STUDY MATERIAL

EXECUTIVE PROGRAMME

ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

GROUP 2

PAPER 6

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EXECUTIVE PROGRAMME

ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

Every legislation, especially in economic matters, is essentially empiric, and it is based on experimentation or what one may call the trial and error method. It may not provide for all possible situations or anticipate all possible abuses. There can be crudities or inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. (*R.K. Garg v. Union of India and Others (1981) 4 SCC 675).* Commercial law is also known as 'trade law', 'mercantile law' or 'business law'. It encompasses business organizations and individuals who are engaged in the buying, selling or trading of merchandise goods. It is imperative that commercial activities being economic activities exerting an impact on the economic development, national income, per capita income and other vital economic and financial variables, needs to be regulated to ensure transparency thereby fostering growth of business activities.

Conceptual understanding and application of compliance mandates of Economic and Commercial legislation is vital for professionals like Company Secretaries specifically from the perspective of compliance risks and especially when it involves foreign exchange, foreign investments, competition law aspects, consumer rights etc. This study aims to provide conceptual and application oriented understanding of the subject and will also equip the student with skills to stand up-to-date with industries need and the economic changes.

Further, Company Secretary plays advisory, compliance and representative roles with respect to various Economic and Commercial Laws including Foreign Exchange Management Act, FDI Policy, Foreign Trade Policy, Competition Law, Consumer Protection Act, law relating Real Estate Regulation etc. It is important for a Company Secretary to be well versed with Economic and Commercial Laws. It is also vital for students to have working knowledge of various Economic and Commercial legislations.

Intellectual Property Rights (IPRs) are private rights which are applied for, and enforced, by the owner of the concerned Intellectual Property (IP). While IPRs are becoming increasingly important in the global arena, there is a need to increase awareness on IPRs in India, be it regarding the IPRs owned by oneself or respect for others' IPRs. The importance of IPRs as a marketable financial asset and economic tool also needs to be recognised. In the Intellectual Property Rights regime Company Secretary is also authorized to act as a Trade Marks Agent.

This study material has been prepared to provide an understanding of certain Economic, Commercial and Intellectual Property legislations which have direct bearing on the functioning of companies. The study material has been divided into two parts consisting of twenty study lessons. Part I dealing with Economic and Commercial Laws consists of Study Lessons I to XIV, whereas Part II dealing with Intellectual Property Laws consists of Study Lesson XV to XX.

This study material has been published to aid the students in preparing for the Economic, Commercial & Intellectual Property Laws paper of the CS Executive Programme under ICSI Syllabus 2022. It has been prepared to provide understanding of the Economic, Commercial & Intellectual Property laws thereunder, which have a bearing on the conduct of corporate affairs. It is part of the educational kit and takes the students step by step through each phase of preparation stressing key concepts, principle, pointers and procedures.

The legislative changes made upto November, 2025 have been incorporated in the study material. The students are advised to refer to the updations at the Regulator's website, Supplement relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications. Specifically, students are advised to read "Student Company Secretary" e-Journal which covers regulatory and other relevant developments relating to the subject. In the event of any doubt, student may contact the Directorate of Academics at *academics@icsi.edu*.

The amendments to law made upto 31st May of the Calendar Year for December Examinations and upto 30th November of the previous Calendar Year for June Examinations shall be applicable.

Although due care has been taken in publishing this study material, the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

Important Note:

The new criminal laws i.e. Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakshya Adhiniyam 2023 have repealed Indian Penal Code 1860, Criminal Procedure Code 1973 and Indian Evidence Act 1872 (old criminal laws) respectively.

Therefore, by virtue of Section 8 of General Clauses Act 1897, the references to the old criminal laws, unless a different intention appears, be construed as references to the provision of new criminal laws.

EXECUTIVE PROGRAMME

Group 2

Paper 6

ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

SYLLABUS

OBJECTIVES:

Part I: To equip the students with working knowledge about Economic & Commercial Laws.

Part II: To provide conceptual & basic understanding of Intellectual Property Laws.

Level of Knowledge: Working Knowledge

Part I: Economic & Commercial Laws (60 Marks)

1. **Law relating Foreign Exchange Management:** Introduction ● Current and Capital Account Transactions ● Liberalized Remittance Scheme ● Acquisition & Transfer of Immovable Property in India ● Export of Goods and Services ● Realization and Repatriation of Foreign Exchange ● Reserve Bank of India.

2. **Foreign Direct Investments – Regulations & Policy :** Automatic Route of FDI ● Approval Route of FDI ● Prohibited Sector ● Permitted Sector ● Foreign Portfolio Investments ● Non-Debt Instrument Rules & Regulations ● Filing of FCGPR Form & other Returns.

3. **Overseas Direct Investment:** ODI Policy ● Foreign Currency Remittances ● Setting up of Subsidiary/ Joint Venture/ Branch Office Abroad ● Filing of Returns.

4. **Foreign Trade Policy & Procedure:** Focus of the Foreign Trade Policy (FTP) ● Legal Basis of the Foreign Trade Policy ● Importer-Exporter Code (IEC) Number ● Status Holder ● Imports and Export Policy ● Deemed Exports ● Trade Disputes ● Various Schemes under Foreign Trade Policy & Procedure.

5. **Law relating to Special Economic Zones:** Establishment of Special Economic Zones ● Approval and Authorization to Operate SEZ ● Setting up of Unit ● Special Economic Zone Authority.

