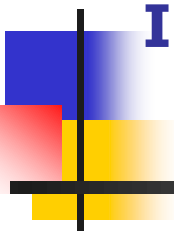


# **Nashik Branch of WIRC of ICAI - Workshop on Real Estate Transactions**

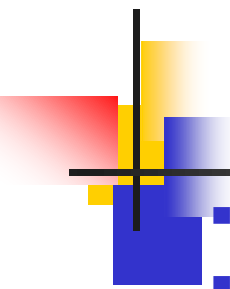


## **Inbound and outbound Investments and FDI - w.r.t. real estate transactions under FEMA**

---

Presented by:  
Mr. Paresh P. Shah

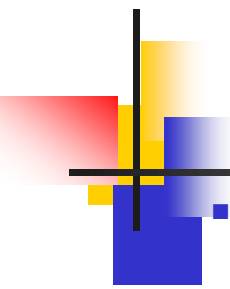
P.P. Shah & Associates  
Chartered Accountants  
Email: [ppshahandassociates@gmail.com](mailto:ppshahandassociates@gmail.com)



# Overview

---

- Introduction – Provisions under FEMA
- Relevant definitions under FEMA
- Acquisition / Transfer of immovable property by NRI / OCI
- Real Estate Sector under FDI Policy
- Acquisition / Transfer of immovable property by Branch of Foreign Company
- Acquisition / Transfer of immovable property by Foreign Embassies / Consulates
- Borrowings on property in India
- Immoveable property in India - Case Studies
- Immoveable property outside India by resident
- Immoveable property outside India under LRS
- Immoveable property outside India by overseas Branch
- Immoveable property outside India by overseas venture of resident
- Borrowings on property outside India



# Overview (con't)

---

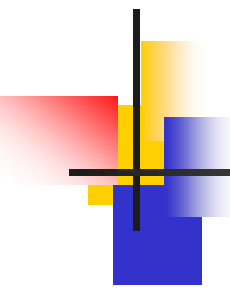
## ■ Abbreviations:

Authorised Dealer(AD),  
Capital Account transaction (CAP),  
Current Account Transaction(CAT),  
Foreign Exchange(FE),  
Government of India (GOI) ,  
Notification no.(Ntf.),  
Person Resident Outside India(PROI),  
Person Resident in India (PRII),  
Non Resident Indian (NRI),  
Overseas Citizen of India (OCI),  
Person of Indian Origin (PIO),  
Reserve Bank of India (RBI),  
Non repatriable basis (NRB),  
Repatriable basis(RB)



# Introduction – Provisions under FEMA

- The term 'immovable property' is not defined in FEMA. It will thus include all types of immovable property – residential, commercial, industrial or agricultural property including tea plantations and farm houses
- Acquisition of Immoveable Property in India by PROI is a Capital Account Transaction
- Section 6 of FEMA regulates such transactions through notifications issued by RBI in consultation with GOI. Powers of RBI are not vested with GOI
- Regulation on acquisition/transfer of Immovable Properties in India
  - S. 6(3)(i) / Notification 21(R) - Acquisition or transfer by PROI (excludes lease for a period not exceeding 5 years)
  - Notification No. 20(R) Schedule 1 - FDI in Real Estate/ Construction - Development Projects in India on repatriation basis; under Schedule 4 on non-repatriation basis



# Introduction – Provisions under FEMA (con't)

## General Permissions:

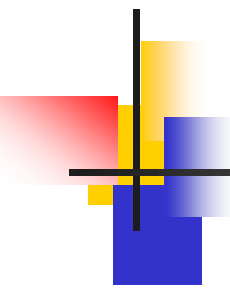
### SEC. 6: Capital account transactions

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

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

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

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

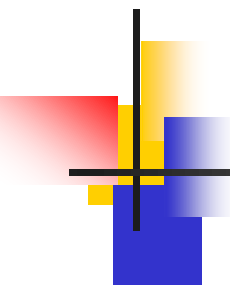


# Introduction – Provisions under FEMA (con't)

---

## **General Restrictions:**

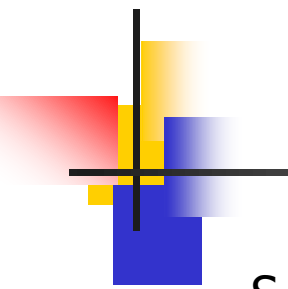
- General Restriction for all capital account transactions on agricultural / plantation activities / construction of farm house in India and dealing in property & TDR by PROIs. [Notification 1 of FEMA]
- Restrictions on Citizens of eleven countries (viz. Citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan or Macau or Hong Kong or North Korea) - irrespective of their residential status, they can acquire immovable property in India only with prior RBI approval. [ Notification 21(R) of FEMA]



