

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999



LEARNING OUTCOMES

After reading this chapter, you will be able to:

- ❑ Explain important terms and definition under the Foreign Exchange Management Act, 1999
- ❑ Determine and explain the concept of Residential Status under the Foreign Exchange Management Act, 1999
- ❑ Identify and explain nature of Current and Capital Account Transactions and the Rules and Regulations governing them
- ❑ The role of Authorised Persons under the Foreign Exchange Management Act, 1999
- ❑ Regulations governing the transactions in relations to import and export of goods and services, and Rules and Regulation governing Overseas Investments (OI)
- ❑ Comprehend Process of loans made by non-resident lenders in foreign currency to Indian borrowers
- ❑ Mention the penalties imposed under the Act and the process of adjudication and the Appellate procedure under the Act.

1. INTRODUCTION

Need for the Act

The change in the economic scenario, globalization of capital, free trade across the globe, necessitated the need for managing foreign exchange in the country in an orderly manner. To facilitate cross border trade and cross border capital flows, exchange control law was required. Foreign exchange control led to introduction of exchange control law through Defense of India rules by the Britishers in 1939. Subsequently, Foreign Exchange Regulation Act (FERA) was enacted in 1947 which was later replaced with 'the Foreign Exchange Regulation Act, 1973' (FERA).



Government as part of its agenda of liberalisation of the Indian economy in 1991, permitted free movement of foreign exchange in connection trade related receipts and payments as well as Foreign Investment in various sectors. This increased the flow of foreign exchange to India and consequently foreign exchange reserves increased substantially. The Foreign Exchange Management Act, 1999 has been made effective from 1st June, 2000. This Act enables management of foreign exchange reserves for the country.

Salient Features of the Act: It provides for-

- Regulation of transactions between residents and non-residents
- Investments in India by non-residents and overseas investments by Indian residents
- Freely permissible transactions on current account subject to reasonable restrictions that may be imposed
- RBI and Central Government control over capital account transactions
- Requirement for realisation of export proceeds and repatriation to India
- Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/Money Changer/Off-shore banking unit
- Adjudication and Compounding of Offences
- Investigation of offences by Directorate of Enforcement
- Appeal provisions including Special Director (Appeals) and Appellate Tribunal.

Enforcement of FEMA: Though RBI exercises overall control over foreign exchange transactions, enforcement of FEMA has been entrusted to a separate 'Directorate of Enforcement' formed for this purpose. [Section 36].

Broad Structure of FEMA

Now let us have a glance at the broad structure the Act. The Act consists of 7 Chapters dealing with following areas:

Chapters	Matters	Sections
I	Preliminary	1 – 2
II	Regulation and Management of Foreign Exchange	3 – 9
III	Authorised Person	10 – 12
IV	Contravention and Penalties	13 – 15
V	Adjudication and Appeal	16 – 35
VI	Directorate of Enforcement	36 – 38
VII	Miscellaneous	39 – 49

2. PREAMBLE, EXTENT, APPLICATION AND COMMENCEMENT OF FEMA, 1999

(A) Preamble: This Act aims to consolidate and amend the law relating to foreign exchange with the objective of —

- (i) facilitating external trade and payments and
- (ii) for promoting the orderly development and maintenance of foreign exchange market in India.

(B) Extent and Application [Sections 1]: FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

The scope of the Act has been extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words “Owned or Controlled”. Contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.

(C) Commencement: The Act, 1999 came into force with effect from 1st June, 2000 vide Notification G.S.R. 371(E), dated 1.5.2000.



3. DEFINITIONS [SECTION 2]

In this Act, unless the context otherwise requires:

- (a) **“Adjudicating Authority”** means an officer authorised under sub-section (1) of section 16(1); [Section 2(a)]
- (b) **“Appellate Tribunal”** means the Appellate Tribunal for Foreign Exchange established under section 18; [Section 2(b)]
- (c) **“Authorised person”** means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under section 10(1) to deal in foreign exchange or foreign securities; [Section 2(c)]
- (d) **“Capital Account Transaction”** means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in ¹Section 6(3); [Section 2(e)]
- (e) **“Currency”** includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers’ cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank. [Section 2(h)]
- (f) **“Currency Notes”** means and includes cash in the form of coins and bank notes; [Section 2(i)]
- (g) **“Current Account Transaction”** means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,
 - (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.
 - (ii) payments due as interest on loans and as net income from investments.
 - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
 - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children; [Section 2(j)]
- (h) **“Export”**, with its grammatical variations and cognate expressions means;
 - (i) the taking out of India to a place outside India any goods.
 - (ii) provision of services from India to any person outside India; [Section 2(l)]
- (i) **“Foreign Currency”** means any currency other than Indian currency; [Section 2(m)]
- (j) **“Foreign Exchange”** means foreign currency and includes:

¹ Section 6(3) has been deleted with effect from 15th October 2019.

- (i) deposits, credits and balances payable in any foreign currency,
 - (ii) drafts, travelers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
 - (iii) drafts, travelers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; [Section 2(n)]
- (k) **“Foreign Security”** means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency; [Section 2(o)]
- (l) **“Import”**, with its grammatical variations and cognate expressions, means bringing into India any goods or services; [Section 2(p)]
- (m) **“Person”** includes:
- (i) an individual,
 - (ii) a Hindu undivided family,
 - (iii) a company,
 - (iv) a firm,
 - (v) an association of persons or a body of individuals, whether incorporated or not,
 - (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
 - (vii) any agency, office or branch owned or controlled by such person; [Section 2(u)]
- (n) **“Person resident in India”** means:
- (i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—
 - (A) a person who has gone out of India or who stays outside India, in either case—
 - (a) for or on taking up employment outside India, or
 - (b) for carrying on outside India a business or vocation outside India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
 - (B) a person who has come to or stays in India, in either case, otherwise than:
 - (a) for or on taking up employment in India, or
 - (b) for carrying on in India a business or vocation in India, or

- (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India; [Section 2(v)]
- (o) **“Person Resident Outside India”** means a person who is not resident in India; [Section 2(w)]
- (p) **“Repatriate to India”** means bringing into India the realised foreign exchange and
 - (i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or
 - (ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank.

It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly; [Section 2(y)]

- (q) **“Security”** means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944, savings certificates to which the Government Saving Certificates Act, 1959 applies, deposit receipts in respect of deposit of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act; [Section 2(za)]
- (r) **“Service”** means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service; [Section 2(zb)]
- (s) **“Transfer”** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. [Section 2(ze)]



4. RESIDENTIAL STATUS UNDER FEMA, 1999

The definition of “person” is similar to the definition contained in the Income-tax Act, 1961. The term ‘person’ includes entities such as companies, firms, individuals, HUF, Association of Persons (AOP), artificial juridical persons agencies, as well as offices and branches. Agencies, offices and branches do not have independent status separate from their owners. Yet these have been considered as persons. Under FEMA such offices and branches are included in definition of Person Resident in India. Therefore, they have been included in the definition of “Person”.

The term ‘**person resident in India**’ means the following entities:

1. A person who resides in India for more than 182 days during the preceding financial year;

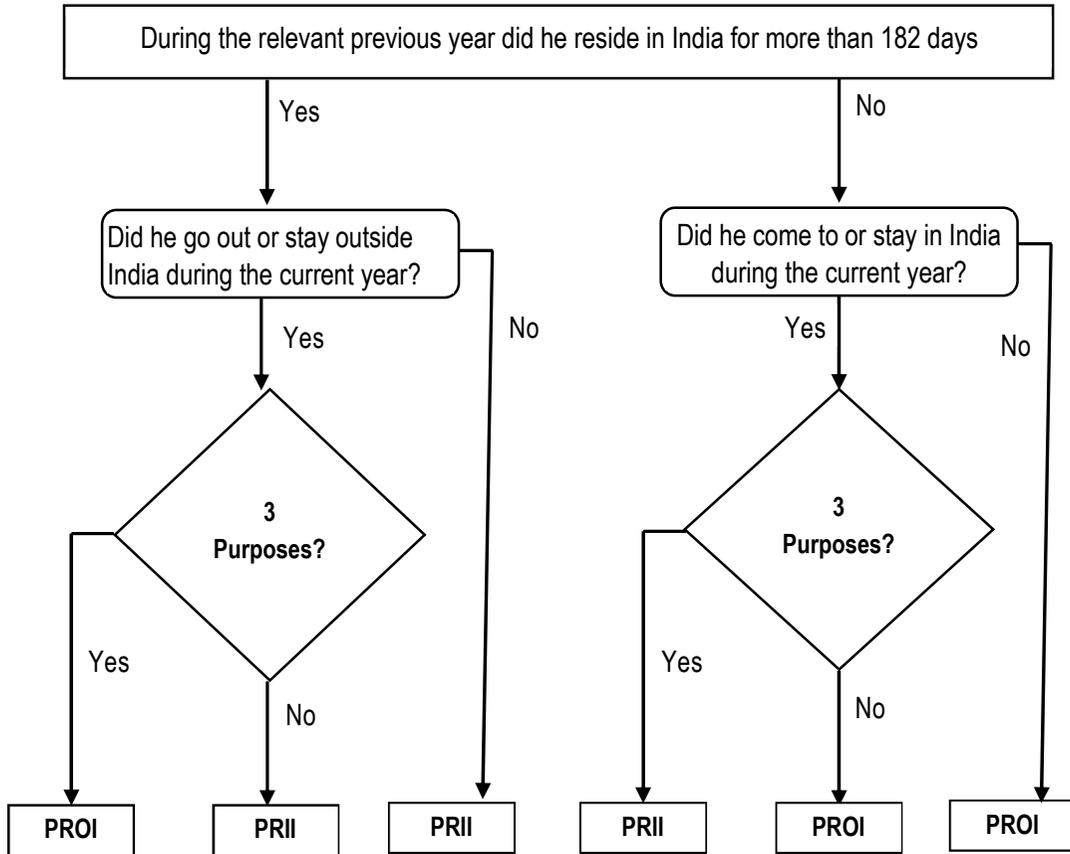
The following persons are NOT persons resident, in India even though they may have resided in India for more than 182 days.

- A. A person who has gone out of India or stays outside India for any of the three purposes given below,
- B. A person who has come to or stays in India OTHERWISE THAN for any of the three purposes given below;

Three Purposes

- (i) For or on taking up Employment
 - (ii) For carrying on a business or Vacation
 - (iii) For any other purpose in such circumstances as would indicate stay for an uncertain period.
- 2. Any person or body corporate registered or incorporated in India;
 - 3. An office, branch or agency in India owned or controlled by a person resident outside India;
 - 4. An office, branch or agency outside India owned or controlled by a person resident in India.

Person resident outside India means a person who is **not** resident in India.



As the definitions of Person Resident in India (PRII) and Person Resident outside India (PROI) are quite relevant for determining the applicability of the Act on an entity, let us analyse and understand it better.

In the case of individuals, to be considered as "resident", the person should have resided in India in the preceding financial year for more than 182 days. **Citizenship is not the criteria for determining whether or not a person is resident in India.**

There are three limbs in the definition. The first limb prescribes the number of days stay. Then there are two limbs which are exceptions to the first limb.

First limb – It states that a person who is in India for more than 182 days in the "preceding year" will be a Person Resident in India. Thus, at the threshold or basic level, one has to consider the period of stay during the preceding year.

Example 1: If a person resides in India for more than 182 days during FY 2018-19, then for the FY 2019-20, the person will be an Indian resident. For FY 2018-19, one will have to consider residence during FY 2017-18, and so on.

There are two exceptions provided in clauses (A) and (B). Clause (A) is for persons going out of India. Clause (B) is for persons coming into India. Exceptions carve out situations that do not fall under the main body of a section, even though they satisfy the criteria. This means that even if a person is an Indian resident based on the test provided in the first limb, the person will be a "Person Resident Outside India (PROI) if he falls within limb (A) or limb (B).

Clause (A) – second limb – It states that if a person leaves India in any of the THREE PURPOSES we saw above, he will not be a PRII. He will be a PROI.

Thus, in the **example** given for the first limb above, if a person leaves India on 1st November 2019, he will be a non-resident from 2nd November 2019 – even though his number of days in India was more than 182 days in FY 2018-19. Similarly, if a person goes and stays out of India for carrying on any business, he will be a PROI from that date. For FY 2019-20 the person will be a PRII till 1st November 2019. He will then be a PROI. From 1st April 2020, the person will continue to be a PROI as long as he stays out of India for employment.

An **example** for clause (iii) can be a person who has a green card in the USA. The green card entitles a person to stay in the USA and eventually become a US citizen. If a person goes abroad and starts staying in the USA, he will be a non-resident from that date as his stay abroad indicates that he is going to stay there for an uncertain period.

Clause (B) – third limb – This is a complex clause as first limb read with third limb has two exceptions. Limb one uses the phrase "but does not include". Third limb uses the phrase "otherwise than". Use of two exceptions make it complex reading.

It states that if a person has come to India **for any reason otherwise than** for - employment, business or circumstances which indicate his intention to stay for uncertain period – he will be a non-resident. This will be so even if the person has stayed in India for more than 182 days in the preceding year.

For **example**, if a person comes to India on 1st June 2019 for visiting his parents. However, his parents fall sick and he stays till 31st March 2020. Thereafter he continues to stay in India. It is however certain that he will leave India in next 6 months when his parents recover. His stay in India is neither for employment, nor for business, nor for circumstances which show that he will stay in India for an uncertain period. In such a case, even if he has resided in India for more than 182 days in FY 2019-20, he will continue to be a non-resident from 1st April 2020 also. In FY 2019-20, he is of course a PROI as he did not reside in India for more than 182 in FY 2018-19.

If a person comes to India on 1st June 2019 for employment, business or circumstances which indicate his intention to stay in India for an uncertain period, he will be a PRII from 1st June 2019.

Residential status is not for a year. It is from a particular date. This is different from income-tax law. Under income-tax law, a person has to pay tax in respect of the income of the previous year. Therefore, it is possible to look at a complete year for determining residential status under the Income Tax Act, 1961. FEMA is a regulatory law. One has to know the person's status at the time of undertaking a

transaction. If for **example**, a person comes to India for employment, and if his status can be known only when the year is completed, how will he and other people enter into commercial transactions with each other? If he is considered as a PROI till the year is over, then people will not be able to enter into transactions with him. This is the reason why the residential status is not for a year but from particular date.

It is understood that this condition applies only to individuals. It will not apply to HUF, AOP or artificial juridical person as they cannot get employed, cannot go out of India or come to India. Hence, they do not come within the ambit of the second and third limbs. These entities like HUF and AOP are not required to be registered or incorporated like corporate entities nor the definition can be far stretched to cover by applying the criteria of 'owned or controlled'. Hence legally the definition for HUF, AOP, BOI fail. Practically if the HUF, AOP etc. are in India, they will be considered as Indian residents.

Person or Body corporate: Any person or body corporate registered or incorporated in India, will be considered a PRII. This definition too, does not apply to AOP, BOI etc.

Office, branch or agency: Any agency, branch or agency outside India but **owned or controlled by PRII** will be considered as person resident in India (PRII). Thus, one cannot set up a branch outside India and attempt to avoid FEMA provisions.

Any agency, branch or agency in India but **owned or controlled by a person resident outside India (PROI)** will be considered as a person resident in India. This is relevant as Indian residents can deal with such branch in India without considering FEMA. If such branch is considered as a PROI then it will be difficult to undertake several transactions.

Illustration: Mr. X had resided in India during the financial year 2019-2020 for less than 182 days. He had come to India on April 1, 2020 for carrying on business. He intends to leave the business on April 30, 2021 and leave India on June 30, 2021. Determine his residential status for the financial years 2020-2021 and 2021-2022 up to the date of his departure?

Answer: As explained in the above example, Mr. X will be considered as a person resident in India' from 1st April 2020. As regards, financial year 2021-2022, Mr. X would continue to be an Indian resident from 1st April 2021.

If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure. It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any these purposes, he would be considered, 'person resident in India' during the financial year 2021-2022. Thus, it is the purpose of leaving India which will decide his status from 1st July 2021.

Illustration: Mr. Z had resided in India during the financial year 2019-2020. He left India on 1st August, 2020 for United States for pursuing higher studies for three years. What would be his residential status during financial year 2020-2021 and during 2021-2022?

Answer: Mr. Z had resided in India during financial year 2019-2020 for more than 182 days. After that he has gone to USA for higher studies. He has not gone out of or stayed outside India for or on taking up employment, or for carrying a business or for any other purpose, in circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2020-2021. RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2021-2022, he would not have been in India in the preceding financial year (2020-2021) for a period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2021-2022.

Illustration: Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarters in Mumbai and has a branch in Singapore. The Headquarters at Mumbai controls the Singapore branch of the robotic unit. What would be the residential status of the robotic unit in Mumbai and that of the Singapore branch?

