

FEMA REGULATIONS GOVERNING

NRI INVESTMENTS AND LOANS

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FRAMEWORK OF FEMA

- Applies to the whole of India and all branches, offices and agencies outside India which are owned or controlled by A person resident in India.
- FEMA has 49 sections of which 9 (section 1 to 9) are substantive and the rest are procedural/ administrative
- Sec 37A – power to seize value equivalent Indian assets for overseas assets viz., Foreign exchange, foreign security, immovable property suspected to have been held outside India held in contravention of sec 4
- Section 46 of FEMA grants power to Central Government to make rules to carry out the provision of FEMA
- Section 47 of FEMA grants power to RBI to make regulations to implement its provisions and the rules made there under
- RBI is entrusted with the administration and implementation of FEMA

FRAMEWORK OF FEMA

- FEM ACT
- NOTIFICATIONS
- MASTER DIRECTIONS
- A.P. DIR CIRCULARS
- FAQs

CONCEPT OF RESIDENCE

RESIDENTIAL STATUS UNDER FEMA

- Under FEMA act residential status is of two types:
 - ❑ Person resident in India
 - ❑ Person resident outside India
- The current account rules under FEMA, also refer to '**Person Resident but not permanently resident in India**'
- Under FERA, citizenship was considered as deciding factor
- FEMA lays emphasis on 'residing' which denotes permanency
- The definition of "resident" is silent regarding the Residential status of students going abroad for education.

RESIDENTIAL STATUS UNDER FEMA

❑ PERSON RESIDENT IN INDIA [SEC. 2(V)(I) OF FEMA]:

RESIDING IN INDIA FOR > 182 DAYS DURING THE COURSE OF PRECEDING F.Y. BUT **DOESN'T INCLUDE**

- GOING OUT OF INDIA OR STAYING OUTSIDE INDIA
 - ✓ For taking up employment
 - ✓ For carrying business or vacation
 - ✓ For any other purpose in such circumstances as would indicate his intention to stay outside India for uncertain period
- COMING TO INDIA OR STAYING IN INDIA OTHERWISE THAN
 - ✓ For taking up employment
 - ✓ For carrying business or vacation
 - ✓ For any other purpose in such circumstances as would indicate his intention to stay in India for uncertain period

❑ PERSON RESIDENT OUTSIDE INDIA[SEC. 2(W) OF FEMA] : A person who is not resident in India.

ANALYSIS OF DEFINITION

- Unlike income tax, wherein residential status of a person is determined only on the basis of physical stay in India, under FEMA, it is the **intention of 'leaving India' or 'coming to India'** determines the residential status
- However, definition does refer to physical stay in India.
- The better view however should be – **“intention”** prevails over **“physical stay”**.

CASE STUDY -1 ON RESIDENTIAL STATUS

- **Mr. X, OCI Card holder residing in USA returned to India in December, 2014 with an Intention to settle here. Mr. X bought Agricultural land in March, 2015 and built farmhouse in the agricultural land. He is using his NRO, NRE & FCNR Accounts even today for his regular expenses.**

- ✓ **Q1. Will he be treated as Resident for the Financial Year: 2014-15?**
- ✓ **Q2. Can he buy Agricultural Land in FY: 2014-15 immediately after his return? Is he subject to compounding for non-compliances?**
- ✓ **Q3. Can he continue his NRO/NRE/FCNR Accounts because he is OCI card Holder?**

In case of Mr. X being a Foreign National, will the answers be same for the above Questions?

REFERENCE TO FEMA NOTIFICATION EMPHASIZING 'INTENTION'

PARA 7 OF SCHEDULE 1 OF FEMA NOTIFICATION NO. 5(R) –

■ DEPOSIT REGULATIONS

NRE ACCOUNTS SHOULD BE RE-DESIGNATED AS RESIDENT ACCOUNTS OR FUNDS HELD MAY BE TRANSFERRED TO RFC ACCOUNTS

.....IMMEDIATELY UPON RETURN TO INDIA FOR TAKING UP EMPLOYMENT OR FOR CARRYING ON BUSINESS OR FOR ANY OTHER PURPOSE INDICATING INTENTION TO STAY IN INDIA.....

- ABOVE PARA DOES GIVE AN INDICATION THAT PHYSICAL STAY IS NOT THE GUIDING FACTOR.

■ VISIT TO INDIA-

SAME PARA STATES- WHERE A/C HOLDER IS ON A SHORT VISIT TO INDIA THE A/C MAY CONTINUE AS NRE EVEN DURING HIS STAY IN INDIA.

PHYSICAL STAY SHOULD BE RELEVANT ONLY FOR ACQUISITION OF IMMOVABLE PROPERTY BY FOREIGN NATIONALS OTHER THAN OCI

▪ **PRESS RELEASE OF MINISTRY OF FINANCE DATED 1ST FEBRUARY 2009**

- ✓ Government's advice on acquiring land by persons resident outside India
- ✓ In case of foreign nationals, physical condition to stay for more than 182 days is mandatory for buying of immovable property as resident.
- ✓ Along with period of stay intention also needs to be established.
- ✓ Travel related documents and nature of **VISA CAN ESTABLISH INTENTION OF A PERSON.**

RESIDENTIAL STATUS UNDER FEMA- INDIAN STUDENTS STUDYING ABROAD

■ **A.P. (DIR SERIES) CIRCULAR NO. 45 DATED DECEMBER 8, 2003**

- ✓ While taking up studies, students may have to take up job or seek scholarship to supplement their income. As a result their stay gets prolonged than what is intended while leaving India.
- ✓ They are not dependent for a dominant part of their expenses on remittances from their households in India.

Hence, their stay will be for more than 182 days and intention will also be to stay outside India for uncertain period. Thus they **can be treated** as Non Resident Indians (NRI).

RESIDENTIAL STATUS UNDER FEMA-

PERSON RESIDENT BUT NOT PERMANENTLY RESIDENT

- Explanation to **Schedule III OF CURRENT A/C RULES**
-, 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 assignment, the duration of which does not **exceed 3 years**, is considered to be *a person resident but not permanently resident in India*.
- This is more in nature of facility available.
- Being resident but not permanently resident in India means a person is resident of India.
- Even his bank account is resident account.