6. **Law relating to Foreign Contribution Regulation:** Introduction and Object ● Eligible Contributor ● Eligible Receiver ● Registration ● Offences and Penalties.

7. **Prevention of Money Laundering:** Process of Money Laundering ● Adjudication ● Attachment and confiscation ● Obligation of Banking Companies, Financial Institutions and Intermediaries ● Problem and Adverse effect of Money Laundering ● Offence of Money Laundering ● Enforcement Directorate ● KYC & FIU.

8. **Competition Law**: Competition Policy ● Anti-Competitive Agreements ● Abuse of Dominant Position ● Overview of Combination ● Regulation of Combinations ● Competition Advocacy ● Competition Commission of India ● Appellate Tribunal.

9. **Law relating to Consumer Protection:** Consumer Protection in India ● Rights of Consumers ● Consumer Dispute Redressal Forums ● Nature and Scope of Remedies ● E-commerce & Direct Selling Guidelines.

10. **Legal Metrology**: Standard Weights And Measures ● Power of inspection, Seizure ● Declarations on Pre-packaged Commodities ● Offences and penalties.

11. **Real Estate Regulation and Development Law**: Registration of Real Estate Project ● Real Estate Agents ● Real Estate Regulatory Authority ● Central Advisory Council ● The Real Estate Appellate Tribunal ● Offences, Penalties and Adjudication.

Part II: Intellectual Property Laws (40 Marks)

12. **Law relating to Patents:** Applications for Patents ● Publication and Examination of Applications ● Inventions Not Patentable ● Opposition Proceedings to Grant of Patents ● Restoration of Lapsed Patents ● Surrender and Revocation of Patents ● Working of Patents ● Compulsory Licences and Revocation ● Infringement of Patents.

13. **Law relating to Trade Marks:** Classification of Goods And Services ● Conditions for Registration ● Procedure for and Duration of Registration ● Absolute Grounds for Refusal of Registration ● Assignability and Transmissibility of Registered Trademarks ● Collective Marks ● Certification Trademarks ● Trademark Agent ● Infringement of Trade Marks.

14. **Law relating to Copyright:** Meaning of Copyright ● Works in which Copyright Subsists ● Registration of Copyright ● Ownership of Copyright ● Assignment of Copyright ● Term of Copyright ● Licences by Owners of Copyright ● Copyright Society ● Infringement of Copyright.

15. **Law relating to Geographical Indications of Goods :** Geographical Indication ● Application for registration ● Procedure for and Duration of Registration ● Effect of Registration ● Prohibition of registration of geographical indication as Trade Mark.

16. **Law relating to Industrial Designs :** Registration of Designs ● Prohibition of Registration of Certain Designs ● Certificate of Registration ● Copyright in Registered Designs ● Industrial and International Exhibitions ● Piracy of registered design.

ARRANGEMENT OF STUDY LESSONS

ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

GROUP 2 • PAPER 6

PART I: ECONOMIC & COMMERCIAL LAWS

PART II: INTELLECTUAL PROPERTY LAWS

LESSON WISE SUMMARY

ECONOMIC, COMMERCIAL & INTELLECTUAL PROPERTY LAWS

PART I: ECONOMIC & COMMERCIAL LAWS

Lesson 1 – Law relating to Foreign Exchange Management

The Foreign Exchange Management Act, 1999 (FEMA) is an Act of the Parliament of India to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The Act extends to the whole of India and it also applies 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 management of foreign exchange is very important in the present day business. FEMA is a regulatory mechanism that enables the Reserve Bank of India to pass regulations and the Central Government to pass rules relating to foreign exchange in tune with the Foreign Trade policy of India. The Act is more transparent in its application as it lays down the areas requiring specific permissions of the Reserve Bank/ Government of India on acquisition/holding of foreign exchange. It stipulate the strict compliances in case of import, export, debt funding, equity capital infusion, transfer of shares etc.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand the:

- Concept of FEMA;
- Concept of Current Account Transactions and Capital Account Transactions;
- Provisions of Realization, Repatriation and Surrender of Foreign Currency;
- Structure and Overall Schemes of FEMA;
- Rules and Regulations framed by RBI under FEMA.

Lesson 2 – Foreign Direct Investments – Regulations & Policy

Foreign Direct Investment (FDI) is a major source of non-debt financial resource for the economic development of India. Foreign companies invest in India to take advantage of relatively lower wages, special investment privileges such as tax exemptions, etc. To promote Foreign Direct Investment (FDI), the Government has put in place an investor friendly policy, wherein except for a small negative list, most sectors are open for 100% FDI under the Automatic route.

The objective of the lesson is to familiarize the students with:

- Eligible Investors under FDI;
- Entry Routes for Investment i.e. Automatic Route, Government Route, Competent authority etc;
- Prohibited and Permitted Sectors;
- Non-debt Instruments Rules & Regulations;

- Conditions of FDI in major sector i.e. E-commence activity, Insurance etc.;
- Modes of Payment allowed for receiving FDI in an Indian Company;
- Reporting of FDI i.e. reporting of Inflow/Issue of shares/Transfer of shares etc. and filing of FCGPR form and other returns.