Answer: Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

The robotic unit headquartered in Mumbai, which is a person resident in India as discussed above, controls the Singapore branch, Hence, the Singapore branch is a 'person resident in India'.

Illustration: Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the Airline is headquartered. However, for security considerations, she was based at Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

Answer: Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v)(B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be a Person Resident in India.

If however she has been employed in Mumbai branch of British Airways, then she will be considered a Person Resident in India.

Case law

Basant Kumar Sharma v. Government of India, Delhi High Court held that if NRI returns to stay in India for an 'uncertain period' he will become a person resident in India and his NRE account should be re-designated as Resident's account

In *K. Ramullan v. Commissioner of Income-tax*, it was held that for being a resident of India within FEMA, the stay has to be of some permanence and not with intention of returning abroad in some short, set period and it has to be a stay for taking up employment or carrying on business or a vocation with intention of remaining in India for an uncertain period.

In this case, person, though of Indian origin, had settled in Malaysia and also acquired Malaysian citizenship. His wife and children were residing in India. He stayed in India with his wife for undergoing medical treatment for 3 years. In this case, the person could not be treated as a person resident in India.



5. REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

❖ Dealing in foreign exchange, etc. [Section 3]

No person shall-

- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person (AP);
- (b) make any payment to or for the credit of any person resident outside India in any manner;
- (c) receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

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

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

The above transactions may carried on

- a. as otherwise provided in this Act; or
- b. with the general or special permission of the Reserve Bank.

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

This section imposes blanket restrictions on the specified transactions. This section applies to PRIs and PROIs. The purpose of this section is to regulate inflow and outflow of Foreign Exchange through Authorised dealers and in a permitted manner.

Consider following examples:

- (i) **Example pertaining to clause (a)- Dealing in foreign exchange** – A PROI comes to India and would like to sell US\$ 1,000 to his friend who is resident in India. The friend offers him a rate better than the banks. This cannot be done as it would amount to dealing in foreign exchange.
- (ii) **Example pertaining to clause (b)** – A PROI has an insurance policy in India. He requests his brother in India to pay the insurance premium. This will amount to payment for the credit of non-resident. This is not permitted.
- (iii) **Example pertaining to clause (c)**– A foreign tourist comes to India and he takes food at a restaurant. He would like to pay US\$ 20 in cash to the restaurant. The restaurant cannot accept cash as it will be a receipt otherwise than through Authorised Person. The restaurant will have to take a money changers license to accept foreign currency.
- (iv) **Example pertaining to clause (d)**–Transactions covered by this sub-section are known as Hawala transactions. An Indian resident gives Rs` 70,000 in cash to an Indian dealer. For this transaction, the brother in Dubai will get US\$ 1,000 from a Dubai dealer. The two dealers may settle the transactions later. However, transaction is not permitted.

❖ **Holding of foreign exchange [Section 4]**

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

This section prevents Indian residents to acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property abroad. Then through separate notifications, acquisition of these assets has been permitted subject to certain conditions and compliance rules.

Example 2: If an Indian resident receives bank balance of US\$ 10,000 from his uncle in London, the Indian resident cannot hold on to the foreign funds. He is supposed to bring back the funds as provided in section 8.

Case law

The Appellate Tribunal for Foreign Exchange Management Act, New Delhi gave the decision in *Dr. D. Rewatha Thera v. Joint Director, Directorate of Enforcement*, on holding of foreign exchange under FEMA read with the section 12 of the FCRA, 2020.

In the given case, a complaint was received from ex-managing trustee of a society, registered in India. A show cause notice was issued to society for contravening provisions of section 4 for holding foreign exchange outside India.

As per the facts, society had inherited said amount as per voluntary settlement deed executed by settlors being persons resident outside India. Since, the society was not registered under the Foreign Contribution (Regulation) Act, and was prohibited from accepting foreign contribution, it moved an application in office of Ministry of Home Affairs for obtaining prior permission of Central Government under the Foreign Contribution (Regulation) Act for acceptance of foreign contribution.

Since no permission was granted, society, decided to transfer said amount to its bank account maintained in Sri Lanka till Home Ministry grant permission. Society moved an application in office of Ministry of Home Affairs much prior to realisation of said amount for granting permission for repatriation of said amount. By transferring of funds in Sri Lanka and by making various application to Home Ministry for granting permission for repatriation of said amount, Society had taken all reasonable steps to realize and repatriate foreign currency in India.

Hence it was held that that Society could not be held guilty of violating provisions of section 4.

Current account transactions [Section 5]

The term 'Current Account Transaction' is defined negatively by Section 2(j) of the Act. It means a transaction **other than a capital account transaction** and includes the following types of transactions:

- (i) Payments in the course of ordinary course of foreign trade, other services such as short-term banking and credit facilities in the ordinary course of business etc.
- (ii) Payments in the form of interest on loans or income from investments.
- (iii) Remittances for living expenses of parents, spouse, or children living abroad
- (iv) Expenses in connection with foreign travel, education etc.

Example 3: An Indian resident imports machinery from a vendor in UK for installing in his factory. As per accounts and income-tax law, machinery is a "capital expenditure". However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor is owed anything in the other country. Hence it is a Current Account Transaction.

Example 4: An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. As per accounts and income-tax law, for the credit period of 3 months, there

is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], “short-term banking and credit facilities in the ordinary course of business” are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

What if the credit period is 12 months? Under Master Directions for imports, payment has to be made within 6 months. If the credit period is in excess of 6 months, then the provisions of Trade Credit shall trigger. The provisions for Trade Credit are stated in Foreign Exchange Management (Borrowing and Lending) Regulations, 2018. For exports, the period for realisation of proceeds, is 9 months.

Example 5: A Person Resident in India transfers US\$ 1,000 to his NRI brother in New York as “gift”. The funds are sent from the PRII’s Indian bank account to the NRI brother’s bank account in New York. Under accounts and income-tax law, gift is a “capital receipt”. However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transaction is over. Hence it is a Current Account Transaction.

If gift is a current account transaction, why is there a restriction under Current Account regulations? It is because while there is no restriction on Current Account transactions, some reasonable restrictions can be imposed. Otherwise people may transfer funds abroad under the garb of current account transactions.

If however the PRII gives a PROI a gift in India in Indian currency, for the PROI it will result in funds lying in India (alteration of Indian asset). For PRII, there is no creation of asset or a liability. As this transaction creates an asset in India for the PROI, it is a Capital Account transaction. (Under separate rules, giving a gift in India to an NRI is permitted subject to certain rules.)

In a similar manner, if a PROI gives a gift to an PRII by remitting funds in India, there is no restriction. However, if the PROI gives the funds abroad, the resident cannot keep it abroad. He has to bring it to India.

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction.

The Central Government may, in public interest and in consultation with the Reserve Bank, impose such **reasonable restrictions** for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

The general rule to be understood is that Current Account transactions are freely permitted unless specifically prohibited and Capital Account transactions are prohibited unless specifically or generally permitted.

Section 5 of the Act permits any person to sell or draw Foreign Exchange to or from an Authorised person to undertake any current account transaction. The Central Government has the power to impose reasonable restrictions, in consultation with the RBI and in public interest on current account transactions. The Central Government has in exercise of this power issued the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

Let us now see the various schedules to the Rules that lay down the restrictions:

I. SCHEDULE I

²Transactions for which drawal of foreign exchange is prohibited:

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

II. SCHEDULE II

³Transactions, which require prior approval of the Government of India for drawal of foreign exchange:

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport (Chartering Wing)

²Schedule I (Transactions which are prohibited)-Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time.

³Schedule II (Transactions which require prior approval of the Central Government)- Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time

Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport (Chartering Wing)
Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders by (a) TV Channels (b) Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology.
Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)

Transactions which require RBI's prior approval for drawal of foreign exchange:

SCHEDULE III

1. **Facilities for individuals—Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 250,000 only.:**

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or donation.
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relatives abroad
- (vi) Travel for business or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

Any additional remittance in excess of the said limit for the said purposes shall require prior approval of the Reserve Bank of India.

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

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

Further, that for a person who is resident but not permanently resident in India and-

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

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

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

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

2. Facilities for persons other than individual—The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
 - a. creation of Chairs in reputed educational institutes,
 - b. contribution to funds (not being an investment fund) promoted by educational institutes; and
 - c. contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial

plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

Explanation—For the purposes of this sub-paragraph, the expression “infrastructure” shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

3. **Procedure**—The procedure for drawal or remittance of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

If the transaction is not listed in any of the above three schedules, it can be freely undertaken.

Exemption for remittance from RFC Account – No approval is required where any remittance has to be made for the transactions listed in Schedule II and Schedule III above from an RFC account.

Exemption for remittance from EEFC Account – If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from EEFC account, then also no approval is required. However, if payment has to be made for the following transactions, approval is required even if payment is from EEFC account:

- Remittance for membership of P & I Club.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Exemption for payment by International Credit Card while on a visit abroad – If a person is on a visit abroad, he can incur expenditure stated in Schedule III if he incurs it through International credit card.

Note: Liberalised Remittance Scheme (LRS): Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both. This

is inclusive of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of Foreign Exchange Management (CAT) Amendment Rules 2015, dated May 26, 2015.

In case of remitter being a minor, the LRS declaration form must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

Consolidation of remittance of family members - Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.

Exception: 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.

Case Law

In Board of Control for Cricket in India (BCCI) v. Special Director, Directorate of Enforcement, Mumbai, Appellate Tribunal for Foreign Exchange Management Act, New Delhi gave the decision as per section 42, read with section 5, of the Foreign Exchange Management Act, 1999 which dealt with the contravention by companies.

As per the facts, an agreement between Cricket South Africa (CSA) and BCCI, IPL-2 was organized in South Africa in April-May 2009 on payment of fixed fee by BCCI. The Competent authority, by impugned order imposed penalty upon appellants i.e., BCCI and its officers, for contravention of provisions of FEMA.

It was held that as there was no allegation in show cause notice that transactions, in question were Capital Account Transaction, it was difficult to conclude about nature of transaction particularly when appellants claimed that those were Current Account transactions for which no permission of RBI was necessary.

Since BCCI was not a company but only an Association, having been registered as a society, BCCI could not be treated as 'company' as per Explanation provided under section 42 of FEMA, 1999 and, therefore, appellant office bearers of BCCI could not be penalised under section 42.

IMPORT OF GOODS AND SERVICES: Import of Goods and Services into India is being allowed in terms of Section 5 of the Foreign Exchange Management Act 1999, read with Notification No. G.S.R. 381(E) dated May 3, 2000 viz. Foreign Exchange Management (Current Account Transaction) Rules, 2000. It is regulated by Master Direction – Import of Goods and Services updated from time to time.

As per the section I of the Master Direction – Import of Goods and Services, Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of Commerce, Government of India. Authorised Dealer Category – I banks should ensure that the imports into India are in conformity with the Foreign Trade Policy in force and Foreign Exchange Management (Current Account Transactions) Rules, 2000 and the Directions issued by Reserve Bank under Foreign Exchange Management Act, 1999 from time to time.

General Guidelines for Imports: These General Guidelines deals with the imports relating to foreign exchange transactions.

(1) **General Guidelines:** Rules and regulations to be followed by the Authorised Dealer (AD) from the foreign exchange angle while undertaking import payment transactions on behalf of their clients are given in this para of the Section II of the Master direction. Where specific regulations do not exist, AD may be governed by normal trade practices and it may particularly adhere to "Know Your Customer" (KYC) guidelines (issued by Reserve Bank) in all their dealings.

(2) **Remittances for Import Payments:** AD may allow remittance for making payments for imports into India, after ensuring that all the requisite details are made available by the importer and the remittance is for bona fide trade transactions as per applicable laws in force.

(3) **Obligation of Purchaser of Foreign Exchange:** Following are the obligations to be complied with by the purchaser:

(i) **Utilization of acquired Foreign Exchange:** In terms of Section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA), any person acquiring foreign exchange is permitted to use it either for the purpose mentioned in the declaration made by him to an Authorised Person or for any other purpose for which acquisition of foreign exchange is permissible under the said Act or Rules or Regulations framed there under.

(ii) **Evidence of import:** Where foreign exchange acquired has been utilised for import of goods into India, the AD should ensure that the importer furnishes evidence of import viz., as in IDPMS, Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself that goods equivalent to the value of remittance have been imported. AD should ensure that all import remittances outstanding on the notified date of IDPMS are uploaded in IDPMS (Import Data Processing and Monitoring System).

(iii) **Mode of payment:** A person resident in India may make payment for import of goods in foreign exchange through-

- an **international card** held by him/in rupees from international credit card/ debit card through the credit/debit card servicing bank in India against the charge slip signed by the importer, or
- as **prescribed by Reserve Bank** from time to time,

provided that the transaction is in conformity with the extant provisions and the import is in conformity with the Foreign Trade Policy in force.

In essence, payment has to be made through banking channels.

(iv) **Other modes:** For following transactions, a person resident in India may also make payment as under:

- (a) **In rupees** towards meeting expenses on account of boarding, lodging and services

related thereto or travel to and from and within India of a person resident outside India who is on a visit to India;

- (b) **By means of a crossed cheque or a draft** as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under the Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for the time being in force;
- (c) **A company or resident in India may make payment in rupees** to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company's Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors. This is also subject to compliance with requirement of any law, rules, regulations, directions applicable for making such payments.

(4) Time Limit for Settlement of Import Payments:

(i) Time limit for Normal Imports:

- (a) In terms of the extant regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.
- (b) AD may permit settlement of import dues delayed due to disputes, financial difficulties, etc. However, interest if any, on such delayed payments, usance bills (a bill of exchange which allows the drawee to have period of credit or term) or overdue interest is payable only for a period of up to three years from the date of shipment at the rate prescribed for trade credit from time to time.

- (ii) **Time Limit for Deferred Payment Arrangements:** Any deferred payment arrangements (including suppliers' and buyers' credit) entered into, for up to three years in case of import of capital goods and up to one year or the operating cycle whichever is less, in case of import of non-capital goods, shall be treated as trade credits for which the procedural guidelines as laid down in the Master Direction on External Commercial Borrowings, Trade Credits and Structured Obligations may be followed.

(5) Extension of Time:

- (i) **limit of extension:** AD can consider granting extension of time for settlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where

importer has filed suit against the seller. In cases where sector specific guidelines have been issued by Reserve Bank of India for extension of time (i.e. rough, cut and polished diamonds), the same will be applicable.

- (ii) **Circumstances:** While granting extension of time, AD must ensure that:
- The import transactions covered by the invoices are not under investigation** by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;
 - While considering extension beyond one year from the date of shipment, the **total outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances** during the preceding two financial years, whichever is lower; and
 - Where extension of time has been granted by the AD, **the date up to which extension has been granted may be indicated** in the 'Remarks' column.
- (iii) **In exceptional cases:** Cases not covered by the above instructions / beyond the above limits, may be referred to the concerned Regional Office of Reserve Bank of India.
- (iv) **Noting of the extension:** The above extension period shall be reported in IDPMS as per message "Bill of Entry Extension" and the date up to which extension is granted will be indicated in "Extension Date" column.

(6) Import of Foreign Exchange / Indian Rupees:

- Except as otherwise provided in the Regulations, no person shall, without the general or special permission of the Reserve Bank, import or bring into India, any foreign currency. Import of foreign currency, including cheques, is governed by Section 6(3)(g) of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and Import of Currency) Regulations 2000.
- Reserve Bank may allow a person to bring into India currency notes of Government of India and / or of Reserve Bank subject to such terms and conditions as the Reserve Bank may stipulate.

(7) Import of Foreign Exchange into India: A person may–

- Send into India**, without limit, foreign exchange in any form (other than currency notes, bank notes and travelers cheques);
- Bring into India** from any place outside India, without limit, foreign exchange (other than unissued notes), subject to the condition that such person makes, on arrival in India, a declaration to the Custom Authorities at the Airport in the Currency Declaration Form (CDF) annexed to these Regulations;

Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travelers cheques brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes (cash portion) alone brought in by such person at any one time does not exceed USD 5,000 (US Dollars five thousand) or its equivalent.

(8) Import of Indian Currency and Currency Notes

- (i) Any person resident in India who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (**other than from Nepal and Bhutan**), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding ` 25,000 (Rupees twenty five thousand only).
- (ii) **A person may bring into India from Nepal or Bhutan**, currency notes of Government of India and Reserve Bank of India for any amount in denominations up to `100/-.

