

## MOST IMPORTANT QUESTIONS FOR CA INTER CORPORATE & OTHER LAWS

### CHAPTER 3 – THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

#### RESIDENTIAL STATUS

##### Question 1A

'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?

##### Answer

Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)].

##### Section 2(u): Person

The definition of person includes any BRANCH, OFFICE or AGENCY owned or controlled by a person.

##### Section 2(v): Person Resident in India (PRI)

Person Resident in India (PRI) includes: -

- (i) Any person or body corporate registered or incorporated in India,
- (ii) A BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India,
- (iii) A BRANCH, OFFICE or AGENCY outside India owned or controlled by 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.

##### Question 1B

Mr. Ram had resided in India during the Financial Year 2020-2021 for less than 183 days. He again came to India on 1st May 2021 for higher studies and business and stayed upto 15th July, 2022. State under the FEMA, 1999.

- (i) If Mr. Ram can be considered 'person Resident in India' during the Financial year 2021-2022 and
- (ii) Is citizenship relevant for determining such a status?

##### Answer

##### Section 2(v): Person Resident in India (PRI)

A person residing in India for more than 182 days during the course of the preceding financial 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;

### Answer (i)

Individual resides more than 182 days in India in the Previous Year.

(a) If he goes out of India for Employment, business vocation & uncertain period, then he will be considered as PRO from that date.

(b) If he comes to India otherwise than for Employment, business vocation & uncertain period, then he will be considered as PRO from that date.

Mr. Ram CANNOT be considered 'Person resident in India' during the financial year 2021-2022 notwithstanding the purpose or duration of his stay in India during 2021-2022. An individual has to be present in India for more than 182 days in the preceding financial year. Mr. Ram does not satisfy this condition for the financial year 2021-2022.

### Answer (ii)

**NO.** Citizenship is no more relevant for determining the status.

### Question 1C

Miss Diana is an airhostess with the British Airways. She flies for 12 days in a month and thereafter a break for 18 days. During the break, she is accommodated of 'base', which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai.

During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

### Answer

**Section 2(v): Person Resident in India (PRI)**

PRI is a person residing in India for more than 182 days during the course of the preceding financial year.

The word used is "resides" and not "stays" unlike the old FERA act. Resides indicates permanent place of living, whereas stay is temporary.

Miss Diana stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. The issue here is whether staying can be considered 'residing'. FEMA emphasises 'residing'. 'Stay' is temporary, while 'residing' denotes permanency.

Thus, while Miss Diana may have stayed in India for more than 182 days, it is doubtful whether she can be said to have 'resided' in India for more than 182 days

Further under section 2(v)(a), she would become resident only if she has come to or stayed in India for employment. It would be doubtful and debatable, whether by staying at Mumbai base during the break, Miss Diana can be said to have come to stay in India for or on taking up employment. **Hence Miss Diana would continue to be PROI [Person Resident outside India].**

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

## CURRENT ACCOUNT TRANSACTIONS

### Question 2A

Explain the meaning of the term "Current Account Transaction" and the right of a citizen to obtain Foreign Exchange under the Foreign Exchange Management Act, 1999.

### Answer

#### Section 2(j): Current Account Transaction

It means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes-

1. Payments due in connection with foreign trade (Import-Export), other current business, services, and short-term banking and credit facilities [Buyer's Credit] in the ordinary course of business,
2. Payments due as interest on loans and as net income from investments,
3. Remittances for living expenses of parents, spouse and children residing abroad, and
4. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

#### Section 5: Permissible Current Account Transaction

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

Provided that the CG may, in public interest and in consultation with the RBI, impose reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

#### Section 6: Permissible Capital Account Transaction

Subject to the restrictions imposed under Sec 6(2) & 6(2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

## CURRENT ACCOUNT TRANSACTIONS – PROHIBITED/PERMISSIBLE

### Question 2B

An Indian National desire to obtain Foreign Exchange on current account transactions for the following purposes:

- a) He requires U.S. \$ 2,000 for payment related to call back services of telephones.
- b) Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw Foreign Exchange.