# Relevant Definitions under FEMA

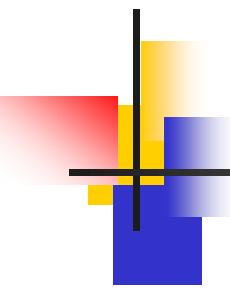
S. 2(v) " person resident in India" means-

- (i) a person residing in India for more than one hundred and eighty- two days during the course of the preceding financial year but does not include-
  - (A) a person who has gone out of India or who stays outside India, in either case-
    - (a) for or on taking up employment outside India, or
    - (b) for carrying on outside India a business or vocation outside India, or
    - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
  - (B) a person who has come to or stays in India, in either case, otherwise than-
    - (a) for or on taking up employment in India, or
    - (b) for carrying on in India a business or vocation in India, or
    - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;



# Relevant Definitions under FEMA

- S. 2(v) " person resident in India" means – (con't)
  - (ii) any person or body corporate registered or incorporated in India,
  - (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
  - (iv) an office, branch or agency outside India owned or controlled by a person resident in India
- S. 2(w) " person resident outside India" means a person who is not resident in India
- S. 2(ze) "transfer" means, sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien



## Relevant Definitions under FEMA Ntf. 21(R)

- Under Notification 21(R), NRI means “a person resident outside India who is a Citizen of India”.
- Under Notification 21(R), OCI means “a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955”.
- ‘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 w.e.f. 12.05.2015
- 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.

# OCIs vs PIOs

| OCI                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | PIO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Following categories of foreign nationals are eligible for registration as Overseas Citizen of India (OCI) Cardholder:-</p> <ol style="list-style-type: none"> <li>(1) Who was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26.01.1950; or</li> <li>(2) who was eligible to become a citizen of India on 26.01.1950; or</li> <li>(3) who belonged to a territory that became part of India after 15.08.1947; or</li> <li>(4) who is a child or a grandchild or a great grandchild of such a citizen; or</li> <li>(5) who is a minor child of such persons mentioned above; or</li> <li>(6) who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or</li> <li>(7) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.</li> </ol> <p>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.</p> | <p>'Person of Indian Origin'(PIO) means a citizen of any country other than Bangladesh or Pakistan, if</p> <ol style="list-style-type: none"> <li>(i) he at any time held Indian Passport; or</li> <li>(ii) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or</li> <li>(iii) the person is a spouse of an Indian citizen or a person referred to in sub-clause (i) or (ii).</li> </ol> |

# Immovable Property in India – FEMA Ntf. 21(R)

## 2. Other Important Definition :-

- (e) 'repatriation outside India' means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency

# Immovable Property in India – FEMA Ntf. 21(R)

## **3. Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India:-**

- An NRI or an OCI may

(a) acquire immovable property in India other than agricultural land/ farm house/ 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.

(b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;

(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;

(d) transfer any immovable property in India to a person resident in India;

(e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

# Immovable Property in India – FEMA Ntf. 21(R)

## **4. Acquisition of Immovable Property for carrying on a permitted activity:-**

A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may –

- a) acquire any immovable property in India, which is necessary for or incidental to carrying on such activity;

Provided that

i) all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and

ii) the person files with the Reserve Bank a declaration in the form IPI annexed to these regulations, not later than ninety days from the date of such acquisition;

- b) transfer by way of mortgage to an authorised dealer as a security for any borrowing, the immovable property acquired in pursuance of clause (a).

