement there is no transfer of asset under settlement and hence it is unlikely to attract any tax at this point of time.

B. <u>On the Income earned by the Trust</u>

i. Where shares of beneficiaries are determinate or known:

a. Income does not include Business profits - The trustee is assessable at the rates applicable to each beneficiary (section 161 of Income Tax Act)

b. Income includes Business profits - The whole of the income of the trust is taxable at maximum marginal rate (section 161 (1A) of Income Tax Act)

ii. Where shares of beneficiaries are indeterminate or not known (section 164(1) of Income Tax Act:

a. Income does not include Business profits and if:
   - None of the beneficiaries has taxable income exceeding maximum amount not chargeable to tax or is a beneficiary in any other trust; or
   - The income is receivable under a trust declared by any person by will and such trust is the only trust so declared by him; or
   - The income is receivable under a non-testamentary trust created before 1.03.1970 exclusively for the benefit of relatives of settlor, or member of HUF, who are mainly dependent upon settlor; or
   - The income is receivable by trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other bona fide fund created by the employer carrying on business or profession for the benefit of his employees,

   Then, income of the trust is taxable in the hands of trustees at the rates applicable to an AOP. It is only the rate as applicable to AOP, but it is not taxed as AOP.

b. Income includes Business profits - The whole of the income of the trust is taxable at maximum marginal rate and not as an AOP. *[CIT vs Balvantrai Jethalal Vaidya (1958) 34 ITR 187 (BOM)]*

C. <u>Distribution of Assets/ Income</u>

i. On the Beneficiaries - When the receipt of the sum of money/ property/ accrual of any income has already been subject matter of tax in the hands of the trustee or beneficiary, then on distribution of such income/ property, no taxable event arises in the hands of the beneficiary.
If on the receipt of any sum of money/ property on behalf of the trust, no tax was paid by the beneficiary or by the trustee on behalf of the beneficiary, then in such cases a taxable event arises on receipt of such property or sum of money by the beneficiary on distribution

ii. On the Trust - Since the Trust does not receive any consideration at the time of distribution, no capital gain implications ought to arise. In the past, tax authorities have attempted to treat a Trust as an AOP, and apply the provisions of section 45(4) of the IT Act on dissolution of a Trust. However, the Hon'ble Bombay High Court in case of L.R. Patel Family Trust vs. Income Tax Officer [2003] 129 Taxman 720 (Bombay), has held that Trustees cannot be taxable as an AOP, and therefore, the provisions of section 45(4)[#] are not applicable

[#]Section 45[(4) Notwithstanding anything contained in sub-section (1), where a specified person receives during the previous year any money or capital asset or both from a specified entity in connection with the reconstitution of such specified entity, then any profits or gains arising from such receipt by the specified person shall be chargeable to income-tax as income of such specified entity under the head "Capital gains" and shall be deemed to be the income of such specified entity of the previous year in which such money or capital asset or both were received by the specified person, and notwithstanding anything to the contrary contained in this Act. In this connection, one may refer to CIT vs Indira Balkrishna (1960) 39 ITR 546 (SC).

3.11.4 FEMA provisions pertaining Trust

a) Important Definitions

i. Person: As per Section 2(u) of FEMA," person" includes—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and

(vii) any agency, office or branch owned or controlled by such person;

ii. Person resident in India

(i) person residing in India for more than 182 days during preceding financial year but does not include ………..(omitted as applicable to individuals only),

(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

iii. Capital Account and Current Account transactions have already been covered in the earlier chapter

b) Residential Status under FEMA

i. As per the definition of a person under FEMA, Trust is not defined as a person. Since it does not fall under the definition of person, FEMA definition of person resident in India or person resident outside India may also not apply to a Trust

ii. How do we determine the residential status of the trust?

a. Is it Place where management / operations of Trust are located i.e. where Trustee is Resident?

b. Is it Place where settlor is Resident?

c. Is it Place where beneficiary/ies are Resident?

d. Is it the Location of the Assets under trust?

e. Is it a place where trust is formed with proper law applicable to trust?

iii. A trust is not included within the definition of person, as provided under FEMA. Under the Indian trust law, a trust is a contract / arrangement. For Indian tax purposes, a trust is not considered as an entity. Under the tax law, a trustee is taxed as representative assessee. Accordingly, it becomes difficult to accord any residential status to the trust since it does not fall within the definition of person

iv. Under FEMA there are no clear rules for a trust, There are three views:

a. FEMA provisions applicable to Non-Residents are applicable to Trust having non-resident beneficiaries, since a Trust is mere pass-through entity

b. If there are mixed beneficiaries, FEMA as applicable to each one of them, either as Resident or Non-resident, will apply