RESIDENTIAL STATUS UNDER FEMA-

PERSON RESIDENT BUT NOT PERMANENTLY RESIDENT

- **A PERSON RESIDENT BUT NOT PERMANENTLY RESIDENT IN INDIA ENJOYS FOLLOWING FACILITIES:**
 - ✓ Such person can make remittance up to net salary (after deduction of taxes, contribution to provident fund and other deductions) – Explanation to Schedule III of CAT rules.
 - ✓ Reg 4 of not 11(R)-[Possession & Retention Of FC]- PRBNPRII can possess FC without any limit- provided such FC was owned by him when he was NR and has been brought into India in accordance with FEMA.

RESIDENTIAL STATUS UNDER FEMA-

PERSON RESIDENT BUT NOT PERMANENTLY RESIDENT

- An entity in India may remit PF or pension in respect of *expatriate staff* who are RBNPRII (reg 5 of 13R).

Expat- means a person whose PF/pension fund is maintained outside India by his Principal employer outside India [expln to above reg 5 of 13(r)]

- Such person who is not permanently resident may purchase a foreign security from out of his foreign currency resources outside India [reg 4(c) of FEMA 120]
- Relaxed remittance facilities as stated above will apply to (i) citizen of foreign state other than Pakistan and (ii) even to Indian citizen who is on deputation to the office or branch or subsidiary or joint venture of foreign company- para 3.2 of MD- other remittance facilities

DEFINITIONS OF **OVERSEAS CITIZEN OF INDIA (OCI)** IN DIFFERENT REGULATIONS

- **OCI IS DEFINED IN FEMA NOTIFICATION NO. 3R – BORROWING AND LENDING REGULATIONS AS –**
 - ✓ OVERSEAS CITIZEN OF INDIA (OCI) CARDHOLDER SHALL HAVE SAME MEANING ASSIGNED TO IT UNDER **SECTION 7(A) OF THE CITIZENSHIP ACT**, 1955 MEANS A PERSON RESIDENT OUTSIDE INDIA WHO IS A CITIZEN OF INDIA.
- **IN NOTIFICATION NO. 396 (DEBT INSTRUMENTS REGULATIONS) AND NON DEBT INSTRUMENTS RULES –**
 - ✓ OCI MEANS AN INDIVIDUAL RESIDENT OUTSIDE INDIA WHO IS REGISTERED AS AN OVERSEAS CITIZEN OF INDIA CARDHOLDER UNDER **SECTION 7(A) OF THE CITIZENSHIP ACT**, 1955.

OCI UNDER SECTION 7(A) OF CITIZENSHIP ACT, 1955

- a) Any person of full age and capacity,—
 - i. Who is a citizen of another country, but was a citizen of India at the time of, or at any time after the commencement of the Constitution; or
 - ii. Who is a citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution; or
 - iii. Who is a citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947; or
 - iv. who is a child or a grandchild or a great grandchild of such a Citizen; or
- b) A person, who is a minor child of a person mentioned in clause (a); or
- c) A person, who is a minor child, and whose both parents are citizens of India or one of the parents is a citizen of India

OCI UNDER SECTION 7(A) OF CITIZENSHIP ACT, 1955

d) 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 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 under this section.

- ✓ Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to PRI or security clearance by a competent authority in India:
- ✓ Provided further that 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 under this sub-section

DEFINITION OF **PERSON OF INDIAN ORIGIN (PIO)**

PIO IS DEFINED IN FEMA NOTIFICATION NO. 5(R) – DEPOSIT REGULATIONS AND FEMA NOTIFICATION NO. 13(R) – REMITTANCE OF ASSETS AS –

‘Person Of Indian Origin (PIO)’ Means A Person Resident Outside India Who Is A Citizen Of Any Country Other Than Bangladesh Or Pakistan Or Such Other Country As May Be Specified By The Central Government, Satisfying The Following Conditions:

- a) Who Was A Citizen Of India By Virtue Of The Constitution Of India Or The Citizenship Act, 1955 (57 Of 1955); Or
- b) Who Belonged To A Territory That Became Part Of India After The 15th Day Of August, 1947; Or
- c) Who Is A Child Or A Grandchild Or A Great Grandchild Of A Citizen Of India Or Of A Person Referred To In Clause (a) or (b); or
- d) Who Is A Spouse Of Foreign Origin Of A Citizen Of India Or Spouse Of Foreign Origin Of A Person Referred To In Clause (a) or (b) or (c)

Explanation: For The Purpose Of This Sub-regulation, The Expression ‘Person Of Indian Origin’ Includes An ‘Overseas Citizen Of India’ Cardholder Within The Meaning Of Section 7(a) Of The Citizenship Act, 1955

CASE STUDY 2

ON DEFINITIONS OF OCI AND PIO

- An Indian citizen staying in UK on work visa. He marries a UK woman. His wife wants to invest in NRE FDs in India and also wants to invest in house property in India.
 - ✓ Wife of Indian citizen can invest in NRE FDs because she will be considered as PIO upon her marriage to Indian citizen.
 - ✓ However she will not qualify as being OCI. For that her marriage must persist for at least 2 years. Therefore, immediately upon marriage since she does not qualify as OCI she cannot invest in house property in India either jointly or singly.

TYPES OF BANK ACCOUNTS

[FEMA NOTE. 5(R)/2016]

TYPES OF ACCOUNTS BY NRI AND PIO

- NRE ACCOUNT.
- FCNR (B) ACCOUNT.
- NRO ACCOUNT.
- NRE and NRO accounts can be opened with “AUTHORIZED BANK” also (including an AUTHORISED CO-OPERATIVE BANK).
- FCNR(B) accounts can be opened with AUTHORIZED “REGIONAL RURAL BANK” also.

[REG. 5]

NRE AND FCNR ACCOUNTS

- Sch. 1 and 2 of Regs.
- Conditions for both accounts are almost same.
- NRE – Rupee account. Can be in any form. Usually savings and FD.
- FCNR(B) – Only FD In any **PERMITTED FOREIGN CURRENCY** – Usually US\$, EURO, YEN AND GBP.
- Account opening – only by NRI and not attorney.
- List of permitted credits and debits specified.
- Current income can be credited to NRE / FCNR(B) Account.