Lesson 3 – Overseas Direct Investments (ODI)

"Overseas Investment" means financial commitment and Overseas Portfolio Investment by a person resident in India. Overseas investments by persons resident in India enhance the scale and scope of business operations of Indian entrepreneurs by providing global opportunities for growth. Such ventures through easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value. These overseas investments are also important drivers of foreign trade and technology transfer thus boosting domestic employment, investment and growth through such inter-linkages. 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 and in keeping with the spirit of liberalization and to promote ease of doing business, the Central Government and the Reserve Bank of India have been progressively simplifying the procedures and rationalizing the rules and regulations under the Foreign Exchange Management Act, 1999. In this direction, a significant step has been taken with operationalization of a new Overseas Investment regime. Foreign Exchange Management (Overseas Investment) Rules, 2022 have been notified by the Central Government on August 22, 2022.

The purpose of the lesson is to familiarize the students with:

- ODI Policy;
- Foreign currency remittances;
- Setting up of Subsidiary/Joint Venture/Branch Office abroad;
- Filing of various returns.

Lesson 4 – Foreign Trade Policy & Procedure

The Foreign Trade Policy as notified by Central Government seeks to provide a stable and sustainable policy environment for foreign trade in merchandise and services. India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports.

The objective of the lesson is to facilitate the students to acquaint with:

- Legal Basis of the Foreign Trade Policy;
- Importer-Exporter Code (IEC) Number;
- Required Documents for Export/Import of Goods From/into India;
- Remission of Duties or Taxes on Export Products Scheme (RoDTEP);
- Duty exemption / remission schemes;
- Quality Complaints and Trade Disputes;
- Concept of Deemed Exports.

Lesson 5 – Law relating to Special Economic Zones

Special Economic Zone (SEZ) is a specifically delineated duty free enclave and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs. Goods and services going into the SEZ area from Domestic Tariff Area treated as exports and goods coming from the SEZ area into DTA treated as if these are being imported.

Special Economic Zone Act, 2005 to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. SEZ Rules, 2006 authorizes company secretaries to appear before Board of Approval constituted under Section 8 of the Act.

The purpose of this lesson is to provide the students with:

- Establishment of Special Economic Zones;
- Approval and Authorization to Operate SEZ;
- Setting up of Unit; and
- Special Economic Zone Authority.

Lesson 6 – Law relating to Foreign Contribution Regulation

Foreign Contribution (Regulation) Act, 2010 regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. The Act mandates that every bank or authorized person in foreign exchange shall report to specified authority, the prescribed amount of foreign remittance, source and manner in which foreign remittance was received and other particulars.

It is expected that, at the end of this lesson, students will, inter alia, be in a position to understand the:

- Regulation of foreign contribution, foreign Source and foreign hospitality;
- Eligible contributor & eligible receiver;
- Accounts, Intimation, Audit and Disposal of Assets; and
- Offences and Penalities.

Lesson 7 – Prevention of Money Laundering

The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society. In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

The Prevention of Money-laundering Act, 2002 enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Problem and adverse effect of money laundering;
- Process and Methods of money laundering;

- Offence of money laundering and its adverse effect;
- Attachment, adjudication and confiscation;
- Obligation of Banking Companies, Financial Institutions and Intermediaries;
- Enforcement Directorate; and
- Concept of KYC and FIU.

Lesson 8 – Competition Law

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition Act, 2002 to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto. Competition Act, 2002, authorizes a company secretary holding a certificate of practice to appear before Competition Commission of India.

The objective of the lesson is to introduce the students regarding:

- Competition Policy;
- Anti-Competitive Agreements;
- Abuse of Dominant Position;
- Overview of Combination and Regulation of Combinations;
- Competition Advocacy;
- Competition Commission of India; and
- Appellate Tribunal.

Lesson 9 – Law relating to Consumer Protection

The Consumer Protection Act, 1986 was enacted to provide for better protection of the interests of consumers and for the purpose of making provision for establishment of consumer protection councils and other authorities for the settlement of consumer disputes, etc. Consumer markets for goods and services have undergone drastic transformation, therefore, Parliament enacted the Consumer Protection Act, 2019.

The objective of the lesson is to introduce the students regarding:

- Consumer Protection in India;
- Rights of Consumers;
- Consumer Dispute Redressal Forums;
- Nature and Scope of Remedies; and
- E-Commerce & Direct Selling Guidelines.

Lesson 10 – Legal Metrology

The branch of knowledge concerning weights and measures is technically known as legal metrology. In basic form, metrology is the science of measurement. Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

The objective of the lesson is to introduce the students regarding:

- Standard weights and measures;
- Power of inspection, seizure;
- Declarations on pre-packaged commodities; and
- Offences and penalties.

Lesson 11 – Real Estate Regulation and Development Law

Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which aims at protecting the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.

As per Section 56 of the Act, the applicant or appellant may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal or the Regulatory Authority or the adjudicating officer, as the case may be.

The objective of the lesson is to introduce the students regarding:

- Registration of Real Estate Project;
- Real Estate Agents;
- Real Estate Regulatory Authority;
- Central Advisory Council;
- The Real Estate Appellate Tribunal; and
- Offences, Penalties and adjudication under the Act.

PART II- INTELLECTUAL PROPERTY LAWS

Lesson 12 – Intellectual Property Rights

Intellectual property is a vital component of economic growth and a tool for corporate competitiveness in today's highly competitive global market. Intellectual property rights serve as a catalyst for the development of innovations and inventions. Ideas, innovations, and creative expressions on the basis of which there is a public desire to grant the status of property are referred to as intellectual property rights (IPR). In order for the inventors or developers of that property to profit commercially from their creative efforts or reputation, IPR grant them specific exclusive rights. There are various forms of intellectual property protection, including trademark, copyright, and patent.