c. Cannot determine Residential Status in a straight manner

3.11.5 FEMA Implications under different scenarios pertaining to NRI

Transaction	Analysis	Implication under FEMA
Settlor (NRI) contribution to a Discretionary Trust in India with Resident beneficiaries by Inward Remittance	-No Alteration of NRI's assets or liabilities in India -Not a capital account transaction	No Implication
Settlor (NRI) contribution to a Discretionary Trust in India with Resident or NRI beneficiaries from NRO/NRE Account	-Alteration of NRI's assets in India -Capital Account Transaction	-FEMA 5 (R): NRE / NRO Scheme -General permission for 'local disbursements' / 'local payments
Settlor (NRI) gifts shares in Indian co. to Discretionary Trust in India	-Alteration of NRI's assets in India -Capital Account Transaction	- FEM Non-Debt (Instruments) Rules, 2019 - General Permission Rule 9(2)
Settlor (NRI) gifts Debt Instruments in Indian co. to Discretionary Trust in India with NRI beneficiaries	-Alteration of NRI's assets in India -Capital Account Transaction	-FEM Debt (Instruments) Rules, 2019 -No General permission for gift of Debt instruments
Settlor (NRI) gifts immovable property to Discretionary Trust in India to Resident or NRI beneficiaries	-Alteration of NRI's assets in India -Capital Account Transaction	- FEM Non-Debt (Instruments) Rules, 2019 - General Permission Rule 24(b) and 24(d)
Any Distribution to NRI beneficiary	-Alteration of NRI's assets in India -Capital Account Transaction	FEMA 5(R) – NRO A/c. General permission to credit legitimate dues
Remittance of current income received by NRI beneficiary	-Alteration of NRI's assets in India -Capital Account Transaction	FEMA 5(R) – NRO A/c General permission to remit current income
Remittance of corpus received by NRI beneficiary	-Alteration of NRI's assets in India -Capital Account Transaction	FEMA 13(R) General permission to remit under million $ scheme

4. Returning Indians

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

4.1 Retention of Foreign Assets

In terms of section 6(4) of FEMA, persons who return to India after being non-resident can retain funds / assets acquired by him abroad out of foreign exchange earned abroad (through employment, business or vocation outside India, inheritance etc.). Such persons can retain their foreign currency accounts with banks abroad and/or hold, transfer or dispose of their assets abroad such as shares, securities or investments in business, etc. and immovable properties as and when they decide to do so. Under FERA, there was approval required for holding even income earned on these assets held abroad. However, from the language of section 6(4) it is obvious that such approval is not necessary under FEMA. Based on representations received by RBI with regards to nature of transactions covered under Section 6(4) of FEMA, it issued clarifications vide A.P. (DIR Series) Circular No. 90 dated 9-1-2014 (attached as Annexure 5) that Section 6(4) covers the following transactions:

i. Foreign currency accounts opened and maintained by such a person when he was resident outside India;
ii. Income earned through employment or business or vocation outside India taken up or commenced while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
iii. Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
iv. A person resident in India may freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/ or any subsequent payments received thereof are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.

Persons returning to India can repatriate the aforesaid assets to India and hold them separately in India if they so desire with authorised dealers under the Resident Foreign Currency Accounts Scheme.

It may be noted that Section 4 of FEMA prohibits any person resident in India from acquiring, holding, owning, possessing or transferring any foreign exchange, foreign security or any immovable property situated outside India save as otherwise provided in FEMA. Similarly, Section 8 imposes an obligation 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 realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

However, Section 9 of FEMA provides exemption from Sections 4 and 8 of FEMA relating to mandatory realisation and repatriation of foreign exchange into India by a person resident in India. According to Section 9(e), a person resident in India is exempted from repatriating 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.

POSER: Participants are requested to discuss the implications under Sections 4, 6(4), 8 and 9 of FEMA with respect to:

i. Repatriation of Income of Business commenced outside India in the form of (a) Private limited company, (b) Partnership Firm, and (c) Proprietary concern
ii. Repatriation of salary from foreign business, honorarium, Gift, etc
iii. Retention of maximum assets abroad by availing of benefits of Section 6(4)

POSER: Although this paper is not an attempt to discuss tax issues, participants are requested to discuss the implications of settlement on a trust in context of Section 93 of the Income Tax Act, 1961.

Leads: Section 93 is a deeming provision which aims to curb the practice of tax avoidance by resident taxpayers through transfer of assets to non-residents but enjoying the fruits of the assets even after such transfer. However, it is not applicable if the purpose is not for avoiding tax or if it is a case of bona fide commercial transactions. Can the transaction of settlement to a Trust by a returning Indian who will be resident beneficiary on his return to India be regarded as bona fide?

4.2 Maintenance of various Foreign Currency Accounts in India by PRII:

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

No RBI permission is required to open RFC accounts with Authorised Dealers. RFC Accounts can be maintained in any convertible currency.

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

Particulars	Exchange Earners Foreign Currency (EEFC) Account	Resident Foreign Currency (Domestic) [RFC(D)] Account	Resident Foreign Currency (RFC) Account
Who can open the account	Exchange Earners	Individuals	Individuals
Joint account	Jointly with eligible persons; or With resident relative(s) on former or survivor' basis. Relative as defined under Companies Act, 2013 (viz. members of HUF, spouse, parents, step-parents, son, step-son, daughter-in-law, daughter, son-in-law,	Jointly with any person eligible to open the account	Same as EEFC

	brother/sister, step-brother/ step-sister) Relative joint account holder cannot operate the account during the life time of the account holder		
Type of Account	Current only	Current only	Current/ savings/ term deposits
Interest	Non-interest earning	Non-interest earning	De-regulated (As decided by the AD bank)
Permitted Credits	1) 100% of foreign exchange received on account of export transactions. 2) advance remittance received by an exporter towards export of goods or services 3) Repayment of loans given to foreign importers 4) Disinvestment proceeds on conversion of ADR/ GDR 5) professional earnings like director's/ consultancy/ lecture fees, honorarium and similar other earnings received by a professional by rendering services in his individual capacity 6) Interest earned on the funds held in the account 7) Re-credit of unutilised foreign currency earlier withdrawn from the account 8) Payments received in foreign exchange by an Indian start-up arising out of sales/ export made by the start-up or its overseas subsidiaries	1) Foreign exchange received as payment/ service/ gift/ honorarium while on visit abroad or from a non-resident who is on a visit to India 2) Unspent amount of foreign exchange acquired from AD for travel abroad 3) Gift from close relative 4) Earning through export of goods/ services, royalty 5) Disinvestment proceed on conversion of shares into ADR/ GDR 6) Foreign exchange received as earnings of LIC claims/ maturity/ surrendered value settled in forex from an Indian insurance company	1) Foreign exchange received by him as superannuation/ other monetary benefits from overseas employer 2) Foreign exchange realised on conversion of the assets referred to in Sec 6(4) of FEMA 3) Gift/ inheritance received from a person referred to in Sec 6(4) of FEMA 4) Foreign exchange acquired before the July 8, 1947 or any income arising on it held outside India with RBI permission 6) Foreign exchange received as earnings of LIC claims/ maturity/ surrendered value settled in forex from an Indian insurance company 7) Balances in NRE/ FCNR (B) accounts on change in residential status
Permitted Debits	1) Any permissible current or capital account transaction 2) Cost of goods purchased 3) Customs duty	Can be used for any permissible current/ capital account transactions.	No restrictions on utilisation in/ outside India.