Provided no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

# Immovable Property in India – FEMA Ntf. 21(R)

## **5. Purchase/ sale of Immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals:-**

A Foreign Embassy/ Diplomat/ Consulate General may purchase/ sell immovable property in India other than agricultural land/ plantation property/ farm house provided (i) clearance from Government of India, Ministry of External Affairs is obtained for such purchase/ sale, and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

## **■ 6. Joint acquisition by the spouse of an NRI or an OCI:-**

A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse, subject to certain conditions including:

- Consideration of transfer shall be made out of inward remittance / balance in non-resident account
- the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property

# Immovable Property in India – FEMA Ntf. 21(R)

## **7. Acquisition by a Long-Term Visa holder:-**

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to the following conditions:

- (a) the property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas;
- (b) the person submits a declaration to the Revenue Authority of the district where the property is located, specifying the source of funds and that he/ she is residing in India on LTV;
- (c) the registration documents of the property should mention the nationality and the fact that such person is on LTV;
- (d) the property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- (e) a copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division);
- (f) such person shall be eligible to sell the property only after acquiring Indian citizenship. However, transfer of the property before acquiring Indian citizenship shall require prior approval of DCP/FRO/FRRO concerned.

# Immovable Property in India – FEMA Ntf. 21(R)

## 8. Repatriation of sale proceeds:-

- (a) A person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section;
- (b) In the event of sale of immovable property other than agricultural land/farm house /plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
  - (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
  - (ii) 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;
  - (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.
- (c) In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, (Notification No. FEMA 3/2000-RB, dated 3-5-2000), a bank which is an authorised dealer may permit the overseas lender or the security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan

# Immovable Property in India – FEMA Ntf. 21(R)

## **9. Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries**

- 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.

Provided this prohibition shall not apply to an OCI.

Explanation: For the purpose of this regulation the term "citizen" shall include natural persons and legal entities.

## **10. Prohibition on transfer of immovable property in India:-**

- Save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India:-

Provided that

(i) The Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

(ii) A bank which is an authorised dealer may, subject to the directions issued by the Reserve Bank in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time.

# Immovable Property in India – FEMA Ntf. 21(R)

## **10. Prohibition on transfer of immovable property in India (con't):-**

(iii) An Authorized Dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the Reserve Bank in this regard, create a mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender.

Provided

(a) the funds shall be used by the borrowing company only for its core business purposes overseas;

(b) in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.

(iv) A person resident outside India who has acquired any immovable property in India in accordance with foreign exchange laws in force at the time of such acquisition or with the general or specific permission of the Reserve Bank may transfer such property to a person resident in India provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.

# Immovable Properties in India (other than agricultural land / farm house / plantation property) – Summary of Acquisition & Transfer by NRIs & OCIs

| Particulars |                       | NRI and OCI                                                                                                                                                                                                                                                                                        |
|-------------|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>A.</b>   | Hold / Own            | Yes, provided property was acquired, held or owned when he was resident in India or inherited from a person who was resident in India (Sec. 6(5) of the Act)                                                                                                                                       |
| <b>B.</b>   | Acquisition:-         |                                                                                                                                                                                                                                                                                                    |
| <b>i.</b>   | By way of Purchase    | Yes, provided consideration is paid in convertible foreign exchange (FEMA Ntf. 21(R))                                                                                                                                                                                                              |
| <b>ii.</b>  | By way of Gift        | Yes - gift may be received from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013 (FEMA Ntf. 21(R))                                                                                                   |
| <b>iii.</b> | By way of Inheritance | Yes - inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India (FEMA Ntf. 21(R)) |
| <b>C.</b>   | Transfer:-            |                                                                                                                                                                                                                                                                                                    |
| <b>i.</b>   | By way of Sale        | Yes, to a person resident in India or to an NRI or OCI.<br>In case of Agricultural land / farm house / plantation property, it can be sold only to person resident in India (FEMA Ntf. 21(R))                                                                                                      |
| <b>ii.</b>  | By way of Gift        | Yes - same as C.(i) above                                                                                                                                                                                                                                                                          |
| <b>iii.</b> | By way of Bequest     | Yes - same as C.(i) above                                                                                                                                                                                                                                                                          |