The objective of this lesson is to acclimatize student with:

- The basics of Intellectual Property Rights, their purpose, need, scope, regulatory framework;

- International legal framework for IPR such as General Agreement on Trade in Services (GATS), World Intellectual Property Organization (WIPO), Trade-Related Aspects of Intellectual Property Rights (TRIPS), international conventions;
- India's National Intellectual Property Rights Policy, its coverage and goals.

Lesson 13 – Law relating to Patents

With increase in the technological progress of India, the patents are given to promote innovations & developments and to ensure that these creations got recognition commercially without delay; and patents are conceded to empower patentee to commercially utilize the monopoly for the importation of the patented product into the nation. Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. A Patent is a statutory right for an invention granted for a limited period of time to the patentee by the Government, in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent.

The objective of this lesson is to facilitate the students to get acquainted with:

- Concept of Patents, its infringement, duration, inventions, what does not fall under purview of inventions etc.;
- Patent Cooperation Treaty;
- Practical aspects relating to the process of registration, termination, revocation, withdrawal of patent application.

Lesson 14 – Law relating to Trade Marks

In view of developments in trading and commercial practices, increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems and to give effect to important judicial decisions, a new Trade Marks Act, 1999 have been enacted. It aims to provide for registration of trade mark for goods as well as services including prohibition to the registration of imitation of well-known trademarks, and expansion of grounds for refusal of registration. A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader.

The objective of this lesson is to familiarize students with:

- Key concepts such as Trade Marks, Well Known Trade Mark, Certification Trade Mark among others;
- The process of application, withdrawal of trademark application;
- Infringement of trademark, Passing Off, Effect of registration;
- Law governing the trademark and its application in India.

Lesson 15 – Law relating to Copyright

In view of technological advancements in recent times, copyright protection has been expanded considerably. Copyright is a well-recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information.

The purpose of this lesson is to help students understand the:

- Key concepts such as Copyright, Adaptations, Author, what all is covered under copyright law, works in which copyright subsists;
- The object, purpose, need and scope of copyright law in India;
- Copyright, its meaning, term, assignment, infringement, registration process and its licensing.

Lesson 16 – Law relating to Geographical Indications of Goods

Every region has its claim to fame. Each fame and reputation was carefully built up and painstakingly maintained by the masters of that region, combining the best of nature, man and traditionally handed over from one generation to the next for centuries. Gradually, a specific link between the goods and place of production evolved resulting in growth of geographical indications. Geographical Indications of Goods are that aspect of industrial property which refers to a country or to a place situated therein as being the country or place of origin of that product. These identifications became so important that these regions started specializing in producing these unique products. Rising demand for such products among the consumers, gave rise for counterfeit products, which began to tarnish the image of genuine products. A effort to safeguard the interest of the producers and consumers led to evolution and conceptualization of “Geographical Indications”.

The objective of this lesson is to familiarize students with:

- Key concepts such as Geographical Indications, duration, infringement of the same among others;
- Regulatory framework governing the Law of Geographical Indications of Goods in India and important concepts related thereto;
- Practical aspects relating to Step by Step Guide on Geographical Indication of Goods Registration Process in India.

Lesson 20 – Law relating to Designs

Design is one of the categories of IPR where the design system focuses on the aesthetic feature of an article derived from its visual appearance. Relevant aspects are the shape, configuration, surface pattern, the colour or line or a combination thereof as applied to an article which produces an aesthetic impression on the sense of sight. The objective of the Designs Act, 2000 is to protect new or original designs so created to be applied or applicable to particular article to be manufactured by Industrial Process or means. Sometimes purchase of articles for use is influenced not only by their practical efficiency but also by their appearance. The important purpose of design registration is to see that the artisan, creator, originator of a design having aesthetic look is not deprived of his bonafide reward by others applying it to their goods.

The purpose of this lesson is to help students understand the:

- Concept of Design, its duration, infringement and publication;
- Regulatory framework governing the Law of Design in India and important concepts related thereto;
- Practical aspects relating to Step by Step Guide on registration of design in India.

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LAW RELATING TO DESIGNS

Law relating Foreign Exchange Management

Lesson 1

KEY CONCEPTS

■ Authorised Person ■ Capital Account Transaction ■ Current Account Transaction ■ Foreign Exchange ■ Foreign Security

Learning Objectives

To understand:

- Concept of Current Account Transactions
- Capital Account Transactions
- Provisions of Realisation, Repatriation and Surrender of Foreign Currency
- Limits for possession or retention of foreign currency or foreign coins
- Procedure for Adjudication, Appeal and Compounding