NRE AND FCNR ACCOUNTS

Transfer between NRE / FCNR(B) permitted – even between different account holders. [It does not mean one NRI can give a loan to another NRI by transferring funds from his NRE account to the borrower NRI's account.]

[Following transactions will be all right:

- A. Purchase of immovable property in India.
- B. Purchase of immovable property abroad.]

LOAN AGAINST NRE AND FCNR FUND

NRI / PIO account holder can obtain a loan for:

- Personal purposes, or for carrying on business (**excluding** relending, agri. Activities and real estate. Even construction activity is not permitted.)
- Contribution to capital of firm and company on **Non-repatriable basis**. (Technically LLP is not permitted)
- Acquiring house for residential use.

Repayment can be made by adjustment of deposit, inward remittance or NRO funds.

ON BECOMING RESIDENT

NRE – Change status to resident immediately. These become Indian funds for ever (or) Transfer funds to RFC account.

(RFC account is free from use).

FCNR(B) – The deposit can continue till maturity. However deposits will be resident deposits.

On maturity the deposits can be converted into rupees, or transferred to RFC account.

NRO ACCOUNTS

Schedule 3 of REGS.

Any non-resident can open NRO account for **Bonafide transactions in rupees**.

Though usually it is NRI and PIO who have these accounts.

- ✓ Pakistani nationals and citizens require PRIor RBI approval.
- ✓ Bangladesh entities require PRIor RBI approval.
- ✓ Bangladesh nationals can open the account if AD is satisfied about their valid residential permit.

Account can be only in Rupees.

Account can be of any kind – savings, FD etc.

AD, authorised banks, and post offices can also open NRO accounts.

Account cannot be used for hawala. No FX can be made available to a resident for NR getting rupees in the account

NRO ACCOUNTS

List of permitted credits and debits specified.

Credit includes legitimate dues in India.

Transfers between NRO account is permissible.

Settlement of ICC issued by AD in India to NRI and PIO is permitted up to US\$ 1mn.

Funds are normally repatriable up to US\$ 1 mn. Per years.

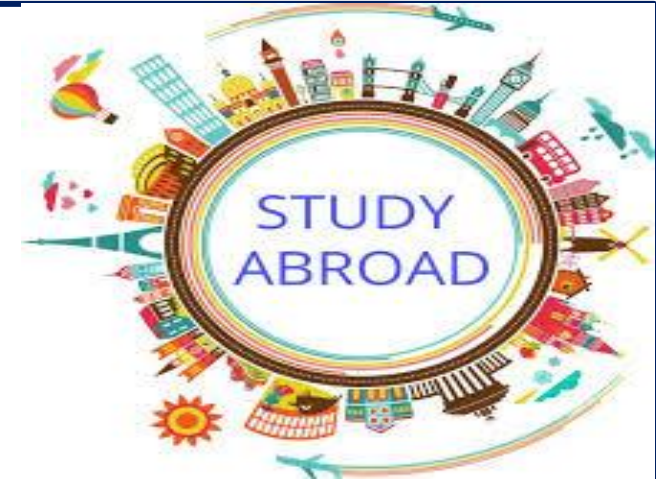
Funds from abroad and **which have not lost their identity** can be repatriated abroad after obtaining approval from RBI.

NRO FUNDS- OTHER ISSUES –

On becoming a Non-resident (except when going to Nepal and Bhutan), change the status to **NRO account**.

On becoming a resident, change the status to **Resident Account**.

ACCOUNTS FOR INDIAN STUDENTS STUDYING ABROAD



■ REGULATION 5(F)(6) OF FEMA NOTIFICATION NO. 10R

- ✓ Indian students studying abroad may open, hold and maintain foreign currency account with bank outside India during their stay outside India.
- ✓ On return to India, after completion of studies, such an account will deemed to have been opened under the LIBERALIZED REMITTANCE SCHEME



IMMOVABLE PROPERTY IN INDIA BY NON-RESIDENTS

REGULATIONS DEAL WITH :

- Acquisition and transfer of IP by NRI / OCI.
- Repatriation of funds on sale.
- Acquiring property for business in India.
- Purchase and sale of property by Foreign Embassy, Diplomats and Consulate General.
- Joint acquisition of property by spouse (NON-NRI/OCI) OF NRI / OCI.
- Acquisition by Long Term Visa Holder.
- Prohibition on certain citizens.
- Mortgage of IP and loan.

REGULATIONS :

- ERSTWHILE NOTIFICATION NO. 21 WAS REPLACED BY NEW NOTIFICATION NO. 21(R) DATED 26.3.2018.
- NOTIFICATION 21(R) HAS BEEN REPLACED BY **NON-DEBT INSTRUMENT RULES**, 2019 W.E.F. 17.10.2019
- NOTIFICATION 21(R) & NON-DEBT INSTRUMENT RULES 2019 ARE AT PAR.
- LARGELY MASTER DIRECTION & FAQs ARE NO LONGER VALID – BUT PRACTICALLY USEFUL.
- IN THIS PRESENTATION, ERSTWHILE REGULATIONS MEANS NOTIFICATION NO. 21 OF 2000.
- NOTIFICATION 21 HAD **DIFFERENT REGULATIONS FOR NRI AND PIO** WHICH CREATED UNINTENDED DIFFICULTIES. THE NEW NOTIFICATION & RULES HAS **ONE REGULATION FOR NRI AND OCI**. RULES ARE MOST USEFUL FOR NRI AND OCI.
- PIOS AS A CATEGORY ARE NO LONGER ELIGIBLE TO ACQUIRE IP WITH EFFECT FROM 26.3.2018.

REGULATIONS :

- NON-RESIDENTS ARE PRIMARILY BARRED FROM ACQUIRING IP IN INDIA.
- **HOWEVER NRI/ OCI CAN:**
 - ACQUIRE PROPERTY FOR HOLDING/SELF-USE.
 - SELL THE PROPERTY & REPATRIATE SALE PROCEEDS ABROAD, MOST OF THE TIMES.
 - LET OUT THE PROPERTY ON RENT & REPATRIATE FUNDS ABROAD AFTER PAYMENT OF TAXES.
- BEQUEATH THE PROPERTY TO ANYONE.