	4) Trade related loans and advances		

4.3 Import of Foreign Currency and INR

As provided in Regulation 3(2)(b) of FEMA Notification 6(R), a person resident outside India not being a citizen of Pakistan or Bangladesh and also not a traveler coming from and going to Pakistan and Bangladesh, and visiting India, may bring into India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25000/- per person.

Regulation 6 of FEMA Ntf. 6(R) permits a person coming into India from abroad to bring with him foreign exchange without any limit. However, if the aggregate value of the foreign exchange in the form of currency notes, bank notes or travelers cheques brought in exceeds USD 10,000 or its equivalent and/or the value of foreign currency alone exceeds USD 5,000 or its equivalent, it should be declared to the Customs Authorities at the Airport in the Currency Declaration Form (CDF), on arrival in India.

4.4 Guiding steps to returning Indian

General purpose:

i. Go through the appropriate channel in the Customs enclosure.

ii. Make an honest and correct declaration.

iii. Make a voluntary and honest declaration immediately on landing in the event he intends to tranship the baggage, or part of it, or keep it with the Customs for transhipment or taking it back with him when he eventually leaves the country. In case any of the items are permitted for reshipment or transhipment and are therefore in the custody of the Customs, the Customs authorities must be contacted well in advance and all dues paid to enable them to keep the items ready for handing over in time at the time of departure.

iv Obtain proper receipts for payments made by him.

v. Keep handy purchase receipts for articles, especially major items like TV, tape deck, video, stereo set, etc. brought in as baggage.

vi. Foreign exchange, in the form of currency notes, bank notes or travelers cheques, exceeding in aggregate U.S. $ 10,000 (Value of currency notes not to exceed US $ 5,000) must be declared in writing in the Currency Declaration Form which should be countersigned by the concerned Customs Officer to facilitate re-export of the unutilised amount by the tourist.

vii. Obtain a 'Landing Certificate' from the concerned Customs Officer on arrival, in the event of any baggage is mishandled i.e., found missing on landing; please note that such a certificate will not be issued subsequently by the Customs.

viii. Ensure shipment of unaccompanied baggage within the time limit prescribed viz, it is dispatched within one month of your arrival in India as laid down in Rule 8 of the Baggage Rules, 2016.

ix. Ensure safety of the items allowed on baggage Re-Export basis or those requiring export certificate/drawback, and produce all the items physically before the Customs Officer at the time of departure from India. If such items are placed in checked-in suitcases, then the Airline staff at the check-in counter should be advised to make available the said package(s) for customs examination. He should ensure that the carriers do comply with this requirement.

x. If any item allowed on Re-Export basis has been lost, misplaced or gifted, he should contact the Public Relations Officer, Customs, well in advance of departure and should avoid check-in at the last moment. Sufficient amount of money for payment of duty/fine should be kept handy.

xi. In certain State in India, which enforce prohibition the tourist should obtain, on arrival from abroad, the requisite liquor consumption permit at the airport from the tourist counter.

xii. If claiming concessions on transfer of residence, current / previous passport should be kept handy to establish his period of stay abroad.

xiii. In order to qualify for the duty-free concession on transfer of residence, the items should be in actual possession and use of the passenger and, in order to establish the fact, the passenger should preferably possess the original purchase vouchers, as evidence. He should also ensure that the Bill of Landing or House Airway Bill is issued before the date of actual departure from abroad.

The concessional rate of duty on new items, applies to articles in his possession abroad before leaving and those purchased at the duty-free shop at the airport of arrival.

xiv. Fire arms are not allowed to be imported as baggage. Fire arms on export must be covered by valid licences and the airline/shipping agents should be kept informed. The fire arms will be kept in the custody of the Pilot/ Master for security reasons. Fire arms of prohibited bore shall not be dealt with.

xv. Convert foreign exchange through authorised dealers/money changers.

xvi. Indian nationals (non-tourists) must surrender unutilised foreign exchange within 90 days (180 days in case of unspent travelers cheques) from the date of their arrival.

xvii. The following types of compensatory payments involving foreign exchange constitute offences under the law:

i) Receiving or making payments at the instance of or on behalf of a person resident outside India.

ii) Placing amounts to the credit of a person resident outside India, or, at his instance or on his behalf, making payments out of these amounts.

iii) Maintaining a foreign currency account without proper authority or using such an account for selling, lending or transferring foreign exchange or failing to surrender the balance to an authorised foreign exchange dealer in India.

xviii. Currency Declaration Form may be surrendered to the Customs Officer at the time of the tourist's departure to facilitate re-export the unutilised foreign exchange.