Lesson Outline

- Foreign Exchange
- Foreign Securities
- Current Account Transactions
- Capital Account Transactions
- Acquisition & Transfer of Immovable Property outside India
- Realisation & Repatriation of Foreign Exchange
- Adjudication
- Compounding of Contraventions
- Lesson Round-Up
- Test Yourself
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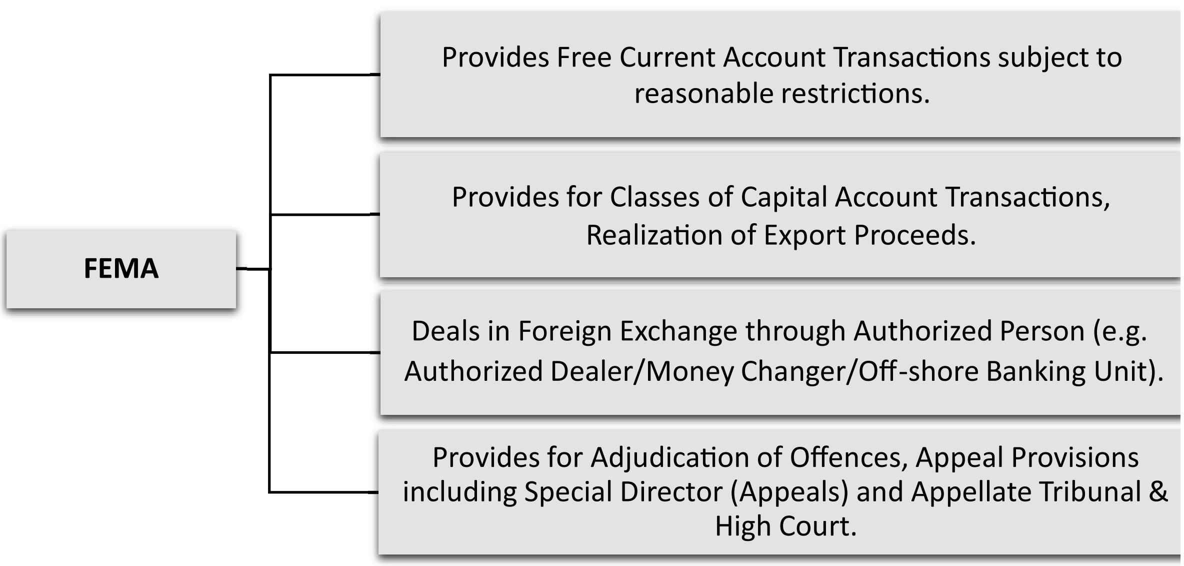
INTRODUCTION

The Foreign Exchange Regulation Act, 1973 was reviewed in 1993 and several amendments were enacted as part of the on-going process of economic liberalisation relating to foreign investments and foreign trade for closer interaction with the world economy. At that stage, the Central Government decided that a further review of the Foreign Exchange Regulation Act would be undertaken in the light of subsequent developments and experience in relation to foreign trade and investment. It was subsequently felt that a better course would be to repeal the existing Foreign Exchange Regulation Act and enact a new legislation. Reserve Bank of India was accordingly asked to undertake a fresh exercise and suggest a new legislation. A Task Force constituted for this purpose submitted its report in 1994 recommending substantial changes in the existing Act.

Significant developments have taken place since 1993 such as substantial increase in our foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets.

Keeping in view the changed environment, the Central Government has decided to introduce the Foreign Exchange Management Bill and repeal the Foreign Exchange Regulation Act, 1973. The provisions of the Bill aim at consolidating and amending the law relating to Foreign Exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange markets in India. Accordingly, the Foreign Exchange Regulation Act (FERA) was repealed and replaced by the new Foreign Exchange Management Act (FEMA) with effect from June 2000. The philosophical approach was shifted from that of conservation of foreign exchange to one of facilitating trade and payments as well as developing orderly foreign exchange market.



REGULATORY FRAMEWORK

Foreign Exchange Management Act, 1999 (FEMA)

The Foreign Exchange Management Act, 1999 enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. In fact it is the central legislation that deals with inbound investments into India and outbound investments from India and trade and business between India and the other countries.

The Rules made under FEMA are as follows:

- Foreign Exchange Management (Overseas Investment) Rules, 2022
- FEM (Non-debt Instruments) Rules, 2019
- FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000
- FEM (Authentication of Documents) Rules, 2000
- FEM (Current Account Transaction) Rules, 2000
- FEM (Adjudication Proceedings and Appeal) Rules, 2000
- FEM (Compounding of Proceedings) Rules, 2024

The Regulations made under FEMA are as follows:

- Foreign Exchange Management (Overseas Investment) Regulations, 2022
- FEM (Debt Instruments) Regulations, 2019
- FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
- FEM (Borrowing and Lending in Rupees) Regulations, 2000
- FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000
- FEM (Deposit) Regulations, 2016
- FEM (Export and Import of Currency) Regulations, 2015
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- FEM (Insurance) Regulations, 2015
- FEM (Manner of Receipt and Payment) Regulations, 2023
- FEM (Permissible Capital Account Transactions) Regulations, 2000
- FEM (Possession and Retention of Foreign Currency) Regulations, 2015
- FEM (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2015
- FEM (Remittance of Assets) Regulations, 2016
- FEM (Foreign Exchange Derivative Contracts) Regulations, 2000
- FEM (Crystallization of inoperative Foreign Currency Deposits) Regulations, 2014
- FEM (Transfer or Issue of any foreign Security) Regulations, 2004
- FEM (International Financial Services Centre) Regulations, 2015
- FEM (Regularization of Assets Held Abroad by a Person Resident in India) Regulations, 2015

IMPORTANT DEFINITIONS

Section 2 of the Foreign Exchange Management Act defines various terms used in the Act, and certain important definitions are given below:

Authorised Person [Section 2(c)]

The term 'authorised person' is defined to include an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised to deal in foreign exchange or foreign securities.