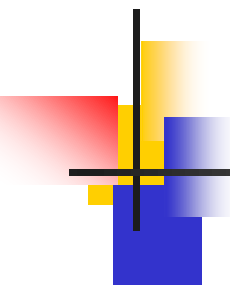
# Immovable Properties in India (other than agricultural land / farm house / plantation property) – Summary of Acquisition & Transfer by Foreign Citizens of non-Indian origin

| Particulars |                       | Foreign citizen of non-Indian origin resident outside India                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Foreign citizen of non-Indian origin resident in India                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|-------------|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>A.</b>   | Hold / Own            | Yes, provided property was acquired, held or owned when he was resident in India or inherited from a person who was resident in India (Sec. 6(5) of the Act)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Yes, (except citizens of 11 countries listed at (a) below) provided property is acquired, held or owned when he is resident in India as FEMA does not apply to transactions between persons resident in India                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>B.</b>   | Acquisition:-         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>i.</b>   | By way of Purchase    | <p>a. Citizens of 11 specified countries, <u>irrespective of their residential status, cannot</u>, without prior permission of the Reserve Bank, acquire or transfer immovable property in India, other than on lease, not exceeding five years. This prohibition shall not be applicable to an OCI.</p> <p>b. Foreign nationals of non-Indian origin resident outside India (except 11 countries) <u>can acquire/ transfer immovable property in India, on lease not exceeding five years</u> and can acquire immovable property in India by way of inheritance from a resident.</p> <p>c. A spouse of an NRI/ OCI who is not a NRI/ OCI may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse subject to the conditions laid down in regulation 6 of FEMA 21(R).</p> | <p>a. Citizens of 11 specified countries, <u>irrespective of their residential status, cannot</u>, without prior permission of the Reserve Bank, acquire or transfer immovable property in India, other than on lease, not exceeding five years. This prohibition shall not be applicable to an OCI.</p> <p>b. Foreign nationals of non-Indian origin resident in India (except 11 countries) can acquire immovable property in India.</p> <p>c. Citizen of Pakistan, Bangladesh or Afghanistan belonging to minority community (Hindu, Christian, Sikh, Parsi, Buddhist, Jain) in that country and residing in India under a Long Term Visa can purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment. However, such acquisition is subject to the conditions as specified under Regulation 7 of FEMA 21 (R)</p> <p>d. A spouse of an NRI/ OCI who is not a NRI/ OCI may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse subject to the conditions laid down in regulation 6 of FEMA 21(R).</p> |
| <b>ii.</b>  | By way of Gift        | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>iii.</b> | By way of Inheritance | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>C.</b>   | Transfer:-            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>i.</b>   | By way of Sale        | A person who has acquired the property U/s 6(5) of FEMA (discussed in (A) above) or his successor cannot repatriate the sale proceeds of such property without RBI approval                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Yes, to a person resident in India or to NRI or OCI.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>ii.</b>  | By way of Gift        | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>iii.</b> | By way of Bequest     | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | As above                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

# Immovable Property in India – FEMA Ntf. 21(R) – Summary as per RBI's FAQs

## Summary of the provisions applicable to NRIs and OCIs under FEMA 21(R):

| Particulars                                                                    | NRI/ OCI (regulation of FEMA 20(R))                                                 |
|--------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| Purchase (other than agricultural land/ farmhouse/ plantation etc) from        | Resident/ NRI/ OCI [3(a)]                                                           |
| Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from | Resident/ NRI/ OCI [3(b)] who is a relative <sup>iii</sup>                          |
| Acquire (any IP) as inheritance from                                           | a. Any person who has acquired it under laws in force [3(c)];<br>b. Resident [3(c)] |
| Sell (other than agricultural land/ farmhouse/ plantation etc) to              | Resident/ NRI/ OCI [3(e)]                                                           |
| Sell (agricultural land) to                                                    | Resident [3(d)]                                                                     |
| Gift (other than agricultural land) to                                         | Resident/ NRI/ OCI [3(e)]                                                           |
| Gift (agricultural land) to                                                    | Resident [3(d)]                                                                     |
| Gift residential/ commercial property                                          | Resident/ NRI/ OCI [3(e)]                                                           |



# Other aspects of Immovable Property in India

---

- Renting of residential / commercial property purchased out of foreign exchange / rupee funds:
  - NRI/OCI can rent out the property without approval of the RBI.
  - Rent can be credited to NRO Account or credited to NRE Account/ Directly remitted abroad subject to payment of appropriate taxes
- Holding of immovable property bought before becoming an NRI/OCI
  - A person who has bought residential/commercial property/agricultural land/ plantation property / farm house in India when he was a resident, can continue to hold the immovable property without RBI approval even after becoming an NRI/OCI.