- c) Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company.
- d) Payment of US \$10,000 as commission on exports under Rupee State Credit Route.
- e) X, a Film Star, wants to perform alongwith 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.
- f) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?
- g) F wants to draw US \$ 30,000 for a business trip to U.K.
- h) He requires U.S. \$ 5,000 for Remittance of hiring charges of transponders.
- i) Mr. C wants US Dollar 10,000 for remitting as commission to his agent in U.S.A. for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. C by way of foreign currency inward remittance amounting to US Dollar 1,00,000.
- j) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.
- k) Mr. A wants to make a Remittance of US \$ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.
- l) Rohan wants to make a Gift Remittance abroad amounting US\$ 10,000.
- m) 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.
- n) Mr. B wants to make a Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.

Advise whether he/ they can obtain Foreign Exchange and, if so, under what conditions?

### **Answer**

The Answers are based on: -

- (a) Section 5: Current Account Transaction and
- (b) FEM (Current Account Transaction) Rules, 2000

#### **(a) Rule 3: Schedule I: Prohibited Transactions**

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

#### **(b) Rule 3: Prohibited Transactions**

Drawal of foreign exchange by any person is prohibited for a travel to Nepal or Bhutan. Hence Mr. Ramesh CANNOT withdraw Foreign Exchange for this purpose.

#### **(c) Rule 3: Schedule I: Prohibited Transactions**

Payment of Commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited. Thus, he cannot obtain the foreign exchange for commission on export for equity investment as it is prohibited.

**(d) Rule 3: Schedule I: Prohibited Transactions**

Payment of commission on exports under Rupee State Credit Route, is prohibited.

**(e) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.**

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.

**(f) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.**

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 needed, if it is required by the Medical institute offering treatment.

Therefore, R can draw foreign exchange up to amount estimated by a medical institute offering treatment.

**(g) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.**

Foreign Exchange for business trip upto USD 2,50,000 can be obtained by any individual. If a person wants to exceed this limit, then prior permission of RBI is required.

As the amount required is less than US \$ 2,50,000, Mr. F can obtain the foreign exchange without obtaining the permission of RBI.

**(h) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.**

Drawal of foreign exchange for remittance of hiring charges of transponder by TV Channels, can be made with the prior approval of the Central Government (Ministry of Information and Broadcasting). However, approval will not be required if the payment is made out of funds held in Resident Foreign Currency Account or Exchange Earner's Foreign Currency Account of the remitter. He can obtain any amount of foreign exchange for hiring charges of transponder after prior approval of Central Government (Ministry of Information and Broadcasting).

**(i) Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit.**

RBI approval is needed if Commission to agents abroad for sale of residential flats or commercial plots in India exceeds Higher of: -

(a) USD 25,000 or

(b) 5% of the inward remittance. (5% of USD 1,00,000 = USD 5,000)

As the amount to be remitted is only USD 10,000 (Lower than USD 25,000), RBI approval is NOT needed.

**(j) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.**

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 studies abroad, no approval of the Reserve Bank of India is needed, if it is required by the educational institution.

Therefore, L can draw foreign exchange for pursuing a course in fashion design in Paris up to amount estimated by the institute offering the course.

**(k) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.**

Remittance of prize money exceeding US\$ 1,00,000 for sports activity abroad other than International.

National or State level body will require the prior permission of the C.G. (Ministry of HRD - Department of Youth Affairs and Sports).

As the amount involved is more than US\$ 1,00,000 and Mr. A is not an International, National or State level body, he has to obtain the permission of the C.G. before remitting the prize money of US\$ 2.00,000.

**(L) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.**

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 US \$10,000, there is no need for any permission from the RBI.

**(m) Rule 3: Schedule I: Prohibited Transactions**

Remittance out of lottery winnings is a prohibited transaction under Schedule 1.

Hence Mr. P cannot withdraw foreign exchange for this purpose.

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**(n) Rule 3: Prohibited Transactions**

Drawal of foreign exchange by any person is prohibited for a transaction with a person resident in Nepal or Bhutan.

Hence Mr. B CANNOT withdraw Foreign Exchange for this purpose.

**Question 2C**

ABC Limited hired the services of Mr. Taylor, a technician from Germany for the installation of a machinery. The company paid USD 40,000 for the services rendered by Mr. Taylor. Examine under the FEMA, 1999, whether payment of remuneration to foreign technician Mr. Taylor is a permissible transaction under the provisions of the said Act.