Other specific matters:

i. Not bring in any contraband goods or goods in trade quantities, dangerous drugs and prohibited goods by concealing these items either on your person or in you baggage or otherwise, as they do not constitute bona fide baggage.

ii. Do not mis declare, fail to declare or conceal any item of your baggage, otherwise the passenger may be deprived of the free allowances permitted under the rules in force. Further, he may be penalised and/or prosecuted.

iii. The passenger should not be involved in bringing in or taking out, directly or indirectly, any package owned by another party or parties, whether known or otherwise, without fully satisfying yourself about its actual contents and admissibility for import or export.

iv. He should not act as a carrier directly or indirectly or accept free passage, free hotel accommodation or any other monetary benefit for such service which may attract penal action under the law in force.

v. Note that a motor vehicle is not considered to be a baggage item. The rules and conditions for import of a motor vehicle are set out in Chapter on Baggage Rules of the book.

vi. He should not bring in any crude gold jewelry which may be classified as gold bullion.

vii. He should not carry foreign exchange such as foreign bank drafts or travelers cheques drawn in favour of another person.

viii. He should not import fire arms (including air guns) as baggage.

ix. Import of fire arms through the medium of post is prohibited.

x. He should not import or export counterfeit coins or literature or paintings or figures, which are obscene / prohibited.

xi. He should not import plants, vegetables or fruits unless these items are covered by proper documents issued at the port of embarkation, as some of these items are liable to be fumigated at the port of landing by an entomologist.

xii. Tourists should refrain from importing jewelry of high value, as it may be detained for valuation by the Customs Jewelry Appraiser and, if the value exceeds Rs. 50,000 in case of male passenger or Rs. 100,000 in case of lady passenger, a suitable guarantee or bond may be required for its release.

xiii. He should not import pets/birds without valid health certificate for the pet.

Under FEMA:

i. Evaluate Foreign Investments, Foreign Bank Accounts such as shares, investment in OCBs, immovable properties before return. Plan gifts prior to his return.

ii. Convert his FCNR, NRE accounts to RFC Account.

iii. Allow NRNR A/c to remain till maturity.

iv. Intimate the bankers, companies, firms where he has investments; about his status as resident.

v. Watch out for the tax liability under Income-tax Act.

4.5 Steps to take after returning to India

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

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

iii. On his return, his NRO bank account will be re-designated as regular bank account.

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

CASE STUDY 4

Repatriation of Section 6(4) assets to India

- Mr. ‘A’ and Mr. ‘B’ who are brothers were born in Kenya, Africa. Their grand-father, father and uncle (all now deceased) had migrated to Africa since 1920s and had set up various businesses in various parts of Africa including Uganda, Kenya, Tanzania and Nigeria and had also expanded the businesses in South East Asia, Middle East, Afghanistan, Kazakhstan, etc. These businesses comprised of diverse areas including trading in natural resources, manufacturing of various hardware products, chemicals, resins and polymers, etc. In 1975, the family set up a company in India and ventured into India in manufacture of plastic products which was listed in late 80s.
- Since completion of their education in 1970s and 1980s, both the brothers have been engaged in managing the various businesses and assets of the family.
- Due to political turmoil in Africa, both brothers sought citizenship of UK and obtained British passport in 1980. Most of the Indian business community in Africa followed a practice of keeping the asset base to as low as possible in Africa, while continuing to carry on the business there keeping low value-added job function in Africa. The profits in Africa were generally kept to a level of not more than required and most of the profits were attributed to entities outside Africa through effective transfer pricing acceptable in Africa. Further, all investments were held

through the trusts set up and investment companies incorporated outside Africa.

- From FY 2002-2003 onwards, both the brothers started spending more time in India as the business in India demanded more attention primarily due to the expansion. Accordingly, they became residents under FEMA and under the Income-Tax Act, 1961.
- During the period that they were resident in India, they continued to hold personal joint bank accounts that were opened outside India prior to their becoming resident in India in which both of them held 1/2 ownership rights & interests. Income generated from their aforesaid African territories was deposited in such joint bank accounts held abroad which are permissible to be held under section 6(4) of FEMA even after becoming residents in India under FEMA;
- Further, the proceeds of whatever disinvestments of their foreign assets that were made were deposited in the said joint foreign bank accounts abroad. None of these foreign investments were made from India but were made only from foreign resources available to them prior to their returning to India.
- As they are Residents in India, they have disclosed the joint foreign bank accounts and other assets in their Indian tax return. Moreover, the deposits into their personal joint bank accounts have been accepted by the tax authority in India as income earned outside India and taxes have been paid on such deposits as applicable Indian taxes. Further, the said deposits are retained abroad as permissible under FEMA.

Issues for discussion under FEMA:

i. As the deposits were received in their personal joint bank accounts, can it be said that such deposits are in the nature of personal income from business conducted from India while they are resident? If yes, what are the implications under FEMA especially considering provisions of Section 8 and FEMA Ntf. 23(R) - Exports of goods and Services

ii. Would it have made a difference if the foreign sources of income were in corporate form instead of being received in personal bank accounts?