(9) Issue of Guarantees by an Authorised Dealer:

- (i) An authorised dealer may give a **guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India**, as an importer, in respect of import on deferred payment terms in accordance with the approval by the Reserve Bank of India for import on such terms.
- (ii) An authorised dealer may give **guarantee, Letter of Undertaking or Letter of Comfort in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India** (being an overseas supplier of goods, bank or a financial institution), for import of goods, as permitted under the Foreign Trade Policy announced by Government of India from time to time and subject to such terms and conditions as may be specified by Reserve Bank of India from time to time.
- (iii) An authorised dealer may, **in the ordinary course of his business, give a guarantee in favour of a non-resident service provider**, on behalf of a resident customer who is a service importer, subject to such terms and conditions as stipulated by Reserve Bank of India from time to time:

Limit of providing guarantee:

Service importer	Amount of guarantee
Where a service importer is other than a Public Sector Company or a Department / Undertaking of the Government of India / State Government:	no guarantee for an amount exceeding USD 500,000 or its equivalent shall be issued

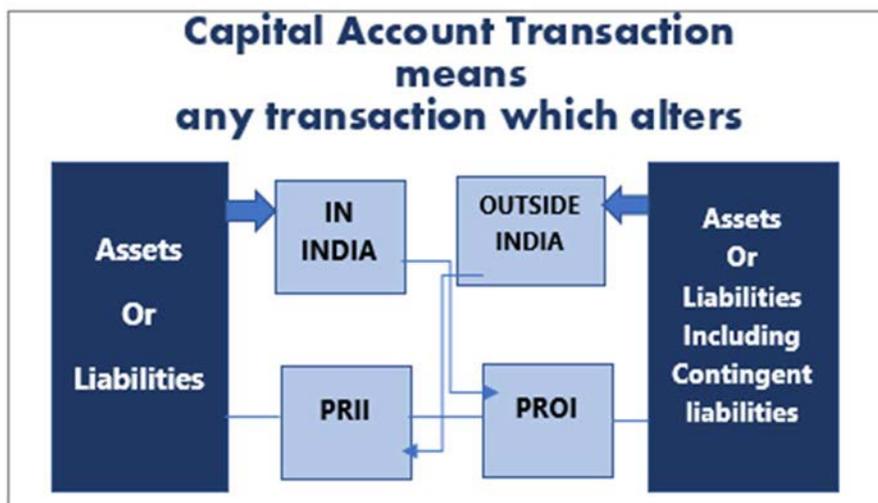
Where the service importer is a Public Sector Company or a Department / Undertaking of the Government of India / State Government	no guarantee for an amount exceeding USD 100,000 or its equivalent shall be issued without the prior approval of the Ministry of Finance, Government of India.
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- (iv) An authorised dealer may, subject to the directions issued by the Reserve Bank of India in this behalf, permit a person resident in India to **issue corporate guarantee in favour of an overseas lessor** for financing import through operating lease effected in conformity with the Foreign Trade Policy in force and under the provisions of the Foreign exchange Management (Current Account Transactions) Rules, 2000, and the Directions issued by Reserve Bank of India under Foreign Exchange Management Act, 1999 from time to time.

❖ Capital account transactions [Section 6]

The definitions of “Capital Account Transactions” and its opposite “current account transactions” are contained in clauses (e) and (j) of Section 2. The regulations under FEMA apply to a transaction based on whether the transaction is “Capital Account Transaction” or a “Current Account Transaction”. These transactions broadly outline the basics and whole approach of the Act. Basically these two transactions have to be understood as being similar to the concepts of items relating to the profit and loss account or revenue items (with respect to current account transactions) and of Balance Sheet or capital items (with respect to capital account transactions).

Capital Account Transactions means “A transaction which alters the assets or liabilities including contingent liabilities outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction.”



Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible. Capital and current account transactions are intended to be mutually exclusive. **A transaction which alters the asset or liabilities in India of non-residents falls under the category of capital account.** However, as far as residents are concerned **transactions which alter the contingent liabilities outside India are also capital account transactions.** The Reserve Bank of India may by regulations place restrictions on various specified capital account transactions. **In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets are Capital Account Transactions.**

- (1) Subject to the provisions of sub-section (2), any person may **sell or draw foreign exchange to or from an authorised person** for a capital account transaction.
- (2) Reserve Bank had the **power to specify the Capital Account transactions which are permitted and the relevant limits, terms and conditions.** By Finance Act 2015, powers for regulation of Capital Account Transactions for Non-debt instruments were transferred to Central Government. RBI continued to have powers to regulate debt instruments. The amendments have however been made effective from 15th October 2019. Now the regulations are as under:

The Reserve Bank may, in consultation with the Central Government, specify:

- (a) any class or classes of capital account transactions, involving debt instruments, which are permissible;
- (b) the limit up to which foreign exchange shall be admissible for such transactions;
- (c) any conditions which may be placed on such transactions;

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

RBI has issued notification for Debt instruments specifying the terms and conditions. These regulations for foreign investment in debt instruments. For investment by Indian residents outside India, RBI continues to have power to regulate the transactions for equity and debt.

- (2A) The Central Government may, in consultation with the Reserve Bank, prescribe— (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible; (b) the limit up to which foreign exchange shall be admissible for such transactions; and (c) any conditions which may be placed on such transactions.

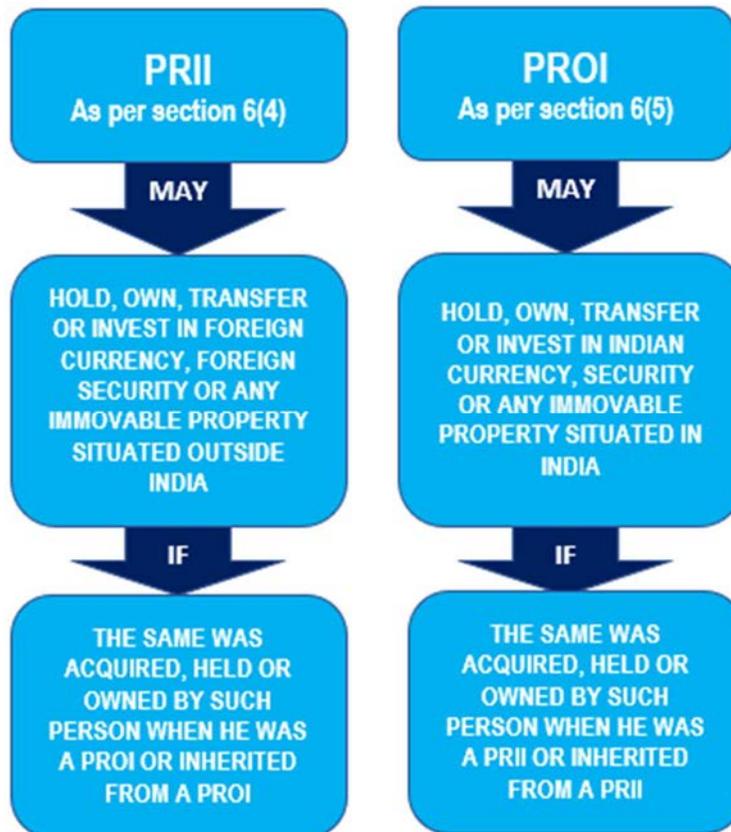
Central Government has issued notification for Non-debt instruments specifying the terms and conditions. RBI has issued notification for mode of payment and reporting of Non-debt instruments.

- (3) Before 15th October 2019, Section 6(3) specified a list of capital account transactions which could be regulated by RBI [apart from the general powers which it had under Section 6(2)]. **This list has now been deleted from 15th October 2019.**
- (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.**

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 has issued a clarification on section 6(4) of the Act. This circular clarifies that section 6(4) of the Act covers the following transactions:

- (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
 - (ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
 - (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
 - (iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.
- (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 a such person when **he was resident in India or inherited from a person who was resident in India.**
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Capital Account Transactions [Sec. 6(4) & 6(5)]



- (7) For the purposes of this section, the term “**debt instruments**” shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

A capital account transaction as stated earlier is a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction. The section gives a liberty by providing that any person may sell or draw foreign exchange to or from an authorised person for capital account transactions. However, the liberty to do so is subject to the provisions of sub-section (2) and (2A), which states that the Reserve Bank and the Central Government may specify class or classes of capital account transactions, which are permissible limit upto, which the foreign exchange shall be admissible for such transactions and the conditions which may be placed on such transactions.

Capital account transaction is basically split into the following categories under **Foreign Exchange Management (Permissible capital account transactions) Regulations, 2000-**:

- (I) transaction, which are permissible in respect of persons resident in India and outside India.

- (II) transaction on which restrictions cannot be imposed; and
- (III) transactions, which are prohibited.

I. Permissible Transactions

Under Sub-section (2) of Section 6, the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The Regulations specify the list of transaction, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II.

Further, subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

SCHEDULE I

The list of permissible classes of transactions made by **persons resident in India** is:

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.
- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Undertake derivative contracts

SCHEDULE II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and

- (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.
- (f) Foreign currency accounts in India of a person resident outside India.
- (g) Remittance outside India of capital assets in India of a person resident outside India.
- (h) Undertake derivative contracts

Transactions with no restriction

They are:

- (1) For amortisation of loan and
- (2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan installments.

Prohibited Transactions

On certain transactions, the Reserve Bank of India imposes prohibition.

- (a) no person shall **undertake or sell or draw foreign exchange to or from an authorised person** for any capital account transaction,

provided that-

- (i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, **a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank** from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

- (ii) Where the **drawal of foreign exchange** by a resident individual for any capital account transaction specified in Schedule I **exceeds USD 250,000 per financial year, or as**

decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

- (b) The **person resident outside India is prohibited from making investments in India** in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:
- (i) In **the business of chit fund**; Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time.
 - (ii) As **Nidhi company**;
 - (iii) In **agricultural or plantation activities**;
 - (iv) In **real estate business, or construction of farm houses or**
Explanation: In "real estate business" the term 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.; or
 - (v) In **trading in Transferable Development Rights (TDRs)**.

'Transferable Development Rights' means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;

- (c) **No person resident in India shall undertake** any capital account transaction which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs, **with any person who is, a citizen of or a resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise, in Democratic People's Republic of Korea**, until further orders, unless there is specific approval from the Central Government to carry on any transaction.
- (d) The **existing investment transactions, with any person** who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in

Democratic People's Republic of Korea, **by a person resident in India**, which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs **shall be closed/ liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification**, unless there is specific approval from the Central Government to continue beyond that period.”

Thus, a capital account transaction is permitted only if it is specifically permitted under the regulations. If the transaction is not stated as generally permitted, a prior specific approval is required.

Framework for raising loans through External Commercial Borrowings: Transactions on account of External Commercial Borrowings (ECB) are governed by section 6(3)(d) of FEMA. ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The para-meters apply in totality and not on a stand-alone basis.

The term '**All-in-Cost**' includes rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or Indian Rupees (INR) but will not include commitment fees, pre-payment fees / charges, withholding tax payable in INR.

In the case of fixed rate loans, the swap cost plus spread should not be more than the floating rate plus the applicable spread. Additionally, for FCCBs, the issue related expenses should not exceed 4 per cent of the issue size and in case of private placement, these expenses should not exceed 2 per cent of the issue size, etc.

Approval route: Under the ECB framework, ECB can be raised either under the automatic route or under the approval route. Under the approval route, the prospective borrowers are required to send their requests to the Reserve Bank through their AD Banks for examination.

Automatic route: For the automatic route, the cases are examined by the Authorised Dealer Category-I (AD Category-I) banks.

ECB Framework: The framework for raising loans through ECB (hereinafter referred to as the ECB Framework) comprises the following two options:

Sr. No.	Parameters	⁴ FCY denominated ECB	INR denominated ECB
i	Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily

⁴Foreign Currency

		credits beyond 3 years; ⁵ FCCBs; ⁶ FCEBs and Financial Lease.	convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.
iii	Eligible borrowers	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: i. Port Trusts; ii. Units in SEZ iii. SIDBI; and iv. EXIM Bank of India.	a) All entities eligible to raise FCY ECB; and b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and Non-Government Organisations.
iv	Recognised lenders	The lender should be resident of FATF or ⁷ IOSCO compliant country, including on transfer of ECB. However, a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders; b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to	

⁵Foreign Currency Convertible Bond: It refers to foreign currency denominated instruments which are issued in accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993, as amended from time to time. Issuance of FCCBs shall also conform to other applicable regulations. Further, FCCBs should be without any warrants attached.

⁶Foreign Currency Exchangeable Bonds (FCEBs): It refers to foreign currency denominated instruments which are issued in accordance with the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008, as amended from time to time. FCEBs are exchangeable into equity share of another company, to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments. Issuance of FCEBs shall also conform to other applicable regulations.

⁷IOSCO Compliant Country: A country whose securities market regulator is a signatory to the International Organisation of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with the SEBI for information sharing arrangements.

		applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.																		
v	Minimum Average Maturity Period (MAMP)	<p>MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:</p> <table border="1"> <thead> <tr> <th>Sr.No.</th> <th>Category</th> <th>MAMP</th> </tr> </thead> <tbody> <tr> <td>(a)</td> <td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td> <td>1 year</td> </tr> <tr> <td>(b)</td> <td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans</td> <td>5 years</td> </tr> <tr> <td>(c)</td> <td>ECB raised by other than foreign equity holder for: (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes</td> <td>10 years</td> </tr> <tr> <td>(d)</td> <td>ECB raised by other than foreign equity holder for: (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose</td> <td>7 years</td> </tr> <tr> <td>(e)</td> <td>ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose</td> <td>10 years</td> </tr> </tbody> </table> <p>for the categories mentioned at (b) to (e) –</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	Sr.No.	Category	MAMP	(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year	(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years	(c)	ECB raised by other than foreign equity holder for: (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years	(d)	ECB raised by other than foreign equity holder for: (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years	(e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose	10 years
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vi	All-in-cost ceiling per annum	⁸ Benchmark rate plus 500 bps spread.	Benchmark rate plus 450 bps
vii	Other costs	Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.	
viii	End-uses (Negative list)	The negative list, for which the ECB proceeds cannot be utilised, would include the following: a) Real estate activities. b) Investment in capital market. c) Equity investment. d) Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above. e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above. f) Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above. g) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.	
ix	Exchange rate	Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.	For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.
x	Hedging provision	The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in	Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I

⁸Benchmark rate: Benchmark rate in case of FCY ECB/TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for eg., EURIBOR. Henceforth, benchmark rate in case of FCY ECB/TC shall refer to any widely accepted interbank rate or alternative reference rate (ARR) of 6-month tenor, applicable to the currency of borrowing.

		<p>respect of foreign currency exposure. Infrastructure space companies shall have a Board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case the average maturity of the ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of the ECB and report the position to RBI through Form ECB 2. The following operational aspects with respect to hedging should be ensured:</p> <p>a. Coverage: The ECB borrower will be required to cover the principal as well as the coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day the liability is created in the books of the borrower).</p> <p>b. Tenor and rollover: A minimum tenor of one year for the financial hedge would be required with periodic rollover, duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of the ECB.</p> <p>c. Natural Hedge: Natural hedge, in lieu of financial</p>	<p>banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis.</p>
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		<p>hedge, will be considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting year. Any other arrangements/ structures, where revenues are indexed to foreign currency will not be considered as a natural hedge.</p>	
xi	Change of currency of borrowing	Change of currency of ECB from one freely convertible foreign currency to any other freely convertible foreign currency as well as to INR is freely permitted.	Change of currency from INR to any freely convertible foreign currency is not permitted.
<p>Note: The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors. Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.</p>			

Limit and leverage: Under the aforesaid framework, all eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

Issuance of Guarantee, etc. by Indian banks and Financial Institutions: Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.

Parking of ECB proceeds: ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:

Parking of ECB proceeds abroad:	Parking of ECB proceeds domestically:
<p>ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation.</p> <p>Till utilisation, these funds can be invested in the following liquid assets:</p> <p>(a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's;</p> <p>(b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and</p> <p>(c) deposits with foreign branches/ subsidiaries of Indian banks abroad.</p>	<p>ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India.</p> <p>ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.</p>

Procedure of raising ECB: All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework. For approval route cases, the borrowers may approach the RBI with an application in prescribed format (Form ECB) for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee. Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form ECB.

Reporting Requirements: Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

1. **Loan Registration Number (LRN):** Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division, Bandra-Kurla Complex, Mumbai – 400

051 (Contact numbers 022-26572513 and 022-26573612). Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

2. **Changes in terms and conditions of ECB:** Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the DSIM through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.
3. **Monthly Reporting of actual transactions:** The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates. Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.
4. **Late Submission Fee (LSF) for delay in reporting:** Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB/ Form ECB 2 returns, by payment of late submission fees.
5. **Standard Operating Procedure (SOP) for Untraceable Entities:** The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.
 - i. **Definition:** Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:
 - (a) Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
 - (b) Entities have not submitted Statutory Auditor's Certificate for last two years or more;
 - ii. **Action:** The followings actions are to be undertaken in respect of 'untraceable entities':
 - (a) File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;

- (b) No fresh ECB application by the entity should be examined/processed by the AD bank;
- (c) Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- (d) No inward remittance or debt servicing will be permitted under auto route.