**Answer**

**Section 5: Current Account Transaction**

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

Provided that the CG may, in public interest and in consultation with the RBI, impose reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

If the transaction is not listed in any of the above 3 schedules, it can be undertaken without any approval.

Hiring of foreign national as technicians is permissible without restriction. There is no ceiling on salary which can be paid as per contract. Their salary can be remitted abroad after-tax

deductions, contribution to provident fund and other deductions at source.

### Question 2D

Under the auspices of the Foreign Exchange Management Act, 1999, (the Act) examine whether the given situations fall under "Current Account Transactions" or not as defined in the Act?

- (i) Mr. S, a resident in India, imports machinery from a vendor in UK for installing in his factory.
- (ii) An Indian resident, imports machinery from a vendor in US for installing in his factory on a credit period of 3 months.
- (iii) An Indian resident, transfers US\$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian Bank account to the NRI brother's Bank account in New York.

### Answer

#### Section 2(j): Current Account Transaction

It means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes.

1. Payments due in connection with foreign trade (Import-Export), other current business, services, and short-term banking and credit facilities (Buyer's Credit) in the ordinary course of business,
2. Payments due as interest on loans and as net income from investments,
3. Remittances for living expenses of parents, spouse and children residing abroad, and
4. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

#### Answer (i)

An Indian resident imports machinery from a vendor in UK for installing in his factory. As per 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 owes anything in the other country.

Hence it is a **Current Account Transaction**.

#### Answer (ii)

An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. Under FEMA, it is a liability outside India. However, under definition of Current Account Transaction (Section 2), "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 a **Current Account Transaction**.

#### Answer (iii)

An Indian resident transfer US\$ 1,000 to his NRI brother in New York as "gift". The funds are from resident's Indian bank account to the NRI brother's bank account in New York. As per FEMA once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA transaction is over.

Hence it is a **Current Account Transaction**.

### Question 2E

Lifesys Limited, a billion-dollar, Indian company wishes to create a chair in a reputed university in the U.S. This chair is for the department of computer science. The company wishes to obtain your advice in regard to the following with reference to the FEMA, 1999.

- (i) Is such "chair" creation permissible?
- (ii) What is the maximum amount that can be denoted for such chair?
- (iii) Any formalities to be complied with?

### Answer

#### **Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit**

The following remittances exceeding the limits mentioned below shall require **prior approval of the RBI.**

#### **Donations exceeding Lower of -**

- (a) 1% of their foreign exchange earnings during the previous 3 financial years or
- (b) USD 5,000,000 for-
  - creation of Chairs (Paying faculty's salary) in reputed educational institutes,
  - contribution to funds (not being an investment fund) promoted by educational institutes; and
  - contribution to a technical institution or body or association in the field of activity of the donor Company.

#### **Answer (i)**

In the first case, "chair" creation for the department of computer science in reputed university in the U.S. is permissible.

#### **Answer (ii)**

Maximum amount that can be donated for such chair will be 1% of their foreign exchange earnings during the previous 3 financial years or USD 5,000,000, whichever is less without prior approval of the

#### **Answer (iii)**

In case where donations exceed 1% of their foreign exchange earnings during the previous 3 financial years or USD 5,000,000, it shall require prior approval of RBI.

### **RESIDENTIAL STATUS | RBI CLARIFICATION | LIBERALISED REMITTANCE SCHEME**

### Question 3

Suresh resided in India during the Financial Year 2020-2021. He left India on 15th July 2021 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 2021-2022 and 2022-2023?

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?

## Answer

### 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 2020-2021 left on 15.7.2021 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 8<sup>th</sup> 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 2021 - 2022 till 16th July 2021 and from 17th July 2021, he will be considered as person resident outside India.

However, during the Financial Year 2022-2023, Mr. Suresh will be considered as person resident outside India as he left India on 15th July 2021.

Foreign Exchange for studies abroad: According to Para I of Schedule III to Foreign Exchange Management (Current Account Transactions), Amendment Rule, 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.