Currency Notes [Section 2(i)]

'Currency Notes' means and includes cash in the form of coins and bank notes. In fact, it means money and such bank notes or other paper money as are authorised by law and circulate from hand to hand as a medium of exchange.

Export [Section2 (l)]

'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.

Foreign Exchange [Section 2(n)]

The term 'foreign exchange' has been defined to mean foreign currency and includes deposits, credits, balance payable in foreign currency, drafts, travelers cheques, letters of credit, bills of exchange expressed or drawn in Indian currency but payable in any foreign currency. Any draft, travelers cheque, letters of credit or bills of exchange drawn by banks, institutions or persons outside India but payable in Indian currency has also been included in the definition of foreign exchange.

Foreign Security [Section 2(o)]

The term 'foreign security' has been defined to mean 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 dividend is payable in Indian currency.

Transfer or issue of a foreign security is a capital account transaction within the meaning of Section 6(3)(a) of the Act. The Reserve Bank of India has made Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2000 for regulation, acquisition and transfer of a foreign security by a person resident in India i.e. investment by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

Person [Section 2(u)]

The definition of the term 'person' includes, an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not; any agency, office or branch owned or controlled by such persons. Even every artificial juridical person not falling within the above definition has been treated as person as per clause (u) of Section 2.

Person Resident in India [Section 2(v)]

The expression 'person resident in India' has been defined to mean -

(i) a person residing in India for more than 182 days during the course of the preceding financial year.

However, two categories of persons are excluded from the purview of definition.

The first category includes any person who has gone out of India or who stays outside India for or on taking up employment outside India, or for carrying on outside India a business or vocation. The definition also includes person who stays outside India for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period. The second category of persons which have been excluded from the definition of person resident in India include:

A person who has come to stay or stays in India, in either case otherwise than—

(a) for or 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 out of India.

(iv) an office, branch or agency outside India owned or controlled by a person resident in India.

Repatriate to India [Section2(y)]

'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, and 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.

Special Director (Appeals) [Section 2(*zc*)]

'Special Director (Appeals)' means an officer appointed under section 17. Section 17 empowers Central Government which 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.

REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

Chapter II of the Act containing sections 3-9 deals with Regulation and Management of Foreign Exchange. Section 3 prohibits any person other than an authorised person from dealing in or transferring any foreign exchange or foreign security to any person or making any payment to or for the credit of any person resident outside India in any manner or receiving otherwise through an authorised person any payment by order or on behalf of any person resident outside India in any manner except as provided in the Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank of India.

Section 3(d) prohibits a person to 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, except as otherwise provided in the Act and rules or regulations made thereunder. For this purpose, financial transaction has been defined to mean making any payment to or for the credit of any person or receiving any payment for, by order or on behalf of any person. Financial transaction also includes drawing, issuing or negotiating any bill of exchange or promissory note or transferring any security or acknowledging any debt.

CURRENT ACCOUNT TRANSACTIONS

The term current account transaction has been defined to mean a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under the Act, freedom has been granted for selling and drawing of foreign exchange to or from an authorized person for undertaking current account transactions. However, the Central Government has been vested with powers in consultation with Reserve Bank to impose reasonable restrictions on current account transactions. The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000 dealing with various aspects of current account transactions.

Section 5 of the Act allows any person to sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction as defined under Section 2(j) of the Act. However, the Central Government may, in the public interest and in consultation with the Reserve Bank impose reasonable restrictions for current account transactions.

Foreign Exchange Management (Current Account Transactions) Rules, 2000 defines the term 'Drawal as to mean drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM Card or any other thing by whatever name called which has the effect of creating foreign exchange liability.'

Example of Current Account Transactions are payment towards private visits to any country; Gift or donation; Going abroad for employment; Emigration; Maintenance of close relatives abroad; 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; Expenses in connection with medical treatment abroad; Studies abroad; Any other current account transaction which is not covered under the definition of current account in FEMA 1999.

Prohibition on drawal of foreign exchange for certain transactions

Rule 3 prohibits the drawal of foreign exchange for the purposes of transactions specified in the Schedule I or a travel to Nepal and/or Bhutan or a transaction with a person resident in Nepal or Bhutan. However, in the case of transaction with a person resident in Nepal and Bhutan, the prohibition may be exempted by RBI subject to such terms and conditions as it may consider necessary. Schedule I to the Rules enumerate the situations in which the drawal of foreign exchange is prohibited. These are as follows:

- Remittance out of lottery winnings.
- Remittance of income from racing/riding etc., or any other body.
- Remittance for purchase of lottery tickets, banned/prescribed magazine, football pools, sweep stakes, etc.
- Payment of Commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries abroad of Indian Companies.
- Payment of Commission on exports under Rupee State Credit Route, except commission upto 10% of invoice value of exports of tea and tobacco.
- Payment related to 'call back service' of telephone.
- Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

Prior approval of Government of India for certain transactions

Rule 4 requires prior approval of the Government of India for the transactions as specified in Schedule II. However, this does not apply to the cases where the payment is made out of funds held in Resident Foreign Currency Account (RFC) of the remitter.

Prior approval of Reserve Bank for certain transaction

Rule 5 of the Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015, governs every drawal of foreign exchange for transactions included in Schedule III. However, Rule 5 does not apply to those cases where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

Transactions included in Schedule III

1. Facilities for individuals

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

(i) Private visits to any country (except Nepal and Bhutan).