6. **Powers delegated to AD Category I banks to deal with ECB cases:** The designated AD Category I banks can approve any requests from the borrowers for changes in respect of ECB, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in name of borrower/lender, transfer of ECB and any other parameters, comply with extant ECB norms and are with the consent of lender(s). Further, the following can also be undertaken under the automatic route:

- (I) **Change of the AD Category I bank:** AD Category I bank can be changed subject to obtaining no objection certificate from the existing AD Category I bank.
- (II) **Cancellation of LRN:** The designated AD Category I banks may directly approach DSIM for cancellation of LRN for ECB contracted, subject to ensuring that no draw down against the said LRN has taken place and the monthly ECB-2 returns till date in respect of the allotted LRN have been submitted to DSIM.
- (III) **Refinancing of existing ECB:** Refinancing of existing ECB by fresh ECB provided the outstanding maturity of the original borrowing (weighted outstanding maturity in case of multiple borrowings) is not reduced and all-in-cost of fresh ECB is lower than the all-in-cost (weighted average cost in case of multiple borrowings) of existing ECB. Further, refinancing of ECB raised under the previous ECB frameworks may also be permitted, subject to additionally ensuring that the borrower is eligible to raise ECB under the extant framework. Raising of fresh ECB to part finance the existing ECB is also permitted subject to same conditions. Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/Navratna public sector undertakings.
- (IV) **Conversion of ECB into equity:** Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:
 - i. The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI policy.
 - ii. The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under FDI policy;

- iii. Applicable pricing guidelines for shares are complied with;
 - iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:
 - (a) For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".
 - (b) For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
 - (c) For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.
 - v. If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;
 - vi. Consent of other lenders, if any, to the same borrower is available or atleast information regarding conversions is exchanged with other lenders of the borrower.
 - vii. For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.
- (V) **Security for raising ECB:** AD Category I banks are permitted to allow creation/cancellation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower, subject to satisfying themselves that:
- (i) the underlying ECB is in compliance with the extant ECB guidelines,
 - (ii) there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
 - (iii) No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, **subject to the following:**

- i. **Creation of Charge on Immovable Assets:** The arrangement shall be subject to the following:
 - (a) Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
 - (b) The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.
 - (c) In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.
- ii. **Creation of Charge on Movable Assets:** In the event of enforcement/ invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may also be taken out of the country subject to getting 'No Objection Certificate' from domestic lender/s, if any.
- iii. **Creation of Charge over Financial Securities:** The arrangements may be permitted subject to the following:
 - (a) Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
 - (b) In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/ promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
 - (c) In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange

Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.

- iv. **Issue of Corporate or Personal Guarantee:** The arrangement shall be subject to the following:
- (a) A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
 - (b) Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
 - (c) Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000, as amended from time to time.
 - (d) ECB can be credit enhanced / guaranteed / insured by overseas party/ parties only if it/ they fulfil/s the criteria of recognised lender under extant ECB guidelines.
7. **Additional Requirements:** While exercising the delegated powers, the AD Category I banks should ensure that:
- (i) The changes permitted are in conformity with the applicable ceilings / guidelines and the ECB continues to be in compliance with applicable guidelines. It should also be ensured that if the ECB borrower has availed of credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, any extension of tenure of ECB (whether matured or not) shall be subject to applicable prudential guidelines issued by Department of Banking Regulation of Reserve Bank including guidelines on restructuring.
 - (ii) The changes in the terms and conditions of ECB allowed by the ADs under the powers delegated and / or changes approved by the Reserve Bank should be reported to the DSIM as given at paragraph 2 above. Further, these changes should also get reflected in the Form ECB 2 returns appropriately.
8. **Special Dispensations under the ECB framework:**
1. **ECB facility for Oil Marketing Companies:** Notwithstanding the provisions contained in “End uses”, “Hedging Provision” and “Limit and Leverage” above, Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

2. **ECB facility for Startups:** AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:
- (i) **Eligibility:** An entity recognised as a Startup by the Central Government as on date of raising ECB.
 - (ii) **Maturity:** Minimum average maturity period will be 3 years.
 - (iii) **Recognised lender:** Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognised lenders under this framework.
 - (iv) **Forms:** The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
 - (v) **Currency:** The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.
 - (vi) **Amount:** The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
 - (vii) **All-in-cost:** Shall be mutually agreed between the borrower and the lender.
 - (viii) **End uses:** For any expenditure in connection with the business of the borrower.
 - (ix) **Conversion into equity:** Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
 - (x) **Security:** The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a non-resident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.
 - (xi) **Hedging:** The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks in India. The lender can also access the domestic market through branches/subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

Note: Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.

- (xii) **Conversion rate:** In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.
- (xiii) **Other Provisions:** Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable. Further, the Start-ups as defined in “Eligibility” above as well as other start-ups which do not comply with the aforesaid definition but are eligible to receive FDI, can also raise ECB under the general ECB route/framework.
9. **Borrowing by Entities under Investigation:** All entities against which investigation / adjudication / appeal by the law enforcing agencies for violation of any of the provisions of the Regulations under FEMA pending, may raise ECB as per the applicable norms, if they are otherwise eligible, notwithstanding the pending investigations / adjudications / appeals, without prejudice to the outcome of such investigations / adjudications / appeals. The borrowing entity shall inform about pendency of such investigation / adjudication / appeal to the AD Category-I bank / RBI as the case may be. Accordingly, in case of all applications where the borrowing entity has indicated about the pending investigations / adjudications / appeals, the AD Category I Banks / Reserve Bank while approving the proposal shall intimate the agencies concerned by endorsing a copy of the approval letter.
10. **ECB by entities under restructuring/ ECB facility for refinancing stressed assets:**
1. An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan.
 2. Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.
 3. Eligible borrowers under the ECB framework, who are participating in the Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 as resolution applicants, can raise ECB from all recognised lenders, except foreign branches/subsidiaries of Indian banks,

for repayment of Rupee term loans of the target company. Such ECB will be considered under the approval route, procedure of which is given at “Procedure of raising ECB” above.

11. **Dissemination of information:** For providing greater transparency, information with regard to the name of the borrower, amount, purpose and maturity of ECB under both Automatic and Approval routes are put on the RBI's website, on a monthly basis, with a lag of one month to which it relates.
12. **Compliance with the guidelines:** The primary responsibility for ensuring that the borrowing is in compliance with the applicable guidelines is that of the borrower concerned. Any contravention of the applicable provisions of ECB guidelines will invite penal action under the FEMA. The designated AD Category I bank is also expected to ensure compliance with applicable ECB guidelines by their constituents.

OVERSEAS INVESTMENTS BY RESIDENTS: Vide Notification G.S.R. 646(E) dated 22 August 2022, through Ministry of Finance, in exercise of the powers conferred under the Foreign Exchange Management Act, 1999 and in supersession of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015, except as respects things done or omitted to be done before such supersession, the Central Government hereby makes the Foreign Exchange Management (Overseas Investment) Rules, 2022 and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.

Said Notification, combined the FEMA (Transfer or Issue of Foreign Security) Regulations, 2004 ('erstwhile ODI regulations') and FEMA (Acquisition and Transfer of immovable property outside India) Regulations, 2015 into FEMA (Overseas Investment) Rules, 2022 ('OI Rules') and FEMA (Overseas Investment) Regulations, 2022 ('OI Regulations') and the erstwhile regulations stand superseded.

To provide clarity to said Rules and Regulations, RBI has also issued Foreign Exchange Management (Overseas Investment) Directions, 2022 on 22 August 2022 ('OI Directions'). It's giving effect to the above, in supersession of the erstwhile Master Directions on Direct Investment by Residents in Joint Venture ('JV') / Wholly Owned Subsidiary ('WOS') abroad.

In view of the evolving needs of businesses in India, in an increasingly integrated global market, there is need of Indian corporates to be part of global value chain. The revised regulatory framework for overseas investment provides for simplification of the existing framework for overseas investment and has been aligned with the current business and economic dynamics. Clarity on Overseas Direct Investment and Overseas Portfolio Investment has been brought in and various overseas investment related transactions that were earlier under approval route are now under automatic route, significantly enhancing "Ease of Doing Business".

Scope:

Overseas Investment Rules	Overseas Investment Regulations
lay down the regulatory framework for making overseas investment	provide only the operational part for making overseas investment
It emphasize on the permissions, conditions for making overseas investment, restrictions from making Overseas Direct Investment ('ODI') and Overseas Portfolio Investment, pricing guidelines, transfer, liquidation and restructuring of ODI. While the OI Rules have been framed by CG, however, the same will be administered by the RBI.	It emphasize on providing of conditions for undertaking Financial Commitment, investment in debt instruments, consideration in case of acquisition or transfer of equity capital of a Foreign Entity, mode of payment, obligations of Persons Resident in India, reporting requirements, consequence of delay in reporting and restrictions on further FC/ transfer.

OVERSEAS INVESTMENT RULES, 2022**Definitions– Significant definitions:**

1. **“control”** means the right to appoint majority of the directors or to control management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten per cent. or more of voting rights or in any other manner in the entity [Regulation 2(1)(c)]
2. **“disinvestment”** means partial or full extinguishment of right, title or possession of equity capital acquired under these rules [Regulation 2(1)(d)]
3. **“equity capital”** means equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments [Regulation 2(1)(e)]
4. **“financial commitment”** means the aggregate amount of investment made by a person resident in India by way of Overseas Direct Investment, debt other than Overseas Portfolio Investment in a foreign entity or entities in which the Overseas Direct Investment is made and shall include the non fund-based facilities extended by such person to or on behalf of such foreign entity or entities [Regulation 2(1)(f)]
5. **“financial service regulator”** means a financial service regulator established under any law in force in India and include the Reserve Bank, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority and the Pension Fund Regulatory and Development Authority [Regulation 2(1)(g)]

6. **“foreign entity”** means an entity formed or registered or incorporated outside India, including International Financial Services Centre that has limited liability:

Provided that the restriction of limited liability shall not apply to an entity with core activity in a strategic sector; [Regulation 2(1)(h)]

“strategic sector” shall include energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups and any other sector or sub-sector as deemed necessary by the Central Government; [Regulation 2(1)(z)]

7. **“host country”** or **“host jurisdiction”** means the country or jurisdiction, including the International Financial Services Centre, in which the foreign entity is formed, registered or incorporated, as the case may be [Regulation 2(1)(i)]

8. **“Indian entity”** means–

- (i) a company defined under the Companies Act, 2013
- (ii) a body corporate incorporated by any law for the time being in force;
- (iii) a Limited Liability Partnership duly formed and incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009); and
- (iv) a partnership firm registered under the Indian Partnership Act, 1932 (9 of 1932). [Regulation 2(1)(j)]

9. **“listed foreign entity”** means a foreign entity whose equity shares or any other fully and compulsorily convertible instrument is listed on a recognised stock exchange outside India; [Regulation 2(1)(m)]

10. **“listed Indian company”** means an Indian company that has equity shares or any of its fully and compulsorily convertible instruments listed on a recognised stock exchange in India and the expression “unlisted Indian company” shall be construed accordingly [Regulation 2(1)(n)]

11. **“Overseas Direct Investment”** or “ODI” means investment by way of acquisition of unlisted equity capital of a foreign entity, or subscription as a part of the memorandum of association of a foreign entity, or investment in ten per cent, or more of the paid-up equity capital of a listed foreign entity or investment with control where investment is less than ten per cent. of the paid-up equity capital of a listed foreign entity;

Explanation– For the purposes of this clause, where an investment by a person resident in India in the equity capital of a foreign entity is classified as ODI, such investment shall continue to be treated as ODI even if the investment falls to a level below ten per cent. of the paid-up equity capital or such person loses control in the foreign entity [Regulation 2(1)(q)]

12. **“Overseas Investment”** or “OI” means financial commitment and Overseas Portfolio Investment by a person resident in India [Regulation 2(1)(r)]

13. **“Overseas Portfolio Investment”** or “OPI” means investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC:

Provided that OPI by a person resident in India in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.

Explanation– For the purposes of this clause, the expression “debt instruments” means the instruments specified as such in clause (A) of rule 5 [Regulation 2(1)(s)]

14. **“relative”** shall have the same meaning as assigned to it in clause (77) of section 2 of the Companies Act, 2013, [Regulation 2(1)(t)]
15. **“resident individual”** means a person resident in India who is a natural person; [Regulation 2(1)(u)]
16. **“Resident Foreign Currency Account” or “RFC Account”** shall have the same meaning as assigned to it in the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015 [Regulation 2(1)(v)]
17. **“Subsidiary” or “step down subsidiary”** of a foreign entity means an entity in which the foreign entity has control [Regulation 2(1)(y)]
18. **“sweat equity shares”** means such equity shares as are issued by an overseas entity to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights like intellectual property rights or value additions, by whatever name called [Regulation 2(za)]

Non-Applicability of Rules and Regulations relating thereto in Certain Cases. Nothing in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022 shall apply to–

- (a) any **investment made outside India by a financial institution** in an IFSC;
- (b) **acquisition or transfer of any investment outside India** made,–
- (i) out of **Resident Foreign Currency Account**; or
 - (ii) out of **foreign currency resources held outside India** by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or
 - (iii) in accordance with **sub-section (4) of section 6** of the Act.

Explanation.– For the purposes of this rule, the expression “financial institution” shall have the same meaning as assigned to it in the International Financial Services Centre’s Authority Act, 2019 (50 of 2019).

Debt instruments and non-debt instruments– The following shall be the debt instruments and non-debt instruments as determined by the Central Government, namely:–

(A) Debt instruments:	(B) Non-debt instruments:
Government bonds;	all investments in equity in incorporated entities (public, private, listed and unlisted);
corporate bonds;	capital participation in Limited Liability Partnerships;
all tranches of securitisation structure which are not equity tranche;	all instruments of investment as recognised in the Foreign Direct Investment policy from time to time;
borrowings by firms through loans; and	investment in units of Alternative Investment Funds and Real Estate Investment Trust and Infrastructure Investment Trusts;
depository receipts whose underlying securities are debt securities;	investment in units of mutual funds and Exchange-Traded Fund which invest more than fifty per cent in equity;
	the junior-most layer (i.e. equity tranche) of securitisation structure;
	acquisition, sale or dealing directly in immovable property;
	contribution to trusts; and
	depository receipts issued against equity instruments;

Continuity of certain investments – Any investment or financial commitment outside India made in accordance with the Act or the rules or regulations made thereunder and held as on the date of publication of these rules in the Official Gazette, shall be deemed to have been made under these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.

Rights issue and bonus shares–

- (1) **Holding of equity capital of foreign entity:** Any person resident in India who has acquired and continues to hold equity capital of any foreign entity in accordance with the provisions of the Act or the rules or regulations made thereunder–
 - (a) may invest in the equity capital issued by such entity as a rights issue; or
 - (b) may be granted bonus shares subject to the terms and conditions under these rules.
- (2) **Transfer of above rights:** The person resident in India acquiring the rights under sub-rule (1) may renounce such rights in favour of a person resident in India or a person resident outside India.

Prohibition on investment outside India– Save as otherwise provided in the Act or these rules or the regulations made or directions issued under the Act, **no person resident in India shall make or transfer any investment or financial commitment outside India.**

Overseas Investment–

- (1) **Investment in foreign entity engaged in bonafide business activity:** Save as otherwise provided in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, any investment made outside India by a person resident in India shall be made in a foreign entity engaged in a bona fide business activity, directly or through step down subsidiary or the special-purpose vehicle, subject to the limits and the conditions laid down in these rules and the said regulations:

Structural requirements of a foreign entity: Provided that the structure of such subsidiary or step down subsidiary of the foreign entity shall comply with the structural requirements of a foreign entity:

When CG approval is required: Provided further that Overseas Investment or transfer of such investment including swap of securities in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as may be advised by the Central Government from time to time shall require prior approval of the Central Government.

Explanation– For the purposes of this sub-rule, “**bonafide business activity**” shall mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be:

- (2) Notwithstanding anything contained in these rules or Foreign Exchange Management (Overseas Investment) Regulations 2022 –
- (i) **Permit for Financial commitment in strategic sectors:** The Central Government may, on an application made to it through the Reserve Bank, permit financial commitment in strategic sectors or geographies, above the limits laid down in these rules and subject to such terms and conditions as it considers necessary.
- (ii) **Permit PRII to make/transfer any investment/Financial commitment:** the Reserve Bank may, on an application made to it through the designated AD bank and for sufficient reasons, permit a person resident in India to make or transfer any investment or financial commitment outside India subject to such conditions as may be laid down by it:
- Provided that Overseas Investment by a person resident in India shall not be made in a foreign entity located in a country or jurisdiction as may be decided by the Central Government from time to time.
- (3) The Reserve Bank, if it considers necessary may, in consultation with the Central Government–
- (i) **stipulate the ceiling for the aggregate outflows** during a financial year on account of financial commitment or Overseas Portfolio Investment;

- (ii) **stipulate the ceiling beyond which** the amount of financial commitment by a person resident in India in a financial year **shall require its prior approval**.