## CAPITAL ACCOUNT TRANSACTION

### Question 4A

Explain the meaning of "Capital Account Transactions" under the Foreign Exchange Management Act, 1999. State its categories and also examine whether the following transactions are permissible or not under the above act as Capital Account transactions:

- (i) Investment by person resident in India in Foreign Securities.
- (i) Foreign currency loans raised in India and abroad by a person resident in India.
- (iii) Export, import and holding of currency/ currency notes.
- (iv) Investment in a Nidhi Company.

(v) Trading in transferable development rights.

### Answer

#### Section 2(e): Capital Account Transaction

It means a transaction which alters:

- a. The contingent liabilities, outside India of Persons Resident in India [PRI]
- b. Assets or liabilities in India of Persons Resident Outside India [PROI].

#### FEM (Permissible Capital Account Transactions) Regulations, 2015

The Reserve Bank of India has formed the FEM (Permissible Capital Account Transactions) Regulations, 2015.

As per these regulations, capital account transactions may be classified under the following heads.

- (1) Permissible capital account transaction of PRI (Persons Resident in India) (Reg. 3 - Schedule I)
- (2) Permissible Capital transactions of PROI (Persons Resident Outside India) (Reg. 3 - Schedule II)
- (3) Prohibited capital account transactions. (Reg. 4)

- (i) Investment by person resident in India in Foreign Securities is permitted transaction.
- (ii) Foreign currency loans raised in India and abroad by a person resident in India is permitted transaction.
- (iii) Export, import and holding of currency / currency notes is permitted transaction.
- (iv) Investment in a Nidhi Company is Prohibited transaction.
- (v) Trading in transferable development rights is Prohibited transaction.

#### Question 4B

Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2020. Mr. Ram purchased a flat at New Delhi for 795 lakhs in September 2021. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2021 for 795 lakhs. Mr. Gopal's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram. Examine with reference to the provisions of the FEMA, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible.

## Answer

### Section 2(e): Capital Account Transaction

It means a transaction which alters:

- a) The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]
- b) Assets or liabilities in India of Persons Resident Outside India [PROI].

Schedule II of FEM (Permissible Capital Account Transactions) Regulations 2015 permits the following Capital Account Transactions of a PROI "Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India."

### Section 6: Permissible Capital Account Transaction

Subject to the provisions of Sec 6(2) & 6(2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

In the given case, there are 2 Capital Account Transactions and both of them are Permissible.

(A) Purchase of immovable property in India by Mr. Ram [PROI].

(B) Giving of Guarantee by Mr. Ram [PROI] on behalf of Mr. Gopal [PRI] to the Housing Finance Company.

## Question 4C

Explain the meaning of "Capital Account Transaction" under the FEMA, 1999. State whether there are any restrictions in respect of the following transactions:

- (i) Drawal of Foreign Exchange for payments due on account of amortisation of loans in ordinary course of business.
- (ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.

## Answer

### Section 2(e): Capital Account Transaction

It means a transaction which alters:

a. The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]

or

b. Assets or liabilities in India of Persons Resident Outside India [PROI].

### Section 6(2): Restrictions imposed by RBI

The RBI or the CG shall not impose any restrictions on the drawal of foreign exchange:-

1. For Amortisation of Loan [repayments of loan instalments] and
2. For Depreciation of Direct Investments in Ordinary Course of Business.

Hence this transaction is permissible without any restrictions.

### Reg. 4 of FEM (Permissible Capital Account Transactions) Regulations 2015

A PROI (person resident outside India) is prohibited from making investment in India, in any form, in any Company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in agricultural or plantation activities.

Hence, it is not possible for a person resident outside India to invest in the shares of a plantation company as such investment is prohibited.

### Question 4D

A Company incorporated in United Kingdom established a branch at Chennai. What is the residential status of the Chennai branch? The Chennai branch proposes the purchase some immovable property at Chennai for the purpose of its business. Is it a 'Capital Account Transaction' within the meaning of Section 2(e) of the FEMA, 1999? Are there any restrictions under the FEMA, 1999 in respect of such acquisition?

### Answer

#### Section 2(v): Person Resident in India (PRI)

Person Resident in India (PRI) includes: -

- (i) Any person or body corporate registered or incorporated in India,
- (ii) A BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India,
- (iii) A BRANCH, OFFICE or AGENCY outside India owned or controlled by a person resident in India;

#### Section 2(e): Capital Account Transaction

It means a transaction which alters:

a. The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]

or

b. Assets or liabilities in India of Persons Resident Outside India [PROI].