Acquisition OF Immovable Property by NRI & OCI

MEANING OF IMMOVABLE PROPERTY :

- “IMMOVABLE PROPERTY” Is **NOT DEFINED**.
- General meaning has to be applied.
- However acquisition, sale or dealing directly in immovable property is considered as **“NON-DEBT INSTRUMENT”**. [R. 2(AI)(VII)].

WHAT NRI / OCI CANNOT DO

- NRI / OCI **CANNOT BUY** AGRICULTURAL LAND, PLANTATION PROPERTY & FARM HOUSES.
- NRI / OCI **CANNOT DO** REAL ESTATE TRADING, OR TRADE IN TRANSFERABLE DEVELOPMENT RIGHTS.

ACQUIRING IP

They can acquire any immovable property – **except** agricultural property/plantation/farm house.

- No approval from RBI is required. No declarations have to be filed.
- **Purchase** - payment for purchase can be paid from abroad through banking channel, or from Indian account only. No other mode.
- **Gift** – only from a “**Relative**” as defined in Companies Act 2013.
- Acquisition can be from a resident, NRI or PIO. (Not from anyone else).
- [Under erstwhile regulations (notification 21), acquisition by way of gift could be from a non- relative also. The donor could be Indian resident, NRI or PIO.]

TRANSFER OF IP

- They can transfer immovable property without any approval as under:
 - ✓ **Non-agricultural property** can be sold or gifted away to Indian resident, NRI & OCI (not to foreigners who are non-residents.)
 - ✓ **Agricultural property** can be sold or gifted, only to **Indian residents** (even if they are foreign citizens.)

REPATRIATION OF SALE PROCEEDS

Subject to guidelines, funds can be repatriated abroad without any approval.

REPATRIABLE INVESTMENT:

- If property was purchased in FX, sale proceeds can repatriated
(Earlier restriction of repatriation up to cost of the property has been removed.)
- Property should not be agricultural property.
- Repatriation is restricted to two properties in case of residential houses. No restriction on commercial properties.

NON-REPATRIABLE INVESTMENT:

- Up to U.S.\$1 million can be repatriated. This limit is all-inclusive limit – not specifically for IP

PIO

- PIO can continue to hold the IP if it was acquired as per the law prevailing at the time of acquisition.
- PIO can sell the IP to Indian resident. [R. 30(2)]
- Such PIO is eligible for repatriation of sale proceeds like an NRI / OCI. [Para 8.2 of MD.]
- PIO is also eligible for repatriation of funds up to US \$ 1 mn.

LOAN FOR IP

- NRI / OCI can take a loan from Indian banks / FIs and employers.
(However conditions not yet prescribed.) [R. 7b(i) of notification 3(R)]
- Existing loan - repayment of loan can be made from NRE A/c / foreign funds / NRO A/c.
- On sale of IP, funds eligible for repatriation if loan repaid from NRE a/c / from abroad.
- Repayment of loan by relatives now not permitted. Earlier it was permitted.
- **PIO also eligible** for the above facility if loan was obtained as per erstwhile rupee loan notification (no. 4).

RENTING OF IP

- NRI / OCI Can Rent Their Property.
- Rent Can Be Repatriated Abroad After Payment Of Taxes. It Is A Current Account Transaction.
- PIO Is Also Eligible For The Above.

ACQUISITION OF IMMOVABLE PROPERTY BY PERSONS OTHER THAN NRI / OCI

FOREIGN CITIZENS RESIDENT IN INDIA

- FEMA applies only to non-residents.
- Indian residents can buy immovable property, without any approval.
- Foreigners buy property in India – cause for concern to RBI
- People have invested under FDI for guest houses and resorts.
- Restriction on citizens of 11 countries (**if they are residents**) on acquisition of property is ultra- vires. (Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan And North Korea)
- However an OCI from these countries is exempted from this prohibition.

FOREIGN CITIZENS RESIDENT IN INDIA

Transfer of property:

- As long as they are Indian residents, no approval is required.
- If they become Non-residents later, no approval is required for transfer to Indian resident. [R.30(2)].
- The resident is otherwise eligible to purchase (i.e. He should not be a citizen of 11 countries).
- Transaction should be through banking channel.

LONG TERM VISA HOLDER

- Property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- 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);

INHERITANCE / BEQUESTS

- NRI can acquire property through inheritance from:
 - Non-resident if he had acquired IP as per then prevailing law, or
 - Indian resident.
- An NRI can bequeath property in his will to another Non-resident or an Indian resident.
- An Indian resident can also bequeath property to Non-resident.
- Even agricultural property can be bequeathed/inherited.
- However restrictions can be put on use / repatriation if inheritor is a Non-resident. (Agri. Activities cannot be carried out.)

INHERITANCE / BEQUESTS

- IP in India can be bequeathed to NR heir.
- Can it be distributed before death?

Indian resident relative can gift the IP to NRI / OCI. LRS limit does not apply.[Indian resident should not buy & gift to NRI / OCI. One should not do things indirectly which cannot be done directly.]

CHANGE OF RESIDENTIAL STATUS / CITIZENSHIP

Resident who becomes NR – can continue to hold property in India. [S. 6(5)]

- Agricultural activities cannot be conducted in case of agricultural properties.
- People who acquire foreign citizenship – can continue to hold property in India. They should acquire OCI card– although R.33 is helpful.
- Non-resident who becomes Indian resident – can continue to hold property. Repatriability is lost.
- Foreign citizens who become Indian citizens – Can continue to hold property.