No Objection Certificate–

- (1) Any person resident in India who–
- (i) has an **account appearing as a non-performing asset**; or
 - (ii) is classified **as a wilful defaulter** by any bank; or
 - (iii) is **under investigation** by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office,
shall, before making any financial commitment or undertaking disinvestment under these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, obtain a No Objection Certificate from the lender bank or regulatory body or investigative agency by making an application in writing to such bank or regulatory body or investigative agency concerned:
where there is failure to furnish the certificate: Provided that where the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within sixty days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.
- (2) The No Objection Certificate issued shall be addressed by the lender bank or regulatory body or investigative agency concerned to the **designated AD bank with an endorsement to the applicant**.

Manner of making overseas investment:

Investment by the body	Manner of overseas investment
Overseas Direct Investment by Indian entity	may make Overseas Direct Investment in the manner and subject to the terms and conditions prescribed in Schedule I.
Overseas Portfolio Investment by an Indian entity	may make Overseas Portfolio Investment in the manner and subject to the terms and conditions prescribed in Schedule II.
Overseas Investment by resident individual	may make Overseas Investment in the manner and subject to the terms and conditions prescribed in Schedule III
Overseas Investment by person resident in India other than Indian entity and resident Individual	may make Overseas Investment in the manner and subject to the terms and conditions prescribed in Schedule IV

Overseas Investment in IFSC by person resident in India

may make Overseas Investment in an IFSC in India in the manner and subject to the terms and conditions prescribed in Schedule V

Pricing guidelines – (1) the issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India shall be subject to a price arrived on an arm's length basis.

- (2) The AD bank, before facilitating a transaction above, shall ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation.

Transfer or liquidation.

- (1) a person resident in India holding equity capital in accordance with these rules may transfer such investment, in compliance with the limits and subject to the conditions for such investment or disinvestment, pricing guidelines or documentation and reporting requirements, in the manner provided in these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022.
- (2) A person resident in India may transfer equity capital by way of sale to a person resident in India, who is eligible to make such investment under these rules, or to a person resident outside India.
- (3) In case the transfer is on account of merger, amalgamation or demerger or on account of buyback of foreign securities, such transfer or liquidation in case of liquidation of the foreign entity, shall have the approval of the competent authority as per the applicable laws in India or the laws of the host country or host jurisdiction, as the case may be.
- (4) Where the disinvestment by a person resident in India pertains to ODI–
- (i) the transferor, in case of full disinvestment other than by way of liquidation, shall not have any dues outstanding for receipt, which such transferor is entitled to receive from the foreign entity as an investor in equity capital and debt;
 - (ii) the transferor, in case of any disinvestment must have stayed invested for at least one year from the date of making ODI:

Provided that the above conditions shall not be applicable in case of a merger, demerger or amalgamation between two or more foreign entities that are wholly-owned, directly or indirectly, by the Indian entity or where there is no change or dilution in aggregate equity holding of the Indian entity in the merged or demerged or amalgamated entity.

- (5) The holding of any investment or transfer thereof in any manner shall not be permitted if the initial investment was not permitted under the Act.

Restructuring – A person resident in India who has made ODI in a foreign entity may permit restructuring of the balance sheet by such foreign entity, which has been incurring losses for the previous two years as evidenced by its last audited balance sheets, subject to ensuring compliance with reporting, documentation requirements and subject to the diminution in the total value of the outstanding dues towards such person resident in India on account of investment in equity and debt, after such restructuring not exceeding the proportionate amount of the accumulated losses:

Provided that in case of such diminution where the amount of corresponding original investment is more than USD 10 million or in the case where the amount of such diminution exceeds twenty per cent of the total value of the outstanding dues towards the Indian entity or investor, the diminution in value shall be duly certified on an arm's length basis by a registered valuer as per the Companies Act, 2013 or corresponding valuer registered with the regulatory authority or certified public accountant in the host jurisdiction:

Provided further that the certificate dated not more than six months before the date of the transaction shall be submitted to the designated AD bank.

Restrictions and prohibitions

- (1) **No person resident in India shall make ODI** in a foreign entity engaged in–
 - (a) real estate activity;
 - (b) gambling in any form; and
 - (c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank.

Explanation– For the purposes of this sub-rule, the expression "real estate activity" means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.

- (2) **Any ODI in start-ups recognised under the laws of the host country or host jurisdiction** as the case may be, shall be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.
- (3) **No person resident in India shall make financial commitment in a foreign entity that has invested or invests into India**, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries:

Exception: Provided that such restriction shall not apply to the following classes of companies mentioned in sub-rule (2) of rule 2 of the Companies (Restriction on Number of Layers) Rules, 2017 as may be amended from time to time, namely:-

- (a) a banking company

- (b) a non-banking financial company which is registered with the Reserve Bank and considered as systematically important non-banking financial company by the Reserve Bank
- (c) an insurance company and
- (d) a Government company

Requirements for investment to be specified by Reserve Bank– The mode of payment, deferred payment of consideration, reporting, realisation, and other requirements for any investment outside India by a person resident in India shall be as per the regulations made in this behalf by the Reserve Bank under the Act.

Restriction on acquisition or transfer of immovable property outside India–

- (1) Save as otherwise provided in the Act or this rule, no person resident in India shall acquire or transfer any immovable property situated outside India **without general or special permission of the Reserve Bank**:

However, nothing contained in this rule shall apply to a property–

- (i) held by a person resident in India who is a national of a foreign State;
- (ii) acquired by a person resident in India on or before the 8th day of July, 1947 and continued to be held by such person with the permission of the Reserve Bank;
- (iii) acquired by a person resident in India on a lease not exceeding five years.

- (2) Notwithstanding anything contained in sub-rule (1)–

- (i) **a person resident in India may acquire immovable property outside India** by way of-
 - inheritance or
 - gift or
 - purchase from a person resident in India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition;
- (ii) Acquiring of immovable property outside India from a person resident outside India- a person resident in India may acquire immovable property outside India from a person resident outside India–
 - (a) by way of inheritance;
 - (b) by way of purchase out of foreign exchange held in RFC account;
 - (c) by way of purchase out of the remittances sent under the Liberalised Remittance Scheme instituted by the Reserve Bank:

Provided that such remittances under the Liberalised Remittance Scheme may be consolidated in respect of relatives if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme;

- (d) jointly with a relative who is a person resident outside India;
 - (e) out of the income or sale proceeds of the assets, other than ODI, acquired overseas under the provisions of the Act;
- (iii) **an Indian entity having an overseas office may acquire immovable property outside India** for the business and residential purposes of its staff, as per the directions issued by the Reserve Bank from time to time;
- (iv) **a person resident in India who has acquired any immovable property outside India** in accordance with the foreign exchange provisions in force at the time of such acquisition may–
- (a) **transfer such property** by way of gift to a person resident in India who is eligible to acquire such property under these rules or by way of sale;
 - (b) **create a charge on such property** in accordance with the Act or the rules or regulations made thereunder or directions issued by the Reserve Bank from time to time.
- (3) The holding of any investment in immovable property or transfer thereof in any manner shall not be permitted if the initial investment in immovable property was not permitted under the Act.

Schedule I [See rule 11]

Manner of making Overseas Direct Investment by Indian entity

1. Manner of making ODI — (1) An Indian entity may make ODI by way of investment in equity capital for the purpose of undertaking bonafide business activity in the manner and subject to the limits and conditions provided in this Schedule.

- (2) The ODI may be made or held by way of–
- (i) **subscription** as part of memorandum of association or purchase of equity capital, listed or unlisted;
 - (ii) **acquisition** through bidding or tender procedure;
 - (iii) **acquisition of equity capital** by way of rights issue or allotment of bonus shares;
 - (iv) **capitalisation**, within the time period, if any, specified for realisation under the Act, of any amount due towards the Indian entity from the foreign entity, the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank under the Act or any rules or regulations made or directions issued thereunder;

- (v) the **swap of securities**;
- (vi) **merger, demerger, amalgamation** or any scheme of arrangement as per the applicable laws in India or laws of the host country or the host jurisdiction, as the case may be.

2. **ODI in financial services activity –**

(1) An **Indian entity engaged in financial services activity in India may make ODI** in a foreign entity, which is directly or indirectly engaged in financial services activity, subject to the following conditions, namely:--

- (i) the Indian entity has **posted net profits** during the preceding three financial years;
- (ii) the Indian entity is **registered with or regulated** by a financial services regulator in India;
- (iii) the Indian entity has **obtained approval** as may be required from the regulators of such financial services activity, **both in India and the host country or host jurisdiction**, as the case may be, for engaging in such financial services:

(2) An **Indian entity not engaged in financial services activity in India may make ODI** in a foreign entity, which is directly or indirectly engaged in financial services activity [except banking or insurance] subject to the condition that such **Indian entity has posted net profits during the preceding three financial years:**

Provided that an Indian entity not engaged in the insurance sector may make ODI in general and health insurance where such insurance business is supporting the core activity undertaken overseas by such an Indian entity.

(3) **If an Indian entity does not meet the net profits** required under sub paragraph (1) & (2) of this paragraph due to the impact of Covid-19 during the period from 2020-2021 to 2021-2022, then the financial results of such period may be excluded for considering the profitability period of three years:

Provided that such period may be extended by the Reserve Bank in consultation with the Central Government, as it may deem necessary:

(4) **Overseas Investment by banks and non-banking financial institutions regulated by the Reserve Bank** shall be subject to the conditions laid down by the Reserve Bank under applicable laws in this regard.

3. Limit for financial commitment – (1) The total financial commitment made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment shall **not exceed 400 percent of its net worth** as on the date of the last audited balance sheet or as directed by the Reserve Bank, in consultation with Central Government from time to time.

(2) The total financial commitment referred as above shall not include capitalisation of retained earnings for reckoning such limit but **shall include–**

- (i) **utilisation of the amount** raised by the issue of American Depository Receipts or Global Depository Receipts and stock-swap of such receipts; and
- (ii) **utilisation of the proceeds** from External Commercial Borrowings to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit:

Provided that the financial commitment made by Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities outside India engaged in strategic sectors shall not be subject to the limits laid down under this paragraph.

Explanation.– For the purposes of this Schedule, a foreign entity shall be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.

Schedule II [See rule 12]

Manner of making Overseas Portfolio Investment (OPI) by an Indian entity

1. OPI by an Indian entity.–

- (1) An Indian entity may make OPI which shall **not exceed fifty percent of its net worth** as on the date of its last audited balance sheet, in the manner and subject to the conditions laid down in this Schedule.
- (2) A **listed Indian company may make OPI** including by way of reinvestment.
- (3) An **unlisted Indian entity may make OPI** only under clauses (iii), (iv), (v) and (vi) of subparagraph (2) of paragraph 1 of Schedule I.

Schedule III [See rule 13]

Manner of making Overseas Investment by resident individual

- 1. **Manner of making OI** – (1) Any resident individual may make ODI by way of investment in equity capital or OPI in the manner provided in this Schedule and unless otherwise provided hereunder, shall be subject to the overall ceiling under the Liberalised Remittance Scheme of the Reserve Bank.
- (2) A resident individual may make or hold Overseas Investment by way of–
 - (i) ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step down subsidiary where the resident individual has control in the foreign entity;
 - (ii) OPI, including by way of reinvestment;
 - (iii) ODI or OPI, as the case may be, by way of–

- (a) capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due from the foreign entity the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank;
- (b) swap of securities on account of a merger, demerger, amalgamation or liquidation;
- (c) acquisition of equity capital through rights issue or allotment of bonus shares;
- (d) gift as per the conditions laid down under this Schedule;
- (e) inheritance;
- (f) acquisition of sweat equity shares;
- (g) acquisition of minimum qualification shares issued for holding a management post in a foreign entity;
- (h) acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme:

Provided that ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control:

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

Explanation— For the purposes of this Schedule, a foreign entity will be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.

2. Acquisition by way of gift or inheritance – (1) A resident individual may, without any limit, acquire foreign securities by way of inheritance from a person resident in India who is holding such securities in accordance with the provisions of the Act or from a person resident outside India.

- (2) A resident individual, without any limit, may acquire foreign securities by way of gift from a person resident in India who is a relative and holding such securities in accordance with the provisions of the Act.
- (3) A resident individual may acquire foreign securities by way of gift from a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010 and the rules and regulations made thereunder.

3. Acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme or sweat equity shares:

- (1) A resident individual, who is an employee or a director of an office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or of an Indian entity in which the overseas entity has direct or indirect equity holding-

may acquire, without limit, shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme or sweat equity shares offered by such overseas entity, provided that the issue of Employee Stock Ownership Plan or Employee Benefits Scheme are offered by the issuing overseas entity globally on a uniform basis.

Explanation.– For the purposes of this paragraph, the expression,–

- (i) “indirect equity holding” means indirect foreign equity holding through a special purpose vehicle or step down subsidiary;
 - (ii) “Employee Benefit Scheme” means any compensation or incentive given to the directors or employees of any entity which gives such directors or employees ownership interest in an overseas entity through ESOP or any similar scheme.
- (2) Notwithstanding anything contained in these rules, a resident individual may acquire Employee Stock Ownership Plans under any scheme of the Central Government.

Schedule IV [See rule 14]

Overseas Investment by person resident in India other than Indian entity and resident Individual

1. **ODI by Registered Trust or Society** – Any person being a registered Trust or a registered Society engaged in the educational sector or which has set up hospitals in India may make ODI in a foreign entity with the prior approval of the Reserve Bank, subject to the following conditions, namely:–

- (i) the foreign entity is engaged in the same sector that the Indian Trust or Society is engaged in;
- (ii) the Trust or the Society, as the case may be, should have been in existence for at least three financial years before the year in which such investment is being made;
- (iii) the trust deed in case of a Trust, and the memorandum of association or rules or bye-laws in case of a Society shall permit the proposed ODI;
- (iv) such investment have the approval of the trustees in case of a Trust and the governing body or council or managing or executive committee in case of a Society;
- (v) in case the Trust or the Society require special licence or permission either from the Ministry of Home Affairs, Central Government or from the relevant local authority, as the case may be, the special licence or permission has been obtained and submitted to the designated AD bank.

2. **OI by Mutual Funds or Venture Capital Funds or Alternative Investment Funds.–**

- (1) A mutual fund or Venture Capital Fund or Alternative Investment Fund may acquire or transfer foreign securities as stipulated by SEBI from time to time in accordance with the provisions of

these rules and subject to such other terms and conditions as may be laid down by the Reserve Bank and the SEBI under applicable laws from time to time:

Provided that the aggregate limit for such investment shall be decided by the Reserve Bank in consultation with the Central Government:

Provided further that the individual limits for such investments shall be as per the instructions issued by the SEBI from time to time.

- (2) Every transaction relating to the purchase and sale of foreign security by the funds referred to in sub- paragraph (1) shall be routed through the designated AD bank in India:
- (3) Notwithstanding anything contained in these rules, any investment under these rules by mutual funds, Venture Capital Funds and Alternative Investment Funds shall be treated as OPI.

Explanation – For the purposes of this paragraph, “Alternative Investment Fund” means any fund registered as such with the SEBI.

3. Opening of Demat Accounts by clearing corporations of stock exchanges and clearing members – Any person, being a SEBI approved clearing corporation of a stock exchange and its clearing members, may acquire, hold and transfer foreign securities, offered as collateral by foreign portfolio investors and, subject to the guidelines issued by the SEBI from time to time–

- (i) open and maintain Demat Account with foreign depositories;
- (ii) remit the proceeds arising due to such action, if any; and
- (iii) liquidate such foreign securities and repatriate the proceeds thereof to India.

4. Acquisition and transfer of foreign securities by domestic depository – A domestic depository may acquire, hold and transfer foreign securities of a foreign entity, being the underlying security to issue Indian Depository Receipts as may be authorised by such foreign entity or its overseas custodian bank and the person investing in Indian Depository Receipts may either sell or continue to hold foreign securities in accordance with the conditions provided in these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022 upon conversion of such depository receipts.

5. Acquisition and transfer of foreign securities by AD bank – An AD bank including its overseas branch may acquire or transfer foreign securities in accordance with the terms of the host country or host jurisdiction, as the case may be, in the normal course of its banking business.