- (i) Company incorporated in United Kingdom is a PROI since it is incorporated outside India.
- (ii) Chennai Branch is a PRI because it is a BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India.
- (iii) The Chennai branch (PRI) acquires immovable property at Chennai (India). Hence this acquisition is not a "capital account transaction" within the meaning of Section 2(e) of FEMA. Therefore, there is no restriction in acquisition of immovable property in India by Chennai branch.

### CAPITAL ACCOUNT TRANSACTIONS [SEC 6(4)]

### Question 4E

Examine with reference to the provisions of the FEMA, 1999 whether there is any restriction if a person, who is resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by the companies in U.S.A.

### **Answer**

#### **Section 6 (4): PROI returns back and settles in India**

A PRI may hold, own, transfer or invest in :-

- foreign currency,
- foreign security or
- immovable property situated outside India

if such currency, security or property was acquired, held or owned by such PRI:-

- (1) when he was resident outside India or
- (2) inherited from a PROI.

#### **Examples [Clarification on Section 6(4)]**

Income earned through employment or business or vocation outside India, or Income from investments made, or Income from gift or inheritance received when he was resident outside India,

In view of this, the person who returned to India permanently can continue to hold the foreign security acquired by him when he was resident in U.S.A.

### **Capital Account Transactions (Sec 6 & FEMA (CAPAT) Regulations, 2015], Current Account Transactions [FEMA (CAT) Rules, 2000]**

#### **Question 4F**

Mr. Janak, a PROI (person resident outside India) i.e. USA has invested in 5 residential immovable properties under construction in Mumbai.

Each property was negotiated at Rs. 1.50 crores with the companies owned by builders. This amount was to be paid in two instalments i.e. 50% on immediate basis on booking and the balance on possession of properties. The above transaction was done by the companies owned by builders through 2 brokers from USA on commission basis.

Mr. Janak as per term and conditions remitted 50% of the amount of all 6 immovable properties directly to the Builders.

Answer the following explaining the provision of the Foreign Exchange Management Act, 1999:

A. Whether investment by Mr. Janak and payment of commission on this transaction is permissible?

B. How much in maximum amount of commission can be paid to each broker?

### **Answer**

#### **Sec 6: Permissible capital account transaction.**

Subject to the provisions of sub-section (2) & (2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

#### **Schedule II of the FEM (Permissible Capital Account Transaction) Regulations, 2015: Capital account transactions of PROI**

Acquisition and transfer of immovable property in India by a PROI is a Permissible capital account transaction.

**Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit.**

RBI approval is needed if Commission to agents abroad for sale of residential flats or commercial plots in

India exceeds Higher of: -

- (a) USD 25,000 or
- (b) 5% of the inward remittance.

**Conclusion**

1. Yes, the investment by Mr. Janak and payment of commission on this transaction is permissible.
2. The maximum amount of commission payable to each broker shall be:  
= (No. of properties X Price X % of inward remittance X Commission %) = No. of brokers  
= (5X1,50,00,000 X 50% X 5%) ÷ 2  
= 18,75,000 ÷ 2  
= 7 9,37,500 to each broker.

**Question 4G**

Mr. Bandha, a software Engineer, Indian Origin took employment in USA. He is a resident of India for a long time. He desires

- (i) to acquire a farmhouse in Munnar (Kerala).
- (ii) to make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.
- (iii) to make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township.

**Answer**

**Regulation 4 of the FEM (Permissible Capital Account Transaction) Regulations, 2015: Prohibited Investments by PROI**

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

- (a) in the business of chit fund.
- (b) as Nidhi Company.
- (c) in agricultural or plantation activities.
- (d) in real estate business, or construction of farmhouses.
- (e) in trading in Transferable Development Rights (TDRs).

For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs).

- (i) Mr. Bandha, **cannot** acquire a farmhouse in Munnar (Kerala).
- (ii) Mr. Bandha **cannot** make investment in KLJ (Nidhi) Ltd.
- (ji) Mr. Bandha **can** make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township because "real estate business" shall not include development of townships.