# Practical Issues – Sale of Immovable Property in India

Regulation 8(b) of Notification No. FEMA 21(R) stipulates that in the event of sale of immovable property by an NRI or OCI, the authorized dealer may permit repatriation outside India subject to the conditions specified therein. As per sub-clause (iii), in the case of residential property, such repatriation of sale proceeds is restricted to not more than two such properties.

## ■ Key Issue:

- What is the time period for which such restriction of two properties is applicable as it could be interpreted as two properties at any point of time or two properties sold within a year or only two properties during the life-time.

**Note:** As per the scheme of investments by non-residents under FEMA, current income may be repatriated without any limits. In addition, remittance upto US\$ 1 million per financial year is permitted from NRO Accounts subject to specified conditions. In view thereof, it may harmoniously be concluded that the aforesaid limit of two properties may apply to the life-time of a non-resident.

Transfer: As per section 2(ze) of FEMA transfer means, sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.



# Real Estate under FEMA Ntf. 20(R)

## 10 Construction Development: Townships, Housing, Built-up Infrastructure Sector

% of Equity/  
FDI Cap

Entry  
Route

### 10.1

100%

Automatic

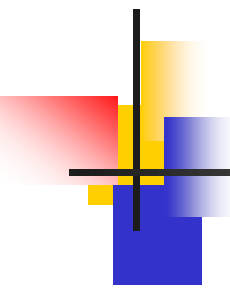
Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)

### 10.2 Other conditions

(a) Each phase of the construction development project would be considered as a separate project for the purposes of FDI policy. Investment will be subject to the following conditions:

(b) The investor will be permitted to exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage.

(c) Notwithstanding anything contained at (b) above, a foreign investor will be permitted to exit and repatriate foreign investment before the completion of project under automatic route, provided that a lock-in-period of three years, calculated with reference to each tranche of foreign investment has been completed. Further, transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor to any government approval.



# Real Estate under FEMA Ntf. 20(R) (con't)

## 10.2 (con't):

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

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

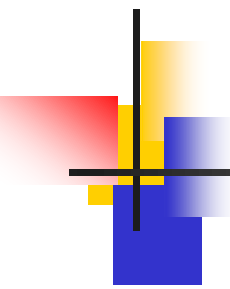
(f) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/bye-laws/regulations of the State Government/Municipal/Local Body concerned.

(g) The State Government/Municipal/Local Body concerned, which approves the building/development plans, will monitor compliance of the above conditions by the developer.

## **Note:**

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

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



# Real Estate under FEMA Ntf. 20(R) (con't)

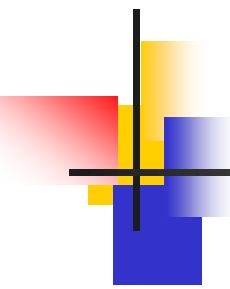
## **Note (con't):**

(3) Completion of the project will be determined as per the local bye-laws/rules and other regulations of State Governments.

(4) FDI upto 100% under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted. However, there would be a lock-in-period of three years, calculated with reference to each tranche of FDI, and transfer of immovable property or part thereof is not permitted during this period.

(5) "Transfer", in relation to FDI policy on the sector, includes,—

- a) the sale, exchange or relinquishment of the asset ; or
- b) the extinguishment of any rights therein; or
- c) the compulsory acquisition thereof under any law ; or
- d) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
- e) any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.



# Real Estate under FEMA Ntf. 20(R) (con't)

Note (con't):

(6) 'Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships;

Explanation:

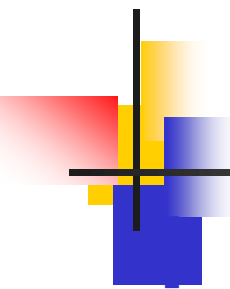
- a. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of "real estate business".
- b. Earning of rent income on lease of the property, not amounting to transfer will not amount to real estate business.

(7) Real estate broking services shall be excluded from the definition of "real estate business" and 100% foreign investment is allowed in real estate broking services under automatic route.