Schedule V [See rule 15]

Overseas Investment in IFSC by person resident in India

1. Overseas Investment in IFSC by person resident in India –

- (1) Subject to the provisions of these rules and the Foreign Exchange Management (Overseas Investment) Regulations, 2022, a person resident in India may make Overseas Investment in an IFSC in India within the limits provided in these rules.

- (2) A person resident in India may make Overseas Investment in an IFSC in the manner as laid down in Schedule I or Schedule II or Schedule III or Schedule IV: Provided that –
- (i) in the case of an ODI made in an IFSC, the approval by the financial services regulator concerned, wherever applicable, shall be decided within forty-five days from the date of application complete in all respects failing which it shall be deemed to be approved;
 - (ii) an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, who does not meet the net profit condition as required under these rules, may make ODI in an IFSC.
 - (iii) a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI;
 - (iv) a resident individual may make ODI in a foreign entity, including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or step down subsidiary outside IFSC where the resident individual has control in the foreign entity.
- (3) A recognised stock exchange in the IFSC shall be treated as a recognised stock exchange outside India for the purpose of these rules.

Foreign Exchange Management (Overseas Investment) Regulations, 2022

Said regulations deals with various modes of operations of investments

Regulation 3 of the FEM (Overseas Investment) Regulations, 2022 deals with **the Financial commitment by Indian entity by modes other than equity capital–**

- (1) The Indian entity may lend or invest in any debt instrument issued by a foreign entity or extend non-fund based commitment to or on behalf of a foreign entity including overseas step down subsidiaries of such Indian entity subject to the following conditions within the financial commitment limit as prescribed in the Foreign Exchange Management (Overseas Investment) Rules, 2022:–
- (i) the Indian entity is eligible to make Overseas Direct Investment (ODI);
 - (ii) the Indian entity has made ODI in the foreign entity;
 - (iii) the Indian entity has acquired control in such foreign entity at the time of making such financial commitment.
- (2) The financial commitments under regulations 4, 5, 6 and 7 shall be reckoned towards the financial commitment limit referred to in sub-regulation (1).

Financial commitment by Indian entity by way of debt – Regulation 4 stated that **an Indian entity may lend or invest in any debt instruments** issued by a foreign entity subject to the

condition that such loans are duly backed by a loan agreement where the rate of interest shall be charged on an arm's length basis.

Explanation— For the purpose of this regulation, the expression “arm's length” means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

Financial commitment by way of guarantee – Regulation 5 states that-

- (1) The following guarantees may be issued to or on behalf of the foreign entity or any of its step down subsidiary in which the Indian entity has acquired control through the foreign entity, namely:-
 - (i) corporate or performance guarantee by such Indian entity;
 - (ii) corporate or performance guarantee by a group company of such Indian entity in India, being a holding company (which holds at least 51 per cent. stake in the Indian entity) or a subsidiary company (in which the Indian entity holds at least 51 per cent. stake) or a promoter group company, which is a body corporate;
 - (iii) personal guarantee by the resident individual promoter of such an Indian entity;
 - (iv) bank guarantee, which is backed by a counter-guarantee or collateral by the Indian entity or its group company as above, and issued, by a bank in India.
- (2) Where the guarantee is extended by a group company, it shall be counted towards the utilisation of its financial commitment limit independently and in case of a resident individual promoter, the same shall be counted towards the financial commitment limit of the Indian entity:

Provided that where the commitment under sub-regulation (1) is extended by a group company, any fund-based exposure to or from the Indian entity shall be deducted from the net worth of such group company for computing its financial commitment limit:

Provided further that where the guarantee under sub-regulation (1) is extended by a promoter, which is a body corporate or an individual, the Indian entity shall be a part of the promoter group.

Explanation – For the purposes of this sub-regulation, the expression “promoter group” shall have the meaning as assigned to it in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018.
- (3) No guarantee shall be open-ended.
- (4) The guarantee, to the extent of the amount invoked, shall cease to be a part of the non-fund based commitment but be considered as lending.
- (5) Where a guarantee has been extended jointly and severally by two or more Indian entities, 100 per cent. of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities.

- (6) In case of performance guarantee, 50 per cent. of the amount of guarantee shall be reckoned towards the financial commitment limit.
- (7) Roll-over of guarantee shall not be treated as fresh financial commitment where the amount on account of such roll-over does not exceed the amount of original guarantee.

Financial commitment by way of pledge or charge,— As per regulation 6, an Indian entity, which has made ODI by way of investment in equity capital in a foreign entity, may—

- (a) **pledge the equity capital of the foreign entity** in which it has made ODI or of its step down subsidiary outside India, held directly by the Indian entity in a foreign entity and indirectly in step down subsidiary, in favour of an AD bank or a public financial institution in India or an overseas lender, for availing fund based or non-fund based facilities for itself or for any foreign entity in which it has made ODI or its step down subsidiaries outside India or in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself;
- (b) **create charge** by way of mortgage, pledge, hypothecation or any other identical mode on—
 - (i) **its assets in India**, including the assets of its group company or associate company, promoter or director, in favour of an AD bank or a public financial institution in India or an overseas lender as security for availing of the fund based or non-fund based facility or both, for any foreign entity in which it has made ODI or for its step down subsidiary outside India; or
 - (ii) **the assets outside India of the foreign entity** in which it has made ODI or of its step down subsidiary outside India in favour of an AD bank in India or a public financial institution in India as security for availing of the fund based or non-fund based facility or both, for itself or any foreign entity in which it has made ODI or for its step down subsidiary outside India or in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself:

Provided that—

- (i) the **value of the pledge or charge or the amount of the facility, whichever is less**, shall be reckoned towards the financial commitment limit in force at the time of such pledge or charge provided such facility has not already been reckoned towards such limit and excluding cases where the facility has been availed by the Indian entity for itself;
- (ii) **overseas lender** in whose favour there is such a pledge or charge **shall not be from any country or jurisdiction in which financial commitment is not permissible** under the Foreign Exchange Management (Overseas Investment) Rules, 2022;
- (iii) the **creation or enforcement of such pledge or charge shall be in accordance with the provisions of the Act or rules or regulations** made or directions issued thereunder.

Explanation – For the purposes of this regulation–

- (i) the expression “public financial institution” shall have the same meaning as assigned to it under clause (72) of section 2 of the Companies Act, 2013 (18 of 2013);
- (ii) the “negative pledge” or “negative charge” created by an Indian entity or a bid bond guarantee obtained in accordance with these regulations for participation in a bidding or tender procedure for the acquisition of a foreign entity shall not be reckoned towards the financial commitment limit referred to in sub-regulation (1) of regulation 3.

Acquisition or transfer by way of deferred payment – As per Regulation 7-

- (1) Where a person resident in India acquires equity capital by way of subscription to an issue or by way of purchase from a person resident outside India or where a person resident outside India acquires equity capital by way of purchase from a person resident in India, and where such equity capital is reckoned as ODI, the payment of amount of consideration for the equity capital acquired may be deferred for such definite period from the date of the agreement as provided in such agreement subject to the following terms and conditions, namely:–

- (i) the foreign securities equivalent to the amount of total consideration shall be transferred or issued, as the case may be, upfront by the seller to the buyer;
- (ii) the full consideration finally paid shall be compliant with the applicable pricing guidelines:

Provided that the deferred part of the consideration in case of acquisition of equity capital of a foreign entity by a person resident in India shall be treated as non-fund based commitment.

- (2) The buyer may be indemnified by the seller up to such amount and be subject to such terms and conditions as may be mutually agreed upon and laid down in the agreement:

Provided that such agreement is in compliance with the provisions of the Act and the rules and regulations made thereunder.

Mode of payment. – Regulation 8 specifies that a person resident in India making Overseas Investment may make payment –

- (i) by remittance made through banking channels;
- (ii) from funds held in an account maintained in accordance with the provisions of the Act;
- (iii) by swap of securities;
- (iv) by using the proceeds of American Depository Receipts or Global Depository Receipts or stock swap of such receipts or external commercial borrowings raised in accordance with the provisions of the Act and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.

Obligations of person resident in India – In accordance with Regulation 9 following are the obligations of person resident in India:

- (1) A person resident in India acquiring equity capital in a foreign entity, which is reckoned as ODI, shall submit to the AD bank share certificates or any other relevant documents as per the applicable laws of the host country or the host jurisdiction, as the case may be, as an evidence of such investment in the foreign entity within six months from the date of effecting remittance or the date on which the dues to such person are capitalised or the date on which the amount due was allowed to be capitalised, as the case may be.
- (2) A person resident in India, through its designated AD bank, shall obtain a Unique Identification Number or "UIN" from the Reserve Bank for the foreign entity in which the ODI is intended to be made before sending outward remittance or acquisition of equity capital in a foreign entity, whichever is earlier.
- (3) A person resident in India making ODI shall designate an AD bank and route all transactions relating to a particular UIN through such AD:

Provided that where more than one person resident in India makes financial commitment in the same foreign entity, all such persons shall route all transactions relating to that UIN through the AD bank designated for that UIN.

- (4) A person resident in India having ODI in a foreign entity, wherever applicable, shall realise and repatriate to India, all dues receivable from the foreign entity with respect to investment in such foreign entity, the amount of consideration received on account of transfer or disinvestment of such ODI and the net realisable value of the assets on account of the liquidation of the foreign entity as per the laws of the host country or the host jurisdiction, as the case may be, within ninety days from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator.
- (5) A person resident in India who is eligible to make ODI may make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD bank for participation in bidding or tender procedure for the acquisition of a foreign entity:

Provided that in case of an open-ended bid bond guarantee, it shall be converted into a close-ended guarantee not later than three months from the date of award of the contract.

Reporting requirements for Overseas Investment– According to Regulation 10 following are the reporting requirements:

- (1) Unless otherwise provided in these regulations, all reporting by a person resident in India, as specified, shall be made through the designated AD bank in the manner provided in this regulation and in the format provided by the Reserve Bank.
- (2) A person resident in India who has made ODI or making financial commitment or undertaking disinvestment in a foreign entity shall report the following, namely:–

- (a) financial commitment, whether it is reckoned towards the financial commitment limit or not, at the time of sending outward remittance or making a financial commitment, whichever is earlier;
 - (b) disinvestment within thirty days of receipt of disinvestment proceeds; (c) restructuring within thirty days from the date of such restructuring.
- (3) A person resident in India other than a resident individual making any Overseas Portfolio Investment (OPI) or transferring such OPI by way of sale shall report such investment or transfer of investment within sixty days from the end of the half-year in which such investment or transfer is made as of September or March-end:

Provided that in case of OPI by way of acquisition of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme, the reporting shall be done by the office in India or branch of an overseas entity or a subsidiary in India of an overseas entity or the Indian entity in which the overseas entity has direct or indirect equity holding where the resident individual is an employee or director.

- (4) A person resident in India acquiring equity capital in a foreign entity which is reckoned as ODI, shall submit an Annual Performance Report (APR) with respect to each foreign entity every year by 31st December and where the accounting year of such foreign entity ends on 31st December, the APR shall be submitted by 31st December of the next year:

Provided that no such reporting shall be required where—

- (i) a person resident in India is holding less than 10 per cent. of the equity capital without control in the foreign entity and there is no other financial commitment other than by way of equity capital; or
- (ii) a foreign entity is under liquidation.

Explanation— For the purposes of this sub-regulation—

- (a) the APR shall be based on the audited financial statements of the foreign entity:

Provided that where the person resident in India does not have control in the foreign entity and the laws of the host country or host jurisdiction, as the case may be, do not provide for mandatory auditing of the books of accounts, the APR may be submitted based on unaudited financial statements certified as such by the statutory auditor of the Indian entity or by a chartered accountant where the statutory audit is not applicable;

- (b) in case more than one person resident in India have made ODI in the same foreign entity, the person holding the highest stake in the foreign entity shall be required to submit APR and in case of holdings being equal, APR may be filed jointly by such persons;

- (c) the person resident in India shall report the details regarding acquisition or setting up or winding up or transfer of a step down subsidiary or alteration in the shareholding pattern in the foreign entity during the reporting year in the APR.
- (5) An Indian entity which has made ODI shall submit an Annual Return on Foreign Liabilities and Assets within such time as may be decided by the Reserve Bank from time to time, to the Department of Statistics and Information Management, Reserve Bank of India.

Delay in reporting – According to regulation 11 following are the requirements to be complied with for delay in reporting:

- (1) A person resident in India who does not submit the evidence of investment within the time specified under sub-regulation (1) of regulation 9 or does not make any filing within the time specified under regulation 10, may make such submission or filing, as the case may be, along with Late Submission Fee within such period as may be advised, and at the rates and in the manner as may be directed by the Reserve Bank, from time to time:

Provided that such facility can be availed within a maximum period of three years from the due date of such submission or filing, as the case may be.

- (2) A person resident in India responsible for submitting the evidence or any filing relating to overseas investment in accordance with the Act or regulations made thereunder before the date of publication of these regulations in the Official Gazette and who has not made or does not make such submission or filing within the time specified thereunder, may make such submission or filing along with Late Submission Fee or make payment of Late Submission Fee where such submission or filing has been done, as the case may be, within such period as may be advised, and at the rates and in the manner as may be directed by the Reserve Bank, from time to time.

Provided that such facility can be availed within a maximum period of three years from the date of publication of these regulations in the Official Gazette.

Restriction on further financial commitment or transfer– Regulation 12 states of following restriction on financial commitment and transfer:

A person resident in India who has made a financial commitment in a foreign entity in accordance with the Act or rules or regulations made thereunder, shall not make any further financial commitment, whether fund-based or non-fund-based, directly or indirectly, towards such foreign entity or transfer such investment till any delay in reporting is regularised.

❖ **Export of goods and services (Section 7)**

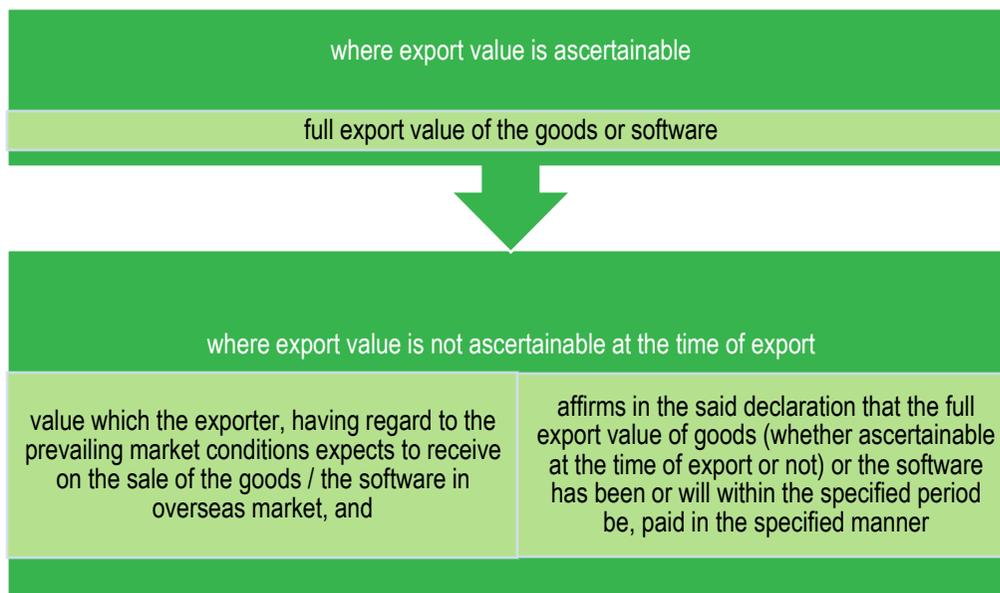
- (1) **Filing of declaration and other information:** Every exporter of goods shall-
- (a) Furnish declaration to the Reserve Bank / to such other authority in such form and manner as may be specified. It will be containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having

regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India,

- (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.
- (2) **Direction to exporter to comply with requirements for ensuring export value of goods:** The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.
- (3) **Submission of declaration in relation to payment for such services:** Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Regulations:

1. **Short title and commencement:** These Regulations may be called the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 w.e.f.12-1-2016.
2. **Definitions:- Some definitions:** In these Regulations, unless the context requires otherwise,
 - (i) **'export'** includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;
 - (ii) **'export value'** in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;
 - (iii) **'form'** means form annexed to these Regulations;
 - (iv) **'software'** means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium;
 - (v) **'specified authority'** means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;
3. **Declaration of exports: In case of exports taking place through Customs manual ports:** every exporter of goods or software in physical or any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority- a declaration in the forms set out in the Schedule with the support of evidence containing true and correct material particulars including the amount representing –



In respect of export of services to which none of the Forms specified in these Regulations apply: the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due /accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

4. Exemptions: Export of goods / software may be made without furnishing the declaration in the following cases, namely:

- (a) trade samples of goods and publicity material supplied free of payment;
- (b) personal effects of travellers, whether accompanied or unaccompanied;
- (c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
- (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value;
- (e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
- (ea) re-export of leased aircraft/helicopter and/or engines/auxiliary power units (APUs),

either completely or in partially knocked down condition re-possessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorisation (IDERA) holder under 'Cape Town Convention' or any other termination or cancellation of the lease agreement between the lessor and lessee subject to permission by DGCA/Ministry of Civil Aviation for such export/s.