5. Facilities for Resident Indians for overseas remittances / investment

5.1 Foreign exchange drawal for Foreign travel

The following points may be noted in connection with drawal of Foreign Exchange for foreign travel as referred to in Master Direction - Other remittance facilities issued under FED No. 8 /2015-16 dt. 01.01.2016:

i. Restrictions on drawal of Foreign Exchange

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

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

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

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

iv. Foreign currency notes and coins

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

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

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

c) Entire exchange (up to USD 250,000) released can be in the form of currency notes in case of travelers proceeding to Iran, Russian Federation and other Republics of Common Wealth of Independent States. For travelers proceeding for Haj/ Umrah pilgrimage, full amount of entitlement (USD 250,000) in cash or up to the cash limit as specified by the Haj Committee of India, may be released by the ADs and FFMCs

v. A drawal up to US$ 250,000 can be made for all travel related purpose in a financial year including in currency as explained in above paragraphs. Thus, the amount can be other than in cash by way of debit card or a credit card including cash within the overall limit of US$ 250,000.

5.2 Retention of foreign currency notes, coins and travellers cheques (FEMA Ntf. 11(R) – attached as Annexure 6)

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

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

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

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

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

5.3 Formalities for a Person being an individual resident in India in connection with unspent foreign exchange drawn for travel abroad (FEMA Ntf. 9(R) – attached as Annexure 7)

i. Unspent foreign exchange in currency notes, should be surrendered within 180 days from the date of return. In case the person resident in India has to travel abroad again within 180 days of return, the unspent foreign exchange can be used by him for his subsequent journey.

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

iii. In case of cancellation of journey, the amount of foreign exchange drawn should be surrendered within 180 days. In such cases US $ 2,000 cannot be retained. (Notification No. 169 dt. 23.10.2007)

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

5.4 Provisions in connection with unutilised foreign exchange acquired for purposes other than foreign travel in case of a Person not being an individual resident in India (FEMA Ntf. 9(R))

i. In case the foreign exchange is purchased for any purpose other than for foreign travel and is not used for that purpose or for any other purpose for which purchase or acquisition of foreign exchange is permitted under the provisions of FEMA, 1999 or Rules or Regulations made thereunder, the same or the unused portion thereof is required to be surrendered to an Authorised person within a period of 60 days from the date of its purchase.

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

CASE STUDY 5

Repatriation and deposit of Foreign Currency

Mr. Returning Indian, a PRII has a proprietary business in India. He has the following transactions involving foreign exchange for which he has approached participants of CTC RRC to understand the implications under FEMA:

i. Exports from India with outstanding export proceeds
ii. Remuneration earned by him from Company outside India from continuous employment taken up while he was PROI
iii. Honorarium / Gift received in the form of valuable momentos by him from Charitable organisation abroad while on visit
iv. Foreign currency purchased from India for visits abroad
v. Unspent foreign currency on hand from earlier purchases as well as withdrawn from RFC A/c.

5.5 Maintenance of Foreign Currency accounts abroad by Residents

Maintenance of bank accounts abroad constitutes a capital account transaction and is not permitted without prior approval of Reserve Bank of India. However, for the following transactions, general permission has been given by RBI vide FEMA Ntf. 10(R):

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

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

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

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

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

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

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

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

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

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

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

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

5.6 Provisions in FEMA in connection with foreign travel for business / attending conferences / seminars / training / medical treatment abroad / studies abroad / private visit, etc.

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

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

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

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

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

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

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

5.7 Prohibited Current Account Transactions of Residents

A few transactions on Current Account are prohibited as stipulated in the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

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

i. For travel to Nepal or Bhutan

ii. Transaction with a resident of Nepal or Bhutan

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

   a) Remittance out of lottery winning

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

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

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

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

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

g) Payment related to “Call Back Services” of telephones.

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

5.8 Liberalised Remittance Scheme (LRS) as updated vide Master Direction – LRS dt. 24.08.2022

5.8.1 The Reserve Bank of India had announced a Liberalised Remittance Scheme (the Scheme) in February 2004 as a step towards further simplification and liberalization of the foreign exchange facilities available to resident individuals. As per the Scheme, resident individuals may remit up to USD 2,50,000 per financial year for any permitted capital and current account transactions or a combination of both. All resident individuals, including minors are eligible to avail of the facility under the scheme. The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.

5.8.2 Prohibited Items under the scheme:

i. Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000.
ii. Remittance from India for margins or margin calls to overseas exchanges / overseas counterparty.
iii. Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market.
iv. Remittance for trading in foreign exchange Abroad.
v. Remittances directly or indirectly to countries identified by the Financial Action Task Force (FATF) as “non-co-operative countries and territories”, from time to time.
vi. Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.
vii. Remittances directly or indirectly to Bhutan, Nepal, Mauritius and Pakistan.

5.8.3 Eligible Items under the scheme:

i. Opening of foreign currency account abroad with a bank
ii. Acquisition of immovable property abroad, Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI), in accordance with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022;
iii. Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013;
iv. Giving gift to a person residing outside India or as donation to an organization outside India;
v. Purchasing objects of art subject to the provisions of other applicable laws such as the extant Foreign Trade Policy of the Government of India;
vi. Purposes under FEM (Current Account Transaction) Rules, 2000

5.8.4 The facility under the Scheme is in addition to those already available for private travel, business travel, studies, medical treatment, etc., as described in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. However, remittances for gift and donation cannot be made separately and are subsumed under the limit available under this LRS.

5.8.5 For undertaking transactions under the Scheme, resident individuals may use the application-cum-Declaration Form and it is mandatory to have PAN number to make remittances under the Scheme.

5.8.6 Investor who has remitted funds under LRS can retain and reinvest the income earned on the investments. However, a resident individual who has made overseas direct investment in accordance with FEMA provisions, shall have to comply with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022.

As per recent amendment dt. 24.08.2022, any amount invested under LRS is now received / realised / unspent / unused foreign exchange, unless reinvested, it shall be repatriated and surrendered to an authorised person within a period of 180 days from the date of such receipt / realisation / purchase / acquisition or date of return to India, as the case may be, in accordance with Regulation 7 of FEMA Ntf. 9(R). It may be noted that prior to such amendment, the resident individual was not required to repatriate the funds or income generated out of investments made under the Scheme.