(ii) Gift or donation.

(iii) Going abroad for employment.

(iv) Emigration.

(v) Maintenance of close relatives abroad.

(vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.

(vii) Expenses in connection with medical treatment abroad.

(viii) Studies abroad.

(ix) Any other current account transaction.

However, the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (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 more 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:

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

2. Facilities for persons other than individual

The following remittances by persons other than individuals 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.

(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.

LIBERALISED REMITTANCE SCHEME (LRS)

Liberalised Remittance Scheme (LRS) of USD 2, 50,000 for resident individuals. Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 2, 50,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both. The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.

The limit of USD 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015. Release of foreign exchange exceeding USD 2,50,000, requires prior permission from the Reserve Bank of India.

a. Private visits

For private visits abroad, other than to Nepal and Bhutan, any resident individual can obtain foreign exchange up to an aggregate amount of USD 2,50,000 from an Authorised Dealer or FFMC, in any one financial year, irrespective of the number of visits undertaken during the year.

Further, all tour related expenses including cost of rail/road/water transportation; cost of Euro Rail; passes/ tickets, etc. outside India; and overseas hotel/lodging expenses shall be subsumed under the LRS limit. The tour operator can collect this amount either in Indian rupees or in foreign currency from the resident traveller.

b. Gift/donation

Any resident individual may remit up-to USD 2,50,000 in one FY as gift to a person residing outside India or as donation to an organization outside India.

c. Going abroad on employment

A person going abroad for employment can draw foreign exchange up to USD 2,50,000 per FY from any Authorised Dealer in India.

d. Emigration

A person wanting to emigrate can draw foreign exchange from AD Category I bank and AD Category II up to the amount prescribed by the country of emigration or USD 250,000. Remittance of any amount of foreign exchange outside India in excess of this limit may be allowed only towards meeting incidental expenses in the country of immigration and not for earning points or credits to become eligible for immigration by way of overseas investments in government bonds; land; commercial enterprise; etc.

e. Maintenance of relatives abroad

A resident individual can remit up-to USD 2,50,000 per FY towards maintenance of relatives 'relative' as defined in Section 2(77) of the Companies Act, 2013 abroad.

f. Business trip

Visits by individuals in connection with attending of an international conference, seminar, specialised training, apprentice training, etc., are treated as business visits. For business trips to foreign countries, resident individuals can avail of foreign exchange up to USD 2,50,000 in a FY irrespective of the number of visits undertaken during the year.

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

g. Medical treatment abroad

Authorised Dealers may release foreign exchange up to an amount of USD 2,50,000 or its equivalent per FY without insisting on any estimate from a hospital/doctor. For amount exceeding the above limit, Authorised Dealers may release foreign exchange under general permission based on the estimate from the doctor in India or hospital/ doctor abroad. A person who has fallen sick after proceeding abroad may also be released foreign exchange by an Authorised Dealer (without seeking prior approval of the Reserve Bank of India) for medical treatment outside India.

In addition to the above, an amount up to USD 250,000 per financial year is allowed to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up.

h. Facilities available to students for pursuing their studies abroad.

AD Category I banks and AD Category II, may release foreign exchange up to USD 2,50,000 or its equivalent to resident individuals for studies abroad without insisting on any estimate from the foreign university. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 2,50,000 based on the estimate received from the institution abroad.

It may be noted that remittances under the Liberalised Remittance Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions. However, clubbing is not permitted by other family members for capital account transactions such as opening a bank account/ investment, if they are not the co-owners/co-partners of the overseas bank account/ investment. Remittances for purchase of property shall be in accordance with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022. Further, a resident cannot gift to another resident, in foreign currency, for the credit of the latter's foreign currency account held abroad under LRS.

The permissible capital account transactions by an individual under LRS are:

i. ***opening of foreign currency account abroad with a bank;***

ii. ***acquisition of immovable property abroad, Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI), in accordance with the provisions contained in Foreign Exchange Management (Overseas Investment) Rules, 2022, Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Directions, 2022;***

iii. ***extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.***

CAPITAL ACCOUNT TRANSACTIONS

'Capital account transaction' has been defined to mean any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.

Example of Capital Account Transactions are transactions such as Indian Party making investment in equity shares/capital contribution in a foreign entity, or acquiring an immovable property outside India and 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.

Section 6 of the FEMA allows capital account transactions subject however to certain conditions. This section empowers the Reserve Bank of India to specify, in consultation with the Central Government, any class or classes of capital account transactions permissible and the limit up to which foreign exchange shall be admissible for such transactions. However, Reserve Bank shall not impose any restrictions on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

The Reserve Bank of India may, by regulations, prohibit, restrict or regulate the transfer or issue of any foreign security by a person resident in India or by a person resident outside India. Reserve Bank of India may also regulate, prohibit or restrict transfer or issue of any security or foreign security through any branch office, or agency in India of a person resident outside India. Any borrowing or lending in foreign exchange in whatever form or by whatever name called may also be regulated or prohibited by the Reserve Bank. Similarly, RBI may also prohibit or restrict any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India. Deposits between person's resident in India and person's resident outside India may be regulated or prohibited by the Reserve Bank of India. RBI may also regulate the export, import or holding of currency or currency notes.

Acquisition or transfer of immovable property other than on lease not exceeding five years in India by person resident in India or a person resident outside India may be prohibited or regulated by the Reserve Bank of India. RBI has also been empowered to prohibit or regulate giving of guarantee or surety in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India or by a person resident outside India.