COMPOUNDING ORDERS

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS - ACQUISITION OF IMMOVABLE PROPERTY IN INDIA w/o RBI APPROVAL

Applicant Name	Mr. Sha Mathew
Compounding App. No. & Date of Order	C.A. No. 87/2019, 08 th March, 2019
Period of contravention and Compounding Fees	5 Years 10 Months 04 Days Rs. 24,53,590/-
Facts of the case	<p>The applicant being an NRI had purchased an agricultural properties in Idukki district, Kerala, India for Rs. 16,38,700/-.</p> <p>The acquisition of immovable property viz. agricultural land by an NRI without RBI permission is not permitted as per FEMA guidelines. Thus, the applicant was advised by the RBI to sell the immovable property to a PRI within 6 months and not to repatriate sale proceeds of the property without PRI or RBI approval.</p> <p>Applicant had transferred property under consideration to Mr. Kevin Sha. As per the valuation report submitted by the applicant, value of land has been appreciated to Rs. 40,30,000/-.</p>

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS – ACQUISITION OF IMMOVABLE PROPERTY IN INDIA w/o RBI APPROVAL (contd...)

Applicant Name

Mr. Sha Mathew

Contravention

Regulation 8 of Notification No. FEMA 21/2000-RB ibid. states that save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India, provided that the Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

Regulation 3(a) of Notification No. FEMA 21/2000-RB dated May 03, 2000 states that a person resident outside India who is a citizen of India may acquire any immovable property in India other than agricultural / plantation / farm house.

Since the applicant being a NRI had acquired the agricultural land in India without the PRI or RBI approval, applicant had contravened the above provision of FEMA.

■ OUR COMMENTS

■ CALCULATION OF AMOUNT OF CONTRAVENTION:

- 1) RS. 16,38,700/- BEING COST OF ACQUISITION OF LAND
- 2) RS. 23,91,300/- BEING DIFFERENCE OF AMOUNT AS PER VALUATION REPORT AND COA

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS – ACQUISITION OF IMMOVABLE PROPERTY IN INDIA

Applicant Name	Mr. Chandan Kumar Mishra
Compounding App. No. & Date of Order	C.A. No. 89/2019, 18 th March, 2019
Period of contravention and Compounding Fees	1 Year 3 Months 1 Day Rs. 1,43,680/-
Facts of the case	<p>The applicant had purchased an agricultural land in Coimbatore district, India for Rs. 97,60,000/-.</p> <p>The acquisition of immovable property viz. agricultural land by an NRI without RBI permission is not permitted as per FEMA guidelines. Thus, applicant was advised by the RBI to sell the immovable property to a PRI within 6 months and not to repatriate sale proceeds of the property without PRI or RBI approval.</p> <p>However, applicant had already transferred property under consideration to Mrs. Shanti Mishra. As per the valuation report submitted by the applicant, value of land has been appreciated to Rs. 98,00,000/-.</p>

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS – ACQUISITION OF IMMOVABLE PROPERTY IN INDIA w/o RBI APPROVAL (contd...)

Name of the Applicant Mr. Chandan Kumar Mishra

Contravention Regulation 8 of Notification No. FEMA 21/2000-RB ibid. states that save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India, provided that the Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

Regulation 3(a) of Notification No. FEMA 21/2000-RB dated May 03, 2000 states that a person resident outside India who is a citizen of India may acquire any immovable property in India other than agricultural / plantation / farm house.

Since the applicant being a NRI had acquired the agricultural land in India without the PRIor RBI approval, applicant had contravened the above provision of FEMA.

OUR COMMENTS

- RBI has properly calculated compounding fee taking into the consideration undue gains made by the applicant on account of appreciation in the value of land.

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS – ACQUISITION OF IMMOVABLE PROPERTY IN INDIA

Applicant Name	Mr. Jayant Nanda
Compounding App. No. & Date of Order	C.A. No. 93/2019, 20 th May, 2019
Period of contravention and Compounding Fees	15 Years 22 Days Rs. 29,75,000/-
Facts of the case	<p>The applicant is a NRI since 1990. From the year 2003 to 2007, the applicant had acquired 6 pieces of agricultural land for Rs. 9,75,000/- in Gujarat, India without RBI approval.</p> <p>As NRI is not allowed to acquire agricultural land without RBI approval, applicant was advised by RBI to sell the property to the PRI. Applicant had transferred property under reference to Mrs. Anita Jayant Nanda on 03rd October, 2018.</p> <p>The contravention has been regularized by RBI subject to the compounding.</p>

IMMOVABLE PROPERTY IN INDIA

COMPOUNDING ORDERS – ACQUISITION OF IMMOVABLE PROPERTY IN INDIA w/o RBI APPROVAL (contd...)

Name of the Applicant Contravention

Mr. Jayant Nanda

Regulation 8 of Notification No. FEMA 21/2000-RB ibid. states that save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India, provided that the Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

Regulation 3(a) of Notification No. FEMA 21/2000-RB dated May 03, 2000 states that a person resident outside India who is a citizen of India may acquire any immovable property in India other than agricultural / plantation / farm house.

Since the applicant being a NRI had acquired the agricultural land in India without the PRIor RBI approval, applicant had contravened the above provision of FEMA.

OUR COMMENTS

Penalty has been levied under section 13 of FEMA, 1999 at thrice the amount of purchase consideration without giving regard to guidance note on compounding matrix. In doing so, it has not neutralized undue gains earned, if any by the applicant.

INVESTMENT IN CORPORATE /NON CORPORATE ENTITIES

PROHIBITED ACTIVITIES

- **Lottery Business Including Government/ Private Lottery, Online Lotteries**
- **Gambling And Betting Including Casinos**
- **Chit Funds**
- **Nidhi Company**
- **Trading In Transferable Development Rights (TDRs)**
- **Real Estate Business Or Construction Of Farm Houses**

Explanation: for the purpose of this regulation, “real estate business” shall not include development of townships, construction of residential /commercial premises, roads or bridges and real estate investment trusts (REITs) registered and regulated under the SEBI (REITs) regulations 2014.