# Investment in Real Estate through Investment Vehicle under FEMA Ntf. 20(R)

## Investment through Real Estate Investment Trusts (REITs) by PROIs on repatriation basis under Schedule 8 of FEMA Ntf. 20(R)

- 'Investment Vehicle' means an entity registered and regulated under relevant regulations framed by Securities and Exchange Board of India or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the Securities and Exchange Board of India (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the Securities and Exchange Board of India (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the Securities and Exchange Board of India (AIFs) Regulations, 2012
- A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity incorporated in Pakistan or Bangladesh) may invest in units of Investment Vehicles and may sell or transfer in any manner or redeem the units as per regulations framed by SEBI or RBI
- Unlike prohibition on acquisition of immovable property in India by citizens of 11 specified countries under FEMA Ntf. 21(R), there is no such specific bar on the citizens of the 11 specified countries other than of Pakistan or Bangladesh under Schedule 8 of FEMA Ntf. 20(R). Hence they may acquire indirect interest in immovable property in India by way of investment in REITs
- It should be noted that 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



# Real Estate under FEMA Ntf. 20(R) – Issues

## Real Estate Sector – Regn. 16 of FEMA Ntf. 20(R)

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

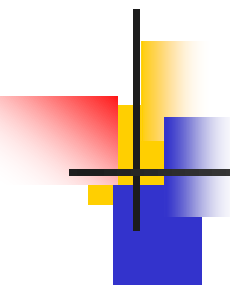
- Minimum area to be developed and minimum capitalization conditions deleted
- Exits simplified
  - Foreign investor can exit before the completion of project under automatic route subject to a lock-in-period of three years (calculated with reference to each tranche of foreign investment)
  - Transfer of stake from non-resident investor to another non-resident investor not involving repatriation neither subject to lock-in period nor Government approval
- Prohibited Real estate business ambit relaxed to exclude earning of rent /income on lease of the property not amounting to transfer and the term transfer **includes**:
  - Sale, exchange or relinquishment
  - Extinguishment of any rights or compulsory acquisition under law
  - Allowing possession under Section 53A of Transfer or Property Act
  - Any arrangement including transfer of capital instruments which has effect of transferring or enabling enjoyment of immovable property
- **Key Issues:** What types of arrangements qualify under above provisions?

Earlier, such conditionalities did not apply to investment by NRIs/OCIs. Now, all the conditionalities except the lock-in conditions will apply to NRI/OCI investment. Was this the intention?

# Real Estate under FEMA Ntf. 20(R) – Schedule 4 (non-repatriation basis)

NRI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs can invest on non-repatriation basis in equity shares, convertible preference shares, convertible debenture, warrants or units, which will be deemed to be domestic investment at par with the investment made by residents.

- NRI can contribute, on non-repatriation basis, to the capital of a partnership firm, a proprietary firm or a LLP.
- NRI to include OCI cardholder.
- Investment in real estate development/ ready infrastructure possible.
- Real estate business will have the same meaning as laid down in regulation 16 of FEMA Ntf. 20(R). Accordingly, following activities will not be regarded to be “real estate business” and hence are freely permitted:
  - Construction/ Development
  - Earning of rent income on lease of properties which does not amount to transfer.
  - Investment in units of Real Estate Investment Trusts (REITs) registered and regulated by SEBI.



## Borrowing on properties in India - FEMA Ntf. 4

### **Lending in INR by an authorised dealer or a housing finance institution to NRI/PIO for housing purpose:**

- An authorised or a housing finance institution in India approved by the National Housing Bank (NHB) may provide housing loan to a NRI or a PIO for acquisition of a residential accommodation in India subject to the following terms and conditions:
  - i. The quantum of loans, margin money and the period of repayment shall be at par with those applicable to housing finance provided to a person resident in India;
  - ii. The loan amount shall not be credited to NRE/FCNR(B)/NRNR account of the borrower;
  - iii. 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;
  - iv. The instalment of loan, interest and other charges, if any, shall be paid by remittances from outside India or out of funds in NRE/ FCNR(B)/ NRNR/ NRO/ NRSR account of the borrower or out of rental income derived from renting out the property acquired or by any relative of the borrower in India by crediting the borrower's loan account through account to account transfer;
  - v. The rate of interest on the loan shall conform to the directives issued, if any, by the RBI and/ or NHB.