- (f) goods imported free of cost on re-export basis;
- (g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:
 - (1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
 - (2) goods imported from foreign suppliers/collaborators on loan basis;
 - (3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.
- (ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs
- (h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.
- (i) goods sent outside India for testing subject to re-import into India;
- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.
- (k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

5. Indication of importer-exporter code number: The importer-exporter code number (allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992) shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and shall be used in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

6. **Authority to whom declaration is to be furnished and the manner of dealing with the declaration:**

Declaration in Form EDF	<ul style="list-style-type: none"> (i) It shall be submitted in duplicate to the Commissioner of Customs. (ii) After verification and authentication of the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank, and (iii) hand over the duplicate form to the exporter for being submitted to the authorised dealer.
Declaration in Form SOFTEX	<ul style="list-style-type: none"> (i) It shall be, in respect of export of computer software and audio/video/ television software, submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India. (ii) After certifying all three copies of the SOFTEX form, the designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. (iii) The triplicate shall be retained by the designated official for record.

Duplicate Declaration Forms to be retained with Authorised Dealers: On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

7. **Evidence in support of declaration:-**The Commissioner of Customs/ the postal authority/ the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –

- (a) the exporter is a person resident in India and has a place of business in India;
- (b) the destination stated on the declaration is the final place of the destination of the goods exported;
- (c) the value stated in the declaration represents –

- (i) the full export value of the goods or software; or
- (ii) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

Explanation—For the purpose of this regulation, 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

8. **Manner of payment of export value of goods:** Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

Explanation—For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

9. **Period within which export value of goods/software/ services to be realised:-**

- (1) **In ordinary case:** The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India **within nine months or within such period** as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided.

However, **where the goods are exported to a warehouse established outside India** with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within **fifteen months or within such period** as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods;

Extension of period: Further the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause, extend the said period.

- (2) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export.

Extension of period: Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period.

The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by above sub-regulation (2). Such a direction shall be given only when the unit has been given a reasonable opportunity to make a representation in the matter.

On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.

For the purpose of this regulation, the “date of export” in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

10. **Submission of export documents:** The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorised dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

11. **Transfer of documents:** An authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3):

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall –

- (a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or
- (b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

12. **Payment for the Export:** In respect of export of any goods / software for which a declaration is required to be furnished, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

- (i) that the payment for the goods or software is made otherwise than in the specified manner; or
- (ii) that the payment is delayed beyond the period specified under these Regulations; or
- (iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

- (iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

13. Certain Exports requiring prior approval: Exports under trade agreement/rupee credit etc.

- (i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.
- (ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

14. Delay in Receipt of Payment: Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

- (a) the payment therefor if the goods or software has been sold and
- (b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

15. Advance payment against exports:

- (1) **Where an exporter receives advance payment (with or without interest), from a buyer / third party** named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
 - (i) **the shipment of goods is made within one year** from the date of receipt of advance payment;
 - (ii) the rate of interest, if any, payable on the advance payment shall not exceed 100 basis points above the London Inter-Bank Offered Rate (LIBOR) or other applicable benchmark as may be directed by the Reserve Bank, as the case may be; and”
 - (iii) the documents covering the **shipment are routed through the authorised dealer** through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

- (2) **Exemption:** Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

16. Issue of directions by Reserve Bank in certain cases:

- (1) In relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters, the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely;
 - (a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order;
 - (b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to

such conditions as may be specified by the Reserve Bank by directions issued from time to time.

- (c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.
- (2) **Exception:** No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

17. Project exports:

- (1) **Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract,** the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.
- (2) **In case a guarantee is required to be given prior to post award approval,** the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements. Explanation:

For the purpose of this Regulation, 'approving authority' means the EXIM Bank of India or the authorised dealer.

❖ Realisation and repatriation of foreign exchange [Section 8]

Foreign Exchange is a common resource and has a vital impact on interest rates and inflation. The funds belong to the individual but the equivalent foreign exchange belongs to the Government of India. Therefore all foreign exchange should be realized, repatriated and surrendered to the Reserve Bank through Authorised Persons. Permitted amounts can be held as foreign currency as per the guidelines issued from time to time.

Where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Exemption from realisation and repatriation in certain cases [Section 9]

The provisions of sections 4 and 8 shall not apply to the following, namely:—

- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify

- (b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify
- (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
- (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;
- (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.



6 AUTHORISED PERSON [SECTION 10]

The term authorised person (AP) is defined under Section 2(c) of the Act to mean an authorised dealer, money changer, off-shore banking unit or any other person authorised to deal in foreign exchange or foreign securities.

Off Shore Banking Unit

An Off Shore Banking Unit means a branch of a bank in India, located in the Special Economic Zone. Although such an Off Shore Banking Unit may have a licence to operate as an Authorised Dealer, it shall not be regarded as an Authorised Dealer under Foreign Exchange Management Act, 1999.

An Off Shore Banking Unit shall NOT conduct any activity or undertake any transaction with residents in India. An Off Shore Banking Unit may undertake any transaction with any Authorised Dealer in India on Principal-to-Principal basis. Off Shore Banking Units are meant to facilitate units in Special Economic Zones and may undertake transactions in Foreign Exchange with a unit in the Special Economic Zone to the extent the latter is eligible to enter into or undertake such transactions.

Appointment of authorized person: The RBI has the power to appoint authorised person under Section 10 of the Act.

Appointment on application: Any person may be authorised by the Reserve Bank of India, on an application made to it in this behalf, **to deal in Foreign exchange or in foreign securities.** Such an authorised person may function as an authorised dealer, money changer or offshore banking unit or in any other manner as he deems fit.

Any such authorisation made by the RBI shall be in writing and shall be subject to the conditions laid down in the authorisation.

AP shall comply with the directions of the RBI : An authorized person must, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give. Also, except with the previous permission of the Reserve Bank, an authorized person may not engage in any transaction involving any foreign exchange or foreign security, which is not in conformity with the terms of his authorization.

AP may ask for declaration and information for carrying of any transaction on behalf of any person: Before commencement of any transactions in Foreign exchange on behalf of any person, an authorised person must insist that such person should make a declaration and give whatever information is required in order to satisfy him that the transaction will not involve and is not designed to contravene or evade the provisions of this Act or any Rule, Regulation, Notification, Direction, or order made under this Act.

In case of contravention/non-compliance of any requirement: If such person refuses to abide by such requirement or his compliance is not good enough, the authorised person shall refuse in writing to undertake the transaction. If the authorised person has reason to believe that any such contravention or evasion (as aforesaid) is contemplated by the other person, the authorised person shall report the matter to the Reserve Bank of India.

If any person, other than an authorized person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorized person

- Does not use it for such purpose or
- Does not surrender it to the authorized person within the specified period or
- Uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made there under

Such person shall be deemed to have committed contravention of the provisions of the Act.

Revocation of authorisation: Any authorisation given by the Reserve Bank of India may be revoked by it, at any time, if it is satisfied that: -

1. It is in public interest so to do, or
2. The authorised person has failed to comply with the conditions laid down in the authorisation.
3. The authorised person has contravened any of the provisions of this Act or any Rule, Regulation, Notification, Direction, or order made under this Act.

An authorisation shall not be revoked on grounds mentioned in 2 and 3 above, unless the authorised person has been given a reasonable opportunity of making a representation in.

❖ **Reserve Bank's powers to issue directions to authorised person [Section 11]**

In order to secure strict compliance with the provisions of this Act and of any Rules, Regulations, Notifications, or directions, the Reserve Bank may direct the authorised persons with regard to :

1. Matters pertaining to
 - (i) Making of payment; or
 - (ii) The doing or desisting from doing of any act relating to Foreign Exchange or foreign security.
2. Furnishing such information, in such manner, as it deems fit.

Penalty for Contravention of Directions by an Authorised Person

Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Note: The Authorized person shall be given a reasonable opportunity of being heard before imposing penalty.

Power of Reserve Bank to inspect authorised person [Section 12]

It shall appear to the Reserve Bank that it is necessary and expedient to cause an inspection of the business of any Authorised person. There upon, it may at any time specially authorize any officer, in writing to inspect such business, such an inspection may be made for the following purpose:-

1. **Verification of the correctness** of any statement, information, or particulars furnished to the Reserve Bank.
2. **Obtaining any information or particulars**, which such authorised person, has failed to furnish, on being called upon to do so.
3. **Securing compliance** with the provisions of this Act or of any Rules, Regulations, Directions, or orders made under the Act.

Every authorized person is duty-bound

- (i) to **produce** such books, accounts and other documents in his custody or power to the officer making the inspection, and
- (ii) to **furnish** any statement relating to the affairs of such person, company or firm.

In the **case of company or firm** it shall be the duty of **every director, partner or other officer** of such company or firm.



7. CONTRAVENTIONS AND PENALTIES IN BRIEF

Section No.	Contravention	Quantum of Penalty
Section 11	By Authorised person any direction by RBI or failure to file any return as directed by RBI	<ul style="list-style-type: none"> ➤ Upto ₹10,000. ➤ If continuing offence additional penalty upto ₹2,000 per day.
Section 13	Of any provision of the Act, or any rule, regulation, notification, direction or order or of any condition subject to which an authorization issued	<ul style="list-style-type: none"> ➤ Upto three times, the sum involved, if it is quantifiable. ➤ If not quantifiable upto ₹2 lacs. ➤ If continuing offence, further penalty upto ₹5,000 per day after first day.
Section 13(1A) and 13(1C)	Acquisition of any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A	<ul style="list-style-type: none"> ➤ Upto three times, the sum involved. ➤ confiscation of the value equivalent of foreign assets involved in contravention, situated in India. ➤ W.r.t contravention related to 13(1C), in addition to the penalty imposed above i.e. for 13(1A), Imprisonment upto 5 years and with a fine
Section 14	Failure to pay penalty as above <ul style="list-style-type: none"> – where demand is of an amount exceeding ₹1 crore. – in any other case 	Civil imprisonment. <ul style="list-style-type: none"> ➤ Upto 3 years ➤ Upto 6 months.

Any Adjudicating Authority adjudging any contravention under section 13(1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the person committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with directions made in this behalf.

Explanation: For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include:

- (a) deposits in a bank, where the said property is converted into such deposits;

- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property, which has resulted out of the conversion of that property.

❖ **Enforcement of the orders of Adjudicating Authority [Section 14]**

- (1) **In case of failure to make full payment of the penalty:** if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.
- (2) **Order of arrest and detention in civil prison:** No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied:
 - (a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred concealed, or removed any part of his property, or
 - (b) that the defaulter has or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to do so.
- (3) **Issue of warrant for the arrest of the defaulter:** a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.
- (4) **In case of absence pursuant to the notice served:** Where appearance is not made pursuant to a notice issued and served, the Adjudicating Authority may issue a warrant for the arrest of the defaulter.
- (5) Every person arrested in pursuance of a warrant of arrest shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey);

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Default by HUF: Where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.
- (6) Where a defaulter appears before the Adjudicating Authority pursuant to a notice, the Adjudicating Authority shall give the defaulter an opportunity showing cause when he should not be committed to the civil prison.

- (7) **In case of pending of an inquiry:** the adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.
- (8) **Upon the conclusion of the inquiry:** the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:
- (9) **Upon satisfaction of arrears:** Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the adjudicating authority for his appearance at the expiration of the specified period if the arrears are not satisfied.
- (10) **Order of release:** When the Adjudicating Authority does not make an order of detention, he shall, if the defaulter is under arrest, direct his release.
- (11) Every person detained in the civil prison in execution of the certificate may be so detained:
- (a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and
 - (b) in any other case, up to six months:
- Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.
- (12) **Defaulter liable for payment of arrears:** A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.
- (13) **Execution of detention order:** A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973.

❖ **Power to recover arrears of penalty [Section 14A]**

- (1) **An officer of Enforcement to recover any arrears of penalty:** The Adjudicating Authority may, by order in writing, authorise an officer of Enforcement (not below the rank of Assistant Director) to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.
- (2) **Powers:** The officer of Enforcement, shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the

procedure laid down under the Second Schedule to the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.

8. COMPOUNDING OF OFFENCES

Compounding Authority: Persons authorized by Central Government under section 15 i.e. classes of officers of the Enforcement Directorate and classes of officers of the RBI can act as Compounding Authority.

According to section 15:

- (1) **Period of compounding of an offence:** Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within **one hundred and eighty days from the date of receipt of application** by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as prescribed under the Foreign Exchange (Compounding Proceedings) Rules, 2000.
- (2) **In case of compounding, no proceeding may be initiated:** Where a contravention has been compounded, no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

Case Law: In *Sterlite Industries (India) Ltd. v. Special Director of Enforcement, Mumbai*, it laid down that once a contravention has been compounded under section 15(1), no proceeding or further proceeding, as case may be, shall be initiated or continued, against person committing contravention.

9. ADJUDICATION AND APPEAL

Time limits

Section No.	Obligation	Time Limit
Section 14	Full penalty to be paid	Within 90 days from the date on which notice for payment of penalty is served.
Section 15	Compounding of Contravention under section 13	Within 180 days of receipt of application by Directorate of Enforcement or RBI
Section 16	Complaint under section 16(1) to be dealt by Adjudicated Authority	Within 1 year of receipt of complaint.
Section 17	Appeal to Special Director (Appeals)	Within 45 days from receipt of order.

Section 19	Appeal to Appellate Tribunal	Within 45 days from receipt of order.
Section 19(5)	Appeal to be dealt with by Appellate Tribunal	Will try to dispose off the appeal within 180 days from receipt of appeal.
Section 35	Appeal to High Court	Within 60 days of communication of order or decision.

❖ Appointment of Adjudicating Authority

For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. [Section 16 (1)]

Adjudicating Authority shall hold an enquiry upon a complaint in writing made by any officer authorized by a general or special order by the Central Government [Section 16(3)]

Every Adjudicating Authority shall deal with the complaint as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period. [Section 16 (6)]

❖ Appeal to Special Director (Appeals)

- (1) The Central Government shall, by notification, **appoint one or more Special Directors (Appeals)** to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction. [Section 17(1)]
- (2) Any **person aggrieved** by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, **may prefer an appeal** of the Special Director (Appeals). [Section 17(2)]
- (3) Every appeal shall be **filed within forty-five days** from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. [Section 17(3)]

- (4) The Special Director (Appeals) may **entertain an appeal after the expiry of the said period** of forty-five days, if he is satisfied that there was **sufficient cause** for not filing it within that period.

❖ **Appeal to Appellate Tribunal [Section 18]**

The Appellate Tribunal constituted under section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (SAFEMA) shall be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act [Section 18].

The Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal [Section 19(1)]. Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government. [Section 19(2)]. Where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.[Section 19(5)]

❖ **Appeal to High Court (Section 35)**

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation: In this section “High Court” means:

- (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.



10. DIRECTORATE OF ENFORCEMENT

❖ **Directorate of Enforcement (Section 36)**

- (1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

- (2) The Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.
- (3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

Power of search and seizure: The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13. [Section 37(1)]

❖ **Empowering other officers (Section 38)**

- (1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.
- (2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961, subject to such conditions and limitations as the Central Government may impose.

11. MISCELLANEOUS

❖ **Presentation as to documents in certain cases [Section 39]**

Where any document:

- (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or
- (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person, such document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall:
 - (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

- (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
- (c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.

❖ **Suspension of operation of this Act [Section 40]**

- (1) If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expending so to do in public interest, the Central Government may, by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act.
- (2) Where the operation of any provision of this Act has under sub-section (1) been suspended or relaxed indefinitely, such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification.
- (3) Every notification issued under this section shall be laid, as soon as may be after it issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

❖ **Power of Central Government to give directions [Section 41]**

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve bank such general or special directions as it thinks fit, and the Reserve bank shall, in the discharge of its functions under this Act, comply with any such directions.

❖ **Contravention by companies [Section 42]**

- (1) **Where a person committing a contravention any of the provisions of this Act or of any rule, direction or order made thereunder is a company**, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly [Sub-section (1)].

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

- (2) **Where contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company** and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purpose of this Section—

- (i) “Company” means anybody corporate and includes a firm or other association of individuals; and
- (ii) “Director” in relation to a firm, means a partner in the firm.