- **Manufacturing of Cigars, Cheroots, Cigarillos And Cigarettes, of Tobacco or of Tobacco Substitutes**
- **Activities/ Sectors not open to Private Sector Investment e.g. (I) Atomic Energy And (II) Railway Operations**
- **Foreign Technology Collaboration in any form including Licensing For Franchise, Trademark, Brand Name, Management contract is also prohibited for Lottery Business and Gambling and Betting activities**

SCHEDULE I TO FEM NON-DEBT REGULATION 2019

Schedule I – Purchase/ Sale Of Equity Instruments Of An Indian Company By A Person Resident Outside India

An Indian Company May Issue Equity Instruments To PROI Subject:

- Entry routes → automatic or government approval
- Sectoral caps and attendant conditionality(s) → Sector wise- caps on foreign investment permitted under automatic/approval route; In Sectors/ activities not listed in rule 2 or 3 of schedule I, foreign investment is permitted up to 100% on the automatic route
- PN 3/2020 of DIPP deals with Investment from beneficial owner situated in country with whom India Shares land boarder.

PROI May Purchase Equity Instruments Of A Listed Indian Company On A Stock Exchange In India Provided That:

- PROI making the investment has already acquired control of such company in accordance with SEBI (SAST) regulations, 2011 and continues to hold such control;
- Amount of consideration may be paid as per the mode of payment prescribed in this Schedule or out of the dividend payable by Indian investee company

WOS Can Issue Equity Instruments Against Pre-incorporation / Preoperative Expenses Incurred By NR Entity For Lower Of (A) Limit Of 5% Of Authorized Capital & (B) USD 500,000, Within 12 Months Of Incorporation Max:

- WOS operates in Sector with 100% FDI under automatic route and no FDI linked performance conditions;
- Compliance of reporting requirement;
- Statutory auditor utilization certification for pre-incorporation / preoperative expenses

SCHEDULE I TO FEM NON-DEBT REGULATION 2019 (Contd.)

Schedule I – purchase/ sale of equity instruments of an Indian company by a person resident outside India (cont...)

An Indian Company May Issue Equity Instruments To A PROI Under Automatic Route, If The Indian Investee Company Is Engaged In Sector Under Automatic Route Against:

- Swap of equity instruments,
- Import of capital goods/ machinery/ equipment (excluding second-hand machinery),
- Pre-operative/ pre-incorporation expenses (including payments of rent etc.)

An Indian Company May Issue Equity Shares Against Any Funds Payable By It To PROI, The Remittance Of Which Is Permitted Under FEMA

Mode Of Payment → Inward remittance from abroad through banking channels or out of Funds held in NRE/ FCNR(B)/ Escrow account

Remittance Of Sale Proceeds → Sale proceeds (net of taxes) of the equity instruments may be remitted outside India or may be credited to the NRE/ FCNR(B) [i.e. Repatriable]

SCHEDULE III TO FEM NON-DEBT REGULATION 2019

Schedule III -Investment by NRI/ OCI on repatriation basis

- NRI/ OCI may Purchase/ sell of equity instrument of listed Indian Co. subject to:
 - Purchase/ sell through branch designated by an AD
 - Total holding by any individual NRI/ OCI should be < 5% of paid-up capital (individual limit)
 - Total holding of all NRI/ OCI put together should be < 10% of paid-up capital (aggregate limit).
 - Ceiling of 10% can be increased to 24% by passing special resolution
- NRI/ OCI may purchase/ sell without any limit units of domestic mutual fund which invests more than 50% in equity.
- NRI/ OCI may purchase/ sell without any limit shares in public sector enterprise being disinvested by CG subject to terms and conditions stipulated in notice inviting bids
- NRI/ OCI may subscribe to the National Pension System (NPS) governed by Pension Fund Regulatory and Development Authority (PFRDA) provided:
 - Such person is eligible to invest as per the provision of PFRDA Act
 - Annuity/ accumulated saving will be repatriable

Schedule III –investment by NRI/ OCI on repatriation basis (cont...)

Mode of payment:

- Inward remittance from abroad through banking channels *or* out of funds held in NRE account
- NRE account will be designated as NRE (PIS) account and the same shall be exclusively used for putting through transaction permitted under this Schedule
- For investment in units of domestic mutual fund: inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B) account
- For subscription to NPS: : inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ *NRO account*

Remittance of sale proceeds:

- Sale proceeds (net of taxes) of the equity instruments may be remitted outside India or may be credited to the NRE (PIS) account.
- Sale proceeds (net of taxes) of the units of mutual funds and subscription to nps may be remitted outside India or may be credited to the nre (pis)/ fcnr (b)/ NRO account.

SCHEDULE IV TO FEM NON-DEBT REGULATION 2019

Schedule IV – Investment on non-repatriable basis

Non-repatriable means -

- Only dividend / interest can be sent back abroad
- Principal + gains cannot be repatriated

Purchase/ sale of equity instruments or convertible notes or units or contribution to the capital of an LLP

Eligible investor:

- NRI
- OCI
- A company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs [*owned & controlled not defined in sch. IV, therefore as per rule 23, ownership shall mean beneficial holding of 50% + of share capital / LLP and major profit share control shall mean right to appoint majority of directors / partners / DPs with NRIs*]

Investment in:

- Equity instruments i.e. Shares / CCDS / warrants etc. Without any limit either on the Stock exchange or outside it
- Units issued by an investment vehicle without any limit, either on / off stock exchange
- The capital of a limited liability partnership without any limit.
- Convertible notes issued by a startup company in accordance with these regulations.

Schedule IV – Investment on non-repatriable basis (cont...)

Investment deemed to be domestic investment at par with the investment made by residents

Shall not invest in equity instruments or units of a Nidhi or company engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in TDRs.

- Real estate business means dealing in land to earn profits but excludes leasing of property / investment in REIT units / earning of rent income

Mode of payment → inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account

Sale/ maturity proceeds →

- Credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid
- Amount invested + capital appreciation shall not be allowed to be repatriated abroad [**NRI may avail USD \$ 1 million scheme**]

Schedule IV – Investment on non-repatriable basis (cont...)