5.8.7 Thus, LRS is an exception for PRII to carry out all the specified as well as residual current account transactions and any capital account transactions up to the value of US$ 250,000 even if it is not possible under the specific Notification or permissible capital account transaction e.g. PRII may not be able to purchase immovable properties outside India for a value above US$ as specified therein, but he can do so under LRS.

POSER: LRS permits a person going abroad for the purpose of employment to draw USD 2, 50,000 per financial year. However as per the definition of person resident in India (PRII) as per Sec 2(v) of FEMA, a person who has gone out of India for the purpose of employment is not considered as a PRII. Will the person going out for employment be permitted to remit USD 2,50,000 (permitted to PRII) + USD 1 Mn (permitted to PROI from NRO A/c) in the year of going out for employment?

POSER: In case funds are remitted under LRS from a PRII's account in India in to the personal account of PRII under the purpose code of maintaining relatives abroad, however the funds were not utilised for the same. Can the PRII use the funds for another permitted purpose like purchase of immovable property outside India?

Participants may discuss the permissibility and implications of the same including issues with AD-Bank that may arise in case of sale of the aforesaid property during repatriation to India.

5.9 Provisions for Overseas Investments by Resident individuals:

5.9.1 The existing regulatory framework in relation to overseas investments and acquisition of immovable property outside India has been overhauled by the Government of India through the Ministry of Finance and in consultation with Reserve Bank w.e.f. 22.08.2022.

Accordingly, the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("OI Rules"), Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("OI Regulations") and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("OI Directions") have been notified in supersession of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 issued under Ntf.120/2004-RB dt. 07.07.2004 and the Foreign Exchange Management (Acquisition and

Transfer of Immovable Property Outside India) Regulations, 2015 issued under Ntf.21(R)/2018-RB dt. 26.03.2018.

The investments already made in accordance with the erstwhile ODI Regulations will be deemed to have been made under OI Rules and Regulations.

5.9.2 As provided in Schedule III of the OI Rules, any resident individual may make ODI by way of investment in equity capital or OPI in the manner provided in the Schedule and unless otherwise provided thereunder, shall be subject to the overall ceiling under the Liberalised Remittance Scheme of the Reserve Bank.

5.9.3 The new OI framework provide precise distinction between the nature of overseas investments which constitute ODI and OPI.

Under the new regime, ODI means investment by way of: (a) acquisition of unlisted equity capital of a foreign entity, or subscription as a part of the memorandum of association of a foreign entity, or (b) investment in 10% or more of the paid-up equity capital of a listed foreign entity, or (c) investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity (Rule 2(q) of OI Rules).

OPI means any investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC (Rule 2(s) of OI Rules).

"Control" means the right to appoint majority of the directors or to control management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten per cent or more of voting rights or in any other manner in the entity (Rule 2(c) of OI Rules).

5.9.4 As provided in Schedule III of the OI Rules, any resident individual may make ODI by way of investment in equity capital or OPI in the manner provided in Schedule III and unless otherwise provided thereunder, shall be subject to the overall ceiling under the Liberalised Remittance Scheme of the Reserve Bank.

A resident individual may make or hold Overseas Investment by way of –

(i) ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step-down subsidiary where the resident individual has control in the foreign entity. Where a resident individual has made ODI without control in a foreign entity that subsequently acquires or sets-up a subsidiary / SDS, such resident individual shall not acquire control in such foreign entity.

(ii) OPI, including by way of reinvestment;

(iii) ODI or OPI, as the case may be, by way of–

(a) Capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due from the foreign entity the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank;

(b) Swap of securities on account of a merger, demerger, amalgamation or liquidation;

(c) Acquisition of equity capital through rights issue or allotment of bonus shares;

(d) Gift as per the conditions laid down under the Schedule which are –

i. A resident individual, without any limit, may acquire foreign securities by way of gift from a person resident in India who is a relative and holding such securities in accordance with the provisions of the Act.

ii. A resident individual may acquire foreign securities by way of gift from a person resident outside India in accordance with the provisions of the Foreign

Contribution (Regulation) Act, 2010 (42 of 2010) and the rules and regulations made thereunder.

Author's comment: It may be noted that there is ambiguity on the compliances required to be fulfilled under the FCRA. The FCRA norms are applicable only where such shares may be considered as 'foreign contribution' under the FCRA. The FCRA allows a resident to receive foreign contribution from a relative. Thus, it appears that a gift from a non-resident may be acceptable as long as such non-resident is a relative of the resident individual. A 'relative' in such case shall be as defined under the Companies Act, 2013.

(e) Inheritance - A resident individual may, without any limit, acquire foreign securities by way of inheritance from a person resident in India who is holding such securities in accordance with the provisions of the Act or from a person resident outside India.

(f) Acquisition of sweat equity shares;

(g) Acquisition of minimum qualification shares issued for holding a management post in a foreign entity;

(h) Acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme –

A resident individual, who is an employee or a director of an office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or of an Indian entity in which the overseas entity has direct or indirect equity holding, may acquire, without limit, shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme or sweat equity shares offered by such overseas entity, provided that the issue of Employee Stock Ownership Plan or Employee Benefits Scheme are offered by the issuing overseas entity globally on a uniform basis.

Such shares / interest may be offered directly by the overseas issuing entity or indirectly through a Special Purpose Vehicle / Step-down subsidiary.