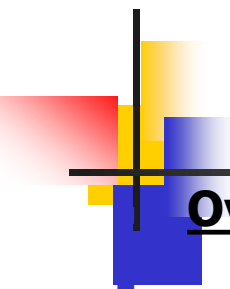
# Immovable Property in India

## Case study – I-A

---

### **Investment in Real estate by NRI in India .**

- Discuss the various alternative available to Mr. "X" an NRI / OCI in India to explore real estate business/ Purchase and sale of Immovable property in India
- Discuss these opportunity in the back ground of various provision under FEMA



# Case study – I-A (con't)

## **Overview of legal provision:**

- 1. As per FDI POLICY 2017 FDI means - Investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
- 2. As per para 5.2.10 of FDI policy 2017 – 100% FDI under automatic route is allowed in Construction Development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships) subject to conditions specified in the policy. Conditions relating to lock-in period of 3 years do not apply to investment by NRIs.

[Above has been discussed in detail in previous slides on Regn. 16 of FEMA Ntf. 20(R)]

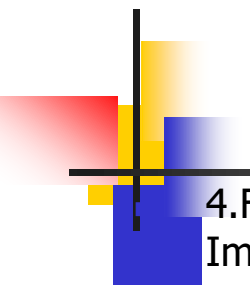
# Case study – I-A (con't)

## Overview of legal provision:

- 3. As per schedule 4 of FEMA Notf.20(R) – a NRI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians may purchase and sale shares/Convertible debentures, warrants or units on Non-repatriation basis which will be deemed to be domestic investment at par with the investment made by residents.

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

- Explanation: For the purpose of this paragraph, "Real estate business" means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent income on lease of the property, not amounting to transfer, will not amount to "real estate business". Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) regulations 2014 shall also be excluded from the definition of "real estate business"



## Case study – I-A (con't)

4. Further as per Regulation 3 of Foreign Exchange Management (Acquisition and transfer of Immovable property in India) – Notf.21(R)

An NRI or an OCI may -

- (a) acquire immovable property in India other than an agricultural property, plantation, or a farm house:

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 of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause'.

- (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
- (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;
- (d) transfer any immovable property in India to a person resident in India.
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI



# Case study – I-A (con't)

## **Repatriation of sale proceeds**

- (a) A person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section;
- (b) In the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
  - (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
  - (ii) 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;
  - (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

# Immovable Property in India

## Case study – I-B

---

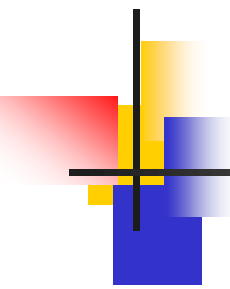
- **Acquisition of Immovable property**
- A PROI who is citizen of Iran gets immovable property in India by way of inheritance from his parents resident in India.
- Can he hold such property?
- What if above property is agricultural land?
- Can he carry out agricultural activities?
- Will the answer be different if he is resident of India?

# Immovable Property in India

## Case study – I-B (con't)

### **Overview of legal framework**

- As per sec. 6(5) of Foreign Exchange Management Act - 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
- According to regulation 9 of Foreign Exchange Management (Acquisition and transfer of immovable property in India) - No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong 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. (Notf 21(R))
- Reg 3...An NRI or an OCI...
  - a)acquire.....other than Agricultural/plantations/farm house....
  - b)acquire.....other than Agricultural/plantations/farm house by way of gift...
  - c)acquire any immovable property by way of inheritance....
  - d)transfer any immovable property in India to a PRII.
  - e)transfer any immovable property other than Agricultural....to an NRI or an OCI (Notf 21(R))



# Immovable Property in India

## Case study – I-B (con't)

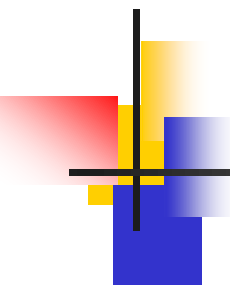
---

- **Question of the India Citizen:**
- Sec 6(5) permits inheritance from Resident Indian. Notification prohibits it - what will prevail?
- Normally inheritance is a Right under other Law, Can FEMA override such a law?
- Answer could be yes for all three questions, However India citizen may approach RBI for the clarity.