B. Investment in a firm or proprietary concern

Eligible investor:

- NRI
- OCI

Investment in:

- Capital of firm / Proprietary concern

Restricted sectors for NRIs/ OCI:

- Agricultural / plantation / real estate business / Print media

Mode of payment

Inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account

Sale/ maturity proceeds

- Credited **only to the NRO account** of the investor, irrespective of the type of account from which the consideration was paid
- Amount invested + capital appreciation shall not be allowed to be repatriated abroad [**NRI may avail USD \$ 1 million scheme**]

SCHEDULE V TO FEM NON-DEBT REGULATION 2019

Schedule V – Investment by other non-resident investors

Permission to other non-resident investors for purchase of securities:

- Long term investors like Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds, Pension Funds And Foreign Central Banks may purchase securities subject to such terms and conditions specified by RBI/ SEBI.
- “Eligible Foreign Entity (EEE)” as defined in SEBI circular dated the 9th October 2018 and having actual exposure To Indian Physical Commodity Market may participate in Domestic Commodity Derivative Markets in accordance with framework specified by the Securities And Exchange Board Of India.

Mode of payment - Inward remittance from abroad through banking channels.

Sale/ maturity proceeds - Eligible for remittance abroad.

SCHEDULE VI TO FEM NON-DEBT REGULATION 2019

Schedule VI – Investment in LLP

Contribute to the capital of an LLP operating in sectors/ activities where

- Foreign investment up to 100% is permitted under automatic route
- There are no FDI linked performance conditions
- Investment in compliance of LLP act, 2008

No FDI in LLP in following cases:

- Sectors with performance linked conditions. [e.g. FS, real estate, single brand retail]
- Sectors eligible to receive less than 100% FDI under automatic route
- Sectors where FDI possible only with govt. Permission
- Agriculture / plantation / Print media / Private security
- Sectors not opened up for FDI – tobacco / railways

Foreign investors not allowed to invest in LLP:

- Pakistani / Bangladeshi entity / citizen
- FVCI
- FPI

Meaning of FDI linked performance conditions:

- FDI linked performance conditions are the sector specific conditions stipulated in rule 3 of Schedule I to these rules for companies receiving foreign investment

Schedule VI – Investment in LLP (cont...)

PRICING

- Capital contribution \geq FMV worked out as per any int'l accepted valuation methodology by CA / CMA / regd. Valuer
- Transfer of capital contribution or profit share from R to NR \geq FMV & vice versa

PAYMENT

- Only cash consideration (no COC as allowed for FDI)
- Inward remittance / NRE / FCNR (B) account

AUTOMATIC ROUTE CONVERSION OF CO. WITH FDI INTO LLP AND CONVERSION OF LLP WITH FDI INTO CO. ONLY IF :

- Sector where FDI up to 100% in automatic route
- No FDI linked performance conditions

OTHER CONDITIONS

- Designated partner – must be an Indian company / Indian resident
- Resident Designated Partner u/s. 7 of LLP act must be a resident u/s. 2 of FEMA, 1999
- Designated Partner shall be responsible for all compliances and penalties on LLP
- **LLPs cannot avail ECBs**

CASE STUDY 3

ON INVESTMENT BY NON RESIDENT

- Mr. X, NRI residing in USA, wants to invest in Indian Company from his account maintained in Hongkong. Will the Investment from Funds held in Hongkong subject to New Government Approval Route?
- Mr. X, NRI residing in USA, wants to invest in Indian Company through his WOS company incorporated in Hongkong. Will the Investment from Hongkong Subsidiary be subject to New Government Approval Route?
- Mr. X, Chinese Citizen invested in Indian Company in the FY:2015-16 and wants to transfer his shares to Indian Resident in August, 2020. Is this Transfer subject to New Government Approval Route?

**BORROWING AND LENDING
BETWEEN
NRI / OCI & PRI
[FEMA NOTE. 3(R)/2018 DT. 17.12.2018]
&
FEMA NOTE. 4/2000**

BORROWING AND LENDING IN FOREX

- **Borrowing in forex by Indian companies:**

Schedule I: lenders - The lender should be resident of FATF or IOSCO compliant country as defined in the ECB policy, including on transfer of ECBs. Further, reserve bank, in consultation with the government of India may specify any other lender/set of lenders under the Schedule or amend the existing provisions. **Does this mean that Indian companies can now avail ECB in forex from NRIs/OCIs?** Yes if he satisfies the condition of Foreign Equity Shareholder.

- **Borrowing by resident individual in forex:**

- ✓ **Individual resident** in India can borrow **from his/her relatives outside India** a sum not exceeding \$ 2,50,000/- or its equivalent, subject to terms and conditions as may be specified by RBI in consultation with GOI
- ✓ **Individual resident** in India **studying abroad** may raise loan **outside India** for the purposes of payment of education fees abroad and maintenance, not exceeding USD 250,000/- or its equivalent, subject to terms and conditions as may be specified by RBI in consultation with GOI

- **Borrowing by NRI / PIO from close relative in forex is prohibited under LRS**

BORROWING AND LENDING IN FOREX

❖ **‘RELATIVE’ MEANS A ‘RELATIVE’ AS DEFINED UNDER THE COMPANIES ACT, 2013**

Act of 2013

U/s 2(77) “relative”, with reference to any person, means anyone who is related to another, if—

- (i) they are members of HUF; or
- (ii) they are husband and wife; or
- (iii) one person is related to the other in such manner as may be prescribed.

Act of 2013 (As prescribed)

Father (including step-father)

Mother (including step-mother)

Son (including step-son)

Son's wife

Daughter

Daughter's husband

Brother (including step-brothers)

Sister (including step-sisters)

BORROWING AND LENDING IN RUPEES

■ Persons resident in India borrowing in INR from NRIs/OCIs:

Borrowing in INR by persons **other than Indian companies:**

- ☐ PRI (other than India company) can borrow in INR from NRI/OCI relatives subject to terms and conditions as may be specified by RBI in consultation with GOI. **[Still does not cover LLP as borrower.]**
- ☐ Borrower cannot use borrowed funds for restricted end uses:
 - ✓ Business of chit fund or Nidhi company;
 - ✓ Investment in capital market including margin trading and derivatives;
 - ✓ Agricultural / plantation activities;
 - ✓ Real estate activity or construction of farm houses; and
 - ✓ Trading in transferable development rights.