Where the investment qualifies as OPI, the necessary reporting in Form OPI shall be done by the employer concerned in accordance with regulation 10(3) of OI Regulations. Where such investment qualifies as ODI, the resident individual concerned shall report the transaction in Form FC.

Foreign entities are permitted to repurchase the shares issued to residents in India under any ESOP Scheme provided (i) the shares were issued in accordance with the rules / regulations framed under FEMA, 1999, (ii) the shares are being repurchased in terms of the initial offer document, and (iii) necessary reporting is done through the AD bank.

Though there is no limit on the amount of remittance made towards acquisition of shares/interest under ESOP/Employee Benefits Scheme or acquisition of sweat equity shares, such remittances shall be reckoned towards the LRS limit of the person concerned.

Notes:

i. ODI in respect of clauses (e), (f), (g) and (h) is permissible in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step-down subsidiary where the resident individual has control. A foreign entity is considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.

ii. Further, acquisition of less than ten per cent. of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), shall be treated as OPI.

iii. Overseas investment by way of capitalisation, swap of securities, rights/bonus, gift, and inheritance shall be categorised as ODI or OPI based on the nature of the investment. However, where the investment, whether listed or unlisted, by way of sweat equity shares, minimum qualification shares and shares / interest under Employee Stock Ownership Plan (ESOP) / Employee Benefits Scheme does not exceed 10 per cent of the paid-up capital/stock of the foreign entity and does not lead to control, such Investment shall be categorised as OPI.

CASE STUDY 6

ODI / OPI

A Returning Indian, Mr. R. Patel holds Shares in various Limited Liability entities abroad, some of them in Joint Venture with Non-Residents as well as with Non-Resident relatives in few companies. He also held various Options and Cashless Shares while he was Non-Resident.

Participants are requested to discuss the implications and compliances under OI Rules & Regulations of the following proposed transactions being contemplated by Mr. R. Patel:

i. Receipt of Shares aggregating 9% in a Private Ltd. Company in Kenya by way of transfer from Executor of Will of his deceased friend.
ii. Investing in a new step-down subsidiary in Kenya of the aforesaid Kenyan company holding 51% and balance shares being held by Mr. R. Patel with participation in management and control of the step-down subsidiary.
iii. Acquiring 15% shareholding in a company in USA by way of Sweat equity for services rendered but not resulting in participation in management and control of the US company.
iv. In case the above-mentioned company in USA has a step-down subsidiary, what would be the implication on the offer of Sweat equity received from the said holding company?
v. Investment of 5% in unlisted entity in USA as portfolio investment without control. Would your answer be different if Mr. R. Patel was to utilize his foreign bank balance which is retained abroad i.e. Section 6(4) asset?
vi. Remittance from India under LRS for investment in interest-bearing bonds issued by US company which are not listed

5.10 Provisions for acquisition or transfer of Immovable Property outside India (Rule 21 of OI Rules):

5.10.1 A person resident in India may acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank in the following cases / situations:

i. held by a person resident in India who is a national of a foreign State;
ii. acquired by a person resident in India on or before the 8^{th} day of July, 1947 and continued to be held by such person with the permission of the Reserve Bank;
iii. acquired by a person resident in India on a lease not exceeding five years
iv. acquired by way of inheritance or gift or purchase from a person resident in India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition

v. acquired from a person resident outside India by way of inheritance or purchase (out of RFC account / LRS / out of the income or sale proceeds of the assets, other than ODI, acquired overseas under the provisions of the Act)

vi. an Indian entity having an overseas office may acquire immovable property outside India for the business and residential purposes of its staff, as per the directions issued by the Reserve Bank from time to time

POSER: Rule 21 of ODI Rules permits acquisition of immovable property outside India by PRIIs subject to conditions. Further Section 6(4) of FEMA permits PRIIs to acquire, hold, etc. immovable property outside India when resident outside India or inherited from a person who was resident outside India. Participants are requested to discuss the inter-play and nuances that arise in such situations

POSER: Is the PRII who has received the property as a gift/inheritance from another resident required to repatriate the sale proceeds from the property sold or can the PRII reinvest the sale proceeds in any other permitted asset outside India?

POSER: Can PRII pay in INR in India to another PRII for the property outside India as per the exchange rate prevailing on the date of sale? If yes is the payment required to be made within the permitted LRS limit?

POSER: Gifting of immovable property is not permitted from PROI to PRII, what solution would you give in case a son (PROI) wishes to gift his father (PRII) an immovable property located outside India?

POSER: What are the implications if the proposed Gift is of Foreign securities from a PROI to PRII?

Lead: The new OI Guidelines now state that any gift of foreign securities from a person resident outside India to an individual resident in India may be made only in accordance with the Foreign Contribution (Regulation) Act, 2010 ("FCRA"). This is a key restriction imposed upon investments by resident individuals, especially since there is no clarity on the compliances required to be fulfilled under the FCRA. The FCRA norms are applicable only where such shares may be considered as 'foreign contribution' under the FCRA. The FCRA allows a resident to receive foreign contribution from a relative. Thus, it appears that a gift from a non-resident may be acceptable as long as such non-resident is a relative of the resident individual. A 'relative' in such case shall be as defined under the Companies Act, 2013.