# Immovable Property outside India by Resident

## ■ **Modes of acquiring property outside India by a resident:**

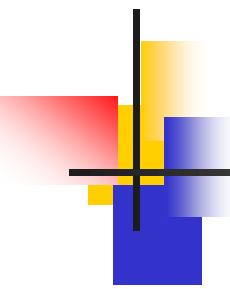
1. According to section 6(4) of the FEMA, a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India.
2. A resident can acquire immovable property outside India by way of gift or inheritance from:
  - (a) a person referred to in (i) above; or
  - (b) a person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank.
  - (c) a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
3. A resident can purchase immovable property outside India out of foreign exchange held in his/ her Resident Foreign Currency (RFC) account.
4. A resident can acquire immovable property outside India jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.



# Immovable Property outside India by Resident under LRS

---

- **Acquisition under the Liberalised Remittance Scheme (LRS):**
  - i. A resident individual can send remittances under the Liberalised Remittance Scheme for purchasing immovable property outside India.
  - ii. Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions. However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account / investment / purchase of property, if they are not the co-owners / co-partners of the overseas bank account / investment / property



# Immovable Property outside India by Companies having overseas offices

---

- **Acquisition by Companies having overseas offices:**

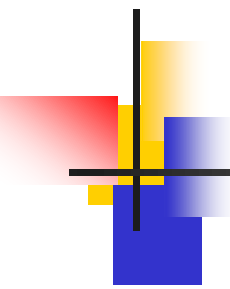
A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, provided total remittances do not exceed the following limits prescribed for initial and recurring expenses, respectively:

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

# Immovable Property outside India by Overseas Venture of resident

- **Investment by “Indian Party” in Overseas JV / WOS under ODI route:**
  - Investment in foreign entities involved in Real Estate Business (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs)) is prohibited under FEMA Ntf. 120
  - Investment in foreign entities doing development of townships, construction of residential / commercial premises, roads or bridges is permissible up to 400% of the net worth of the Indian Party

Issue: Whether ODI in an entity which is engaged only in leasing of a property abroad is permissible?



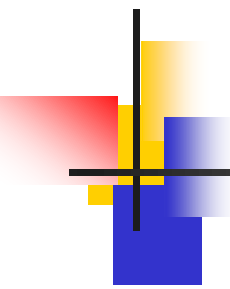
## Borrowing on properties outside India

### **Lending in foreign currency by an authorised dealer in India or its branch outside India:**

- Credit facilities may be extended to a wholly owned subsidiary abroad or a joint venture abroad of an Indian entity; provided that not less than 51 per cent of equity in such subsidiary or joint venture is held by the Indian entity and that the credit facilities are in compliance with the Foreign Exchange Management (Transfer and Issue of Foreign Security) Regulations, 2000

### **Lending by Indian Party to JV / WOS outside India:**

- An Indian entity may lend to its wholly owned subsidiary or joint venture abroad constituted in accordance with the provisions of Foreign Exchange Management (Transfer or issue of foreign security) Regulations, 2000.



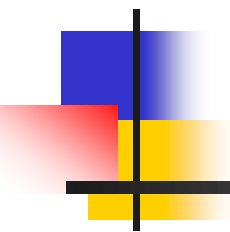
# Real Estate - Key Takeaways under FEMA

## **Business in India:**

- Construction development, Townships, Housing, Infrastructure for NRIs & PROIs on repatriation basis under Regn. 16 read with Schedule 1 of FEMA Ntf. 20(R)
- Construction development, Townships, Housing, Infrastructure for NRIs & OCIs and their foreign entities on non-repatriation basis under Schedule 4 of FEMA Ntf. 20(R)
- Leasing of immovable property through Real Estate Investment Trusts (REITs) being an Investment Vehicle for PROIs on repatriation basis under Schedule 8 of FEMA Ntf. 20(R)

## **Immovable properties by non-resident individuals:**

- NRIs / OCIs and PROIs under Section 6(5) of the Act and FEMA Ntf. 21(R)



# Thank You

---