(“Real estate activity” means any activity involving own or leased property for buying, selling and **renting of commercial and residential properties** or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate. However, this would not include development of integrated township, purchase/ long term leasing of industrial land as part of new project/modernization or expansion of existing units or any activity under ‘infrastructure sub-sectors’ as given in the harmonized master list of infrastructure sub- sectors approved by the government of India vide notification F. No. 13/06/2009-INF, as amended/ updated from time to time)

BORROWING AND LENDING IN RUPEES

■ Persons resident in India borrowing in INR from NRIs/OCIs:

□ Borrowing in INR by Indian companies:

Schedule I: lenders - the lender should be resident of FATF or IOSCO compliant country as defined in the ECB policy, including on transfer of ecbs. Further, reserve bank, in consultation with the government of India may specify any other lender/set of lenders under the schedule or amend the existing provisions. Does this mean NRIs/OCIs can now lend in rupee denominated ECB?

□ Lending by authorised dealers in INR to NRIs/OCI:

- ✓ AD in India may grant loan to a NRI/OCI cardholder 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 board of directors of the AD and in compliance with prudential guidelines of reserve bank of India.
- ✓ Borrowed funds cannot be used for restricted end uses.

□ Other lending transactions in INR to NRIs/OCI:

- Lending by NBFC / HFC / other FI towards housing loan / vehicle loan. (Restricted end uses).
- Lending by Indian company / LLP to NRI / OCI employee. (Restricted end uses)

BORROWING AND LENDING IN RUPEES

- **INR loans by resident individual to NRI / OCI relative:** A resident individual may grant INR loan to a NRI / OCI subject to within the overall limit under LRS (\$ 2,50,000/-) subject to terms and conditions as may prescribed by RBI. (Restricted end uses).
- **Change in residential status:**
 - ✓ **Loan from AD to PRI || change of status of borrower from PRI to PROI:** AD may allow continuance of loan subject to terms and conditions as may prescribed by RBI.
 - ✓ **Loan from PRI to PRI || change of the status of the lender from PRI to PROI:** repayment of the loan by the resident borrower should be made by credit to the NRO account of the lender.
 - ✓ **Loan from NRI/OCI to PRI || change of the status of the lender from PROI to PRI:** repayment of the loan by the resident borrower should be made to resident bank account of the lender in India.
 - ✓ **Loan taken overseas by PROI || change of status of borrower from PROI to PRI:** PRI allowed to service such loans subject to terms and conditions and limits as may prescribed by RBI.

GUARANTEE BY NR

- **MASTER DIRECTION ON ECB, TC & STRUCTURED OBLIGATIONS DT 26.03.2019:**
- Para 19- Domestic rupee borrowing between two residents based on guarantee of NR doesn't have any FEMA implications until the guarantee is invoked.
- Upon invocation of guarantee & payment by NR such NR can enforce recovery and also repatriate such sum, if remitted from abroad or paid out of NRE/FCNR a/c.- General permission

CASE STUDY 4

ON LOAN FROM NRI/OCI IN INR

- A is an NRI (US Resident) having NRI & NRO Accounts in India. “A” received gift from father in INR to NRO account and wants give loan to an Indian company wherein the spouse is a director @ 18% interest MONTHLY.
- ✓ Q1. Can Indian Company Take Loan from NRI in Rupees? If Yes, What are the conditions to be fulfilled by company to accept the loan. At what rate of Interest Loan can be Accepted?
- ✓ Q2. In case conditions not fulfilled by Company, Can Father accept loan from NRI and give back to back loan to company?
- ✓ Q3. Is it possible to transfer the interest & principal amount directly by the company to “A”’s US account?

GIFT TRANSACTIONS

GIFT TRANSACTIONS

- Gift of sum of money by resident to a non-resident or non-resident to resident is a current A/c transaction. Gift of foreign security is a capital a/c transaction having following implications:

DONOR	DONEE	REMARKS
NR	R	Permissible Reg 22(1)(i) of 120
R	R	Not covered by general permission
R	NR	Not covered by general permission

- INHERITANCE OF FOREIGN SECURITY:

DONOR	DONEE	REMARKS
NR	R	Permissible Reg 22(1)(iii) of 120
R	R	Permissible Reg 22(1)(iii) of 120
R	NR	Not covered by general permission

GIFT TRANSACTIONS

- Gift and inheritance of Immovable Property Situated outside India:

DONOR	DONEE	REMARKS
NR	R	Not covered by general permission
R	R	Regulation 5(1)(a) for Sec 6(4) cases and 5(2) of Not. 7(R)
R	NR	Not covered by general permission

- In terms of Section 4 of FEMA, 1999 – foreign exchange, foreign security or any overseas immovable property must be held as per permissible modes of FEMA.
- Contravention of this can lead to penal consequences under Section 13(1A)
 - Penalty up to three times and seizure of equivalent assets in India.

GENERAL DOS AND DON'Ts

DOs FOR NRI / PIO / OCI

- **Distinguish between PRII & PROI**
- Distinguish current account transactions from capital account transactions
- Inform respective persons of the change in residential status
- Plan ahead- keep a track of investments made from rupee funds in India and funds remitted from abroad
- Understand repatriability of sale proceeds of assets located in India
- Comply with statutory guidelines for filing documents / reporting requirements for different transactions in India & abroad (e.g. FBAR, FATCA)
- Give power of attorney for all Indian matters to trusted persons
- Follow custom baggage rules for movable assets when transfer of Residence
- Take benefit of OCI card scheme
- Accept rupee gift from close relative under LRS
- Can gift in INR to from NRO/NRE a/c to relatives & non-relatives

DON'TS FOR NRI / PIO / OCI

- **Executing capital account transactions which are prohibited / not covered by a general permission**
- Effecting current account transactions which are prohibited / restricted
- Instructing residents to make onward payments on their behalf (exception given under regulation 6(2) of notification no. FEMA 14(R)/2016-RB dated May 2, 2016 – for medical expenses, boarding, lodging, travel within India)
- “Netting off” of transactions with residents
- Receiving gifts of movable property from resident relatives not expressly allowed
- Cannot open, cannot renew, cannot make additional contribution to PPF a/c in India
- Check eligibility for Aadhar
- Cannot accept cash gift in INR / forex from PRI. (Allowed only through banking channels under LRS limit – INR gift from relative and forex gift from relative as well as non-relative)
- Cannot borrow from resident relative in forex even under LRS limit



Thank
you!!!

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