❖ **Death or insolvency in certain cases [Section 43]**

Any right, obligation, liability, proceedings or appeal arising in relation to the provision of section 13 shall not abate by reason of death or insolvency of the person liable under that section and upon such death or insolvency such rights and obligations shall devolve on the legal representative of such person or the official receiver or the official assignee, as the case may be:

Provided that a legal representative of the deceased shall be liable only to the extent of the inheritance or estate of the deceased.

❖ **Bar Legal proceedings [Section 44]**

No suit, prosecution or other legal proceeding shall lie against the Central Government or the Reserve Bank or any officer of that Government or of the Reserve Bank or other person exercising any power or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule, regulation, notification, direction or order made thereunder.

Students may note that though they are not expected to know the details of all the Rules/Regulations/Clarifications/Notifications issued by various authorities from time to time. However, they should familiarise with such Notifications and other significant rules/regulations having a bearing on such provisions of the Act and which are covered as part of the Study Material and Revision Test Papers published from time to time.

TEST YOUR KNOWLEDGE**Multiple Choice Questions**

1. *In September, 2020, Mr. Purshottam Saha visited Atlanta as well as Athens and thereafter, London and Berlin on a month-long business trip, for which he withdrew foreign exchange to the extent of US\$ 50,000 from his banker State Bank of India, New Delhi branch. In December, 2020 he further, withdrew US\$ 50,000 from SBI and remitted the same to his son Raviyansh Saha who was studying in Toronto, Canada. In the first week of January, 2021, he sent his ailing mother Mrs. Savita Saha for a specialised treatment along with his wife Mrs. Rashmi Saha to Seattle where his younger brother Pranav Saha, holder of Green Card, is residing. For the purpose of his mother's treatment and to help Pranav Saha to meet increased expenses, he requested his banker SBI to remit US\$ 75,000 to Pranav Saha's account maintained with Citibank, Seattle. In February, 2021, Mr. Purshottam Saha's daughter Devanshi Saha got engaged and she opted for a 'destination marriage' to be held in August, 2021 in Zurich, Switzerland. While on a trip to Dubai in the last week of March, 2021, he again withdrew US\$ 35,000 to be used by him and Devanshi Saha for meeting various trip expenses including shopping in Dubai. Later, the event manager gave an estimate of US\$ 2,50,000 for the wedding of Devanshi Saha at Zurich, Switzerland. Which option do you think is the correct one in the light of applicable provisions of Foreign Exchange Management Act, 1999 including obtaining of prior approval, if any, from Reserve Bank of India since Mr. Purshottam Saha withdrew foreign exchange on various occasions from his banker State Bank of India.*
 - (a) *In respect of withdrawal of foreign exchange on various occasions from his banker State Bank of India and remitting the same outside India during the financial year 2020-21, Mr. Purshottam Saha is not required to obtain any prior approval.*
 - (b) *In respect of withdrawal of US\$ 35,000 in the last week of March, 2021, for a trip to Dubai, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India since the maximum amount of foreign exchange that can be withdrawn in a financial year is US\$ 1,75,000.*
 - (c) *After withdrawing US\$ 1,00,000, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India for the remaining remittances made during the financial year 2020-21, otherwise SBI would not have permitted further withdrawals.*
 - (d) *After withdrawing US\$ 50,000, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India for the remaining remittances made during the financial year 2020-21, otherwise SBI would not have permitted further withdrawals.*
2. *M/s. Kedhar Sports Academy, a private coaching club, provides coaching for cricket, football and other similar sports. It coaches sports aspirants pan India. It also conducts various sports events and campaigns, across the country. In 2022, to mark the 25th year of its operation, a*

cricket tournament (akin to the format of T-20) is being organized by M/s. Kedhar Sports Academy in Lancashire, England, in the first half of April. The prize money for the 'winning team' is fixed at USD 40,000 whereas in case of 'runner-up', it is pegged at USD 11,000. You are required to choose the correct option from the four given below which signifies the steps to be taken by M/s. Kedhar Sports Academy for remittance of the prize money of USD 51,000 (i.e. USD 40,000+USD 11,000) to England keeping in view the relevant provisions of Foreign Exchange Management Act, 1999:

- (a) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Ministry of Human Resource Development (Department of Youth Affairs and Sports).
 - (b) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Reserve Bank of India.
 - (c) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is not required to obtain any prior permission from any authority, whatsoever, and it can proceed to make the remittance.
 - (d) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Ministry of Finance (Department of Economic Affairs).
3. Akash Ceramics Limited, an Indian company, holds a commercial plot in Chennai which it intends to sell. M/s. Super Seller, a real estate broker with its Head Office in the USA, has been appointed by Akash Ceramics Limited to find some suitable buyers for the said commercial plot in Chennai which is situated at a prime location. M/s. Super Seller identifies Glory Estate Inc., based out of USA, as the potential buyer. It is to be noted that Glory Estate Inc. is controlled from India and hence, is a 'Person Resident in India' under the applicable provisions of Foreign Exchange Management Act, 1999. A deal is finalised and Glory Estate Inc. agrees to purchase the commercial plot for USD 600,000 (assuming 1 USD = ₹70). According to the agreement, Akash Ceramics Limited is required to pay commission @ 7% of the sale proceeds to M/s. Super Seller for arranging the sale of commercial plot to Glory Estate Inc. and commission is to be remitted in USD to the Head Office of M/s. Super Seller located in USA. Considering the relevant provisions of Foreign Exchange Management Act, 1999, which statement out of the four given below is correct (ignoring TDS implications arising under the Income-tax Act, 1961):
- (a) There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of commission upto USD 25,000 by Akash Ceramics Limited to M/s. Super Seller but for the balance commission of USD 17,000, prior permission of RBI is required to be obtained.
 - (b) There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of commission upto USD 30,000 by Akash Ceramics Limited to M/s. Super

Seller but for the balance commission of USD 12,000, prior permission of RBI is required to be obtained.

- (c) *There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of entire commission of USD 42,000 by Akash Ceramics Limited to M/s. Super Seller.*
 - (d) *It is mandatory to obtain prior permission of Reserve Bank of India (RBI) for remittance of entire commission of USD 42,000 by Akash Ceramics Limited to M/s. Super Seller.*
4. *Mr. Raman, a non-resident Indian, has a Systematic Investment Plan (SIP) with a prominent Indian mutual fund. Due to some impending financial difficulties, he requested his elder brother Mr. Raghav, a resident Indian currently working as Manager in a multi-national company at Mumbai, to make payment of a few subsequent instalments of SIP on his behalf. Which option, do you think, correctly signifies whether Mr. Raghav is permitted to undertake such transaction of paying a few instalments of SIP on behalf of his nonresident brother considering the applicable provisions of the Foreign Exchange Management Act, 1999:*
- (a) *Mr. Raghav is not permitted to undertake such transaction of paying a few instalments of SIP on behalf of his non-resident brother since it amounts to payment for the credit of a nonresident person.*
 - (b) *Mr. Raghav is permitted to undertake such transaction of paying a few instalments of SIP on behalf of his non-resident brother since Mr. Raman is his real brother.*
 - (c) *Mr. Raghav is permitted to undertake such transaction of paying a few instalments of SIP on behalf of his non-resident brother only if his employer permits.*
 - (d) *Mr. Raghav is permitted to undertake such transaction of paying a few instalments of SIP on behalf of his non-resident brother only if he obtains prior permission of Reserve Bank of India.*
5. *Mohita Periodicals and Mags Publications Limited, having registered office in Chennai, has obtained consultancy services from an entity based in France for setting up a software programme to strengthen various aspects relating to publications. The consideration for such consultancy services is required to be paid in foreign currency. The compliance officer of Mohita Periodicals and Mags Publications Limited, Mrs. Ritika requires your advice regarding the foreign exchange that can be remitted for the purpose of obtaining consultancy services from abroad without prior approval of Reserve Bank of India. Out of the following four options, choose the one which correctly portrays the amount of foreign exchange remittable for the given purpose after considering the provisions of the Foreign Exchange Management Act, 1999 and regulations made thereunder:*

- (a) *Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 50,000,000.*
 - (b) *Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 10,000,000.*
 - (c) *Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 5,000,000.*
 - (d) *Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 1,000,000.*
6. *After five years of stay in USA, Mr. Umesh came to India at his paternal place in New Delhi on October 25, 2019, for the purpose of conducting business with his two younger brothers Rajesh and Somesh and contributed a sum of ` 10,00,000 as his capital. Simultaneously, Mr. Umesh also started a proprietary business of selling artistic brassware, jewelry, etc. procured directly from the manufacturers based at Moradabad. Within a period of two months after his arrival from USA, Mr. Umesh established a branch of his proprietary business at Minnesota, USA. You are required choose the appropriate option with respect to residential status of Mr. Umesh and his branch for the financial year 2020-21 after considering the applicable provisions of the Foreign Exchange Management Act, 1999:*
- (a) *For the financial year 2020-21, Mr. Umesh and his branch established at Minnesota, USA, are both persons resident outside India.*
 - (b) *For the financial year 2020-21, Mr. Umesh is a resident in India but his branch established at Minnesota, USA, is a person resident outside India.*
 - (c) *For the financial year 2020-21, Mr. Umesh and his branch established at Minnesota, USA, are both persons resident in India.*
 - (d) *For the financial year 2020-21, Mr. Umesh is a person resident outside India but his branch established at Minnesota, USA, is a person resident in India.*

Descriptive Questions

1. *'Printex Computer' is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under the FEMA, 1999 of printer units in Pune and that of Dubai branch?*

2. Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:
 - (i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
 - (ii) US Dollar 100,000 for sending a cultural troupe on a tour of U.S.A.Advise him whether he can get Foreign Exchange and if so, under what conditions?
3. State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:
 - (i) X, a Film Star, wants to perform along with associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.
 - (ii) R wants to get his heart surgery done at United Kingdom. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?
4. Referring to the provisions of the Foreign Exchange Management Act, 1999, examine whether V, an exporter is bound to make declaration of a gift of Jewellery valued at ` 20,000 exported from India to United Kingdom.
5. Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:
 - (i) M requires U.S. \$ 5,000 for remittance towards hiring charges of transponders.
 - (ii) P requires U.S. \$ 2,000 for payment related to call back services of telephones.
6. Suresh resided in India during the Financial Year 2013-14. He left India on 15th July, 2014 for Switzerland for pursuing higher studies in Biotechnology for 2 years. What would be his residential status under the Foreign Exchange Management Act, 1999 during the Financial Years 2014-15 and 2015-16?

Mr. Suresh requires every year USD 25,000 towards tuition fees and USD 30,000 for incidental and stay expenses for studying abroad. Is it possible for Mr. Suresh to get the required Foreign Exchange and, if so, under what conditions?
7.
 - (i) Mr. P has won a big lottery and wants to remit US Dollar 20,000 out of his winnings to his son who is in USA. Advise whether such remittance is possible under the Foreign Exchange Management Act, 1999.
 - (ii) Mr. Z is unwell and would like to have a kidney transplant done in USA. He would like to know the formalities required and the amount that can be drawn as foreign exchange for the medical treatment abroad.
8. Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

- (A) US\$ 120,000 for studies abroad on the basis of estimates given by the foreign university.
 (B) Gift Remittance amounting US\$ 10,000.

Advise him whether he can get Foreign Exchange and if so, under what condition(s)?

ANSWERS

Answer to Multiple Choice Questions

1.	a	2.	c	3.	d	4.	a	5.	d
6.	c								

Answer to Descriptive Questions

1. Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)]. Section 2 (u) defines 'person' under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly, Printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned, is controlled by the Printer unit in Pune which is a person resident in India. Hence, the Dubai Branch is a person resident in India.

2. Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.
- (i) In respect of item No.(i), i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Sane can not withdraw Foreign Exchange for this purpose.
- (ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

Hence, in respect of item (ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

3. Approval to the following transactions under FEMA, 1999:

- (i) Foreign Exchange draws for cultural tours require prior permission/approval of the Ministry of Human Resources Development (Department of Education and Culture) irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the said Ministry of the Government of India.
- (ii) Individuals can avail of foreign exchange facility within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the expenses requires an approval from RBI. However in connection with medical treatment abroad, no approval of the Reserve Bank of India is required. Therefore, R can draw foreign exchange up to amount estimated by a medical institute offering treatment.

- 4.** In accordance with provisions of the FEMA, 1999 as contained in section 7 read with section 8, an exporter shall make appropriate declaration of the value of the goods being exported and he is also required to repatriate the foreign exchange due to India in respect of such exports to India in the manner within the time as may be prescribed. Under section 8, the exporter is under an obligation to realise and repatriate to India such foreign. However, if there is an delay in the receipt of export, it will not be a violation which shall be punishable. Section 8 applies to a resident who shall take all the reasonable steps, depending upon the individual case.

There are certain categories of export for which declaration need not be made. These are given under the Regulation 4 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015. According to the regulation, export of goods by way of gift shall be accompanied by a declaration / undertaking by the exporter confirming that they are not more than five lakh rupees in value. Taking into consideration the above, since the value of gift of jewellery to V's friend in the United Kingdom is less than ` 5 lac in value, declaration (as per the format specified in the regulations) is not required to be furnished by the exporter to the specified authority.

- 5.** Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are freely permitted transactions and some others are prohibited transactions. Accordingly,
- (i) It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.

(ii) Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P cannot obtain US \$ 2,000 for the said purpose.

6. **Residential Status:** According to section 2(v) of the Foreign Exchange Management Act, 1999, 'Person resident in India' means a person residing in India for more than 182 days during the course of preceding financial year [Section 2(v)(i)]. However, it does not include a person who has gone out of India or who stays outside India for employment outside India or for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Generally, a student goes out of India for a certain period. In this case, Mr. Suresh who resided in India during the financial year 2013-14 left on 15.7.2014 for Switzerland for pursuing higher studies in Biotechnology for 2 years, he will be resident as he has gone to stay outside India for a 'certain period' RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

Mr. Suresh will be treated as person resident in India for Financial Year 2014-2015 till 16th July 2014 and from 17th July 2014, he will be considered as person resident outside India.

However, during the Financial Year 2015-2016, Mr. Suresh will be considered as person resident outside India as he left India on 15th July 2014.

Foreign Exchange for studies abroad: According to Para I of Schedule III to Foreign Exchange Management (Current Account Transactions), Amendment Rule, 2015 dated 26th May, 2015, individuals can avail of foreign exchange facility for the studies abroad within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit shall require prior approval of the RBI. Further proviso to Para I of Schedule III states that individual may be allowed remittances (without seeking prior approval of the RBI) exceeding USD 2,50,000 based on the estimate received from the institution abroad. In this case the foreign exchange required is only USD 55,000 per academic year and hence approval of RBI is not required.

7. **Remittance of Foreign Exchange (Section 5 of the Foreign Exchange Management Act, 1999):** According to section 5 of the FEMA, 1999, any person may sell or draw foreign exchange to or from an authorized person if such a sale or drawal is a current account transaction. Provided that Central Government may, in public interest and in consultation with the reserve bank, impose such reasonable restrictions for current account transactions as may be prescribed.

As per the rules, drawal of foreign exchange for current account transactions are categorized under three headings-

1. Transactions for which drawal of foreign exchange is prohibited,
2. Transactions which need prior approval of appropriate government of India for drawal of foreign exchange, and

3. Transactions which require RBI's prior approval for drawl of foreign exchange.
- (i) Mr. P wanted to remit US Dollar 20,000 out of his lottery winnings to his son residing in USA. Such remittance is prohibited and the same is included in the Foreign Exchange Management (Current Account Transactions) Rules, 2000.
Hence Mr. P cannot withdraw foreign exchange for this purpose.
 - (ii) "Remittance of foreign exchange for medical treatment abroad" requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 250,000. The Schedule also prescribes that for the purpose of expenses in connection with medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by a medical institute offering treatment.

Therefore, Mr. Z can draw foreign exchange up to the USD 250,000 and no prior permission/ approval of RBI will be required. For amount exceeding the above limit, authorised dealers may release foreign exchange based on the estimate from the doctor in India or hospital or doctor abroad.

- 8 (A) **Remittance of Foreign Exchange for studies abroad:** Foreign exchange may be released for studies abroad up to a limit of US \$ 250,000 for the studies abroad without any permission from the RBI. Above this limit, RBI's prior approval is required. Further proviso to Para I of Schedule III states that individual may be allowed remittances exceeding USD 250,000 based on the estimate received from the institution abroad. In this case since US \$ 120,000 is the drawal of foreign exchange, so permission of the RBI is not required.
- (B) **Gift remittance exceeding US \$ 10,000:** Under the provisions of Section 5 of FEMA 1999, certain Rules have been made for drawal of foreign exchange for current account transactions. Gift remittance is a current account transaction. Gift remittance exceeding US \$ 250,000 can be made after obtaining prior approval of the RBI. In the present case, since the amount to be gifted by an individual, Mr. Rohan is USD 10,000, there is no need for any permission from the RBI.