5.11 Estate Planning for Resident Indians having overseas assets:

i. General Permission has been given to a PRII to inherit assets outside India from a PROI as per Section 6(4) of FEMA and Rule 21 of OI Rules and to PROI to bequeath assets in India to PRII as per Section 6(5) of FEMA and Rule 24 of NDI Rules

ii. Assets can be bequeathed by way of will or a Trust

5.11.1 Transactions pertaining to a Trust and the applicable FEMA provisions

Nature of Transaction	FEMA Rule / Notification applicable
Gift / Donation, purchase of shares / immovable property, etc. by resident	Liberalized Remittance Scheme [A.P. (Dir Series) Circular No. 64 dt. 4th Feb. 2004
Capital account transactions	Notification No. FEMA 1/2000-RB dt. 3rd May 2000
Deposits & Bank Accounts	Notification No. FEMA 5(R)/2016-RB dated April 1,2016
Acquisition & Transfer of Immovable Property outside India	Foreign Exchange Management (Overseas Investment) Rules, 2022
Realisation, Repatriation & Surrender of Foreign Exchange	Notification No. FEMA 9 (R)/2015-RB dated December 29, 2015
Foreign Exchange Borrowing and Lending	Notification No. FEMA.3(R)/2018-RB dated 17th December, 2018
Remittance outside India of assets in India	Notification No. FEMA 13 (R)/2016-RB, Date : April 01, 2016
Investments in India under FDI / Portfolio Investment Scheme / Non –	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
Acquisition & Transfer of Immovable Property in India	
Investment in Firm or Proprietary	

5.11.2 **FEMA Implications – Trust**

Transaction	Analysis	Implication under FEMA
Settlor (PRII) contribution to a Discretionary Trust outside India with Resident beneficiaries by Remittance from India	-No Alteration of PRII's assets or liabilities outside India -Not a capital account transaction	Gift / Donation under LRS Current A/c. transaction
Transfer to Offshore Trust from overseas bank a/c opened by using LRS by Resident Settlor	-Alteration of Resident's Assets outside India -Capital account transaction under FEMA	FEMA 1 – Schedule 1 Not specified as permissible transaction
Settlor (PRII) gifts shares in Foreign co. to Discretionary Trust outside India with Resident Beneficiaries	-Alteration of PRII's assets outside India -Capital Account Transaction	- FEM (Overseas Investment) Rules, 2022 - General Permission Schedule III, clause 2
Settlor (PRII) gifts shares in Foreign co. to Discretionary Trust outside India with Non-Resident Beneficiaries	-Alteration of PRII's assets outside India -Capital Account Transaction	- FEM (Overseas Investment) Rules, 2022 - No General permission for gift to NRI
Settlor (PRII) gifts immovable property outside India to Discretionary Trust outside India	-Alteration of PRII's assets outside India	- FEM (Overseas Investment) Rules, 2022

with NRI beneficiaries	-Capital Account Transaction	- No General permission for gift to NRI
Investment of Foreign Discretionary Trust in foreign assets in shares, real estate, derivative contracts, etc. with Resident or NRI beneficiaries	- No Alteration of Resident's Assets outside India - No Alteration of NRI's Assets in India	No Implication
Collection of trust income by foreign trustee	- No Alteration of Resident's Assets outside India - No Alteration of NRI's Assets in India	No Implication
Loan by Resident to Offshore Trust	-Alteration of Resident's Assets outside India -Capital account transaction under FEMA	FEMA 1 – Schedule 1 Not specified as permissible transaction

5.11.3 Regulatory overview of Trusts in Various Jurisdictions

	Mauritius	**UK**	**Singapore**	**Jersey**	**Nevis**
Registration Requirement	No	No	No	No	Yes
Local resident Trustee required	Yes	No	No	No	No
Beneficiaries' right to remove trustee	Yes	Yes	No	Yes	Yes
Settlor Reserved Power Trust	No	No	Yes	Yes	Yes
Residential Status of Trust	if trust is administered in Mauritius and most of the Trustees are resident in Mauritius or Settlor was resident at the time of creating the trust	determined on the residential status of Trustees	determined on residential status of settlors and beneficiaries	determined on the residential status of Trustees	determined on the residential status of Trustees
Tax exemption available to Foreign Trusts	Previous exemption available when no	Each trust is different and is treated separately	Tax exemption is available for specified	If all beneficiaries are non-residents –	If settlor & all beneficiaries are non-residents –

	beneficiaries were Mauritian resident has been revoked in FA 2021	depending on: whether it's a discretionary trust or an interest in possession trust; the residence status of the settlors or beneficiaries	income that is derived by Qualifying Foreign Trusts (QFTs)	Tax only on Jersey sourced income	exempted from taxation on any income earned anywhere in the world outside of Nevis, including dividends and interest, withholding taxes, capital gains taxes, or estate taxes
Protection Against Creditors	2 years	2years / 5years	No timeline	No specific asset protection provision	2 years
Migration scheme	Yes, Investment of US$ 500,000 in Housing scheme for a Resident Permit	None	Yes, S$ 2.5 mn for Resident Permit	None	Yes, Investment of US$ 150,000

CASE STUDY 7

Transactions relating to Trust

Discuss the FEMA Implications under the following different scenarios

	I	**II**	**III**	**IV**	**V**	**VI**
SETTLOR	NRI	NRI	NRI	R	R	R
TRUSTEE	R	R	NRI	R	NRI	R
BENEFICIARY	R	NRI	R	NRI	NRI	R
LOCATION OF ASSETS	India	India	Outside India	India	Outside India	India
Application of FEMA to:						
Creation of Corpus						

Income generation						
Distribution / Remittance of Income to Beneficiary						
Remittance of Corpus to Beneficiary						

Conclusion:

The law as discussed here is based on the purposive interpretation with practical experience of the Author and may be at time interpreted strictly not in accordance with the literal meaning but as found acceptable with the Regulators.