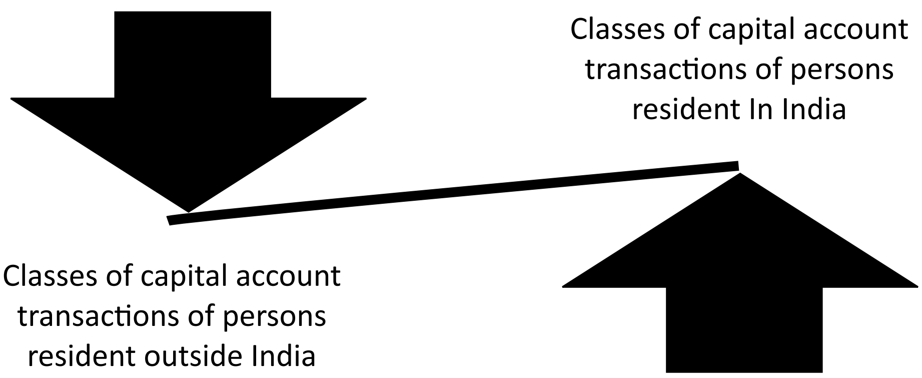
Sub-section (4) allows a person resident in India to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. Similarly, a person resident outside India is permitted to hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Reserve Bank of India under sub-section (6) has been empowered to regulate, prohibit, restrict 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.

Permissible Capital Account Transactions

Schedule I & II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 classifies the capital account transactions of a person under the following two heads viz.:-

Classes of Capital Account Transactions



Classes of Capital Account Transactions by Persons Resident in India

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.

Classes of Capital Account Transactions by Persons Resident Outside India

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 persons 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.

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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.

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g) Remittance outside India of capital assets in India of a person resident outside India.

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h) Undertake derivative contracts.

Subject to the provisions of the Act, or rules, or regulations or directions or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for the above mentioned capital account transactions provided the transactions are within the limit, if any, specified in the Regulations relevant to the transaction. However, no person is allowed to undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction except as provided in the Act, Rules or regulations made thereunder.

Similarly, except as otherwise provided in the Act, no person resident outside India is entitled to 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 proposed to engage in the business of chit funds, or Nidhi company, or in agricultural or plantation activities, or real estate business, or construction of farm houses, or trading in Transferable Development Rights (TDRs). For this purpose real estate business includes development of townships, construction of residential/ commercial premises, roads or bridges.

The payment for investment are required to be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulation made by the Reserve Bank of India. Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction is required to furnish to Reserve Bank a declaration within the time specified in the regulations relevant to the transactions.

REALISATION, REPATRIATION AND SURRENDER OF FOREIGN CURRENCY

Section 8 of the of Foreign Exchange Management Act, 1999 requires the person resident in India to make all reasonable efforts to realise and repatriate the foreign exchange due or accrued as per the directions of the Reserve Bank.

In exercise of the powers conferred by Section 8, Section 10(6), Section 47(2)(c) of the Foreign Exchange Management Act, 1999, the Reserve Bank issued Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

Duty of persons to realise foreign exchange due

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

(b) that the foreign exchange ceases in whole or in part to be receivable by him.

It may be noted that 'Foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange.

Manner of Repatriation

On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

(a) sell it to an authorised person in India in exchange for rupees; or

(b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or

(c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Period for surrender of realised foreign exchange

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person, within the period specified below :-

(i) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

(ii) in all other cases within a period of ninety days from the date of its receipt.

Period for surrender in certain cases

Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the FEMA does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

Where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person-

(i) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

(ii) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

Period for surrender of received/realised/unspent/unused foreign exchange by Resident individuals

A person being an individual resident in India shall surrender the received/ realised/ unspent/ unused foreign exchange whether in the form of currency notes, coins and travelers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/ realisation/ purchase/ acquisition or date of his return to India, as the case may be.

Exemption

The Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015 does not apply to foreign exchange in the form of currency of Nepal or Bhutan.

REMITTANCE OF ASSETS

In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.

Remittances by individuals not being NRIs/ PIOs

'Remittance of assets' means remittance outside India of funds in a deposit with a bank/ firm/ company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of insurance policy, sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provisions of the Foreign Exchange Management Act, 1999 (FEMA) or rules/ regulations made there under.

Authorised Dealer (AD) may allow remittance of assets by a foreign national where:

(i) the person has retired from employment in India;

(ii) the person has inherited from a person referred to in section 6(5) of the Act;

(iii) the person is a non-resident widow/widower and has inherited assets from her/his deceased spouse who was an Indian national resident in India;

The remittance should not exceed USD one million per financial year. This limit, however, will not cover sale proceeds of assets held on repatriation basis. In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD on submission of documentary evidence;

(iv) the remittance is in respect of balances held in a bank account by a foreign student who has completed his/ her studies, provided such balance represents proceeds of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/ scholarship received from the Government or any organisation in India.

These facilities are not available for citizens of Nepal or Bhutan or a PIO.

Remittances by NRIs/ PIOs

'Non-Resident Indian' (NRI) means a person resident outside India who is a citizen of India.

A ***'Person of Indian Origin (PIO)'*** is a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; or

(i) Who belonged to a territory that became part of India after the 15th day of August, 1947; or

(ii) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or

(iii) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

Explanation: PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

ADs may allow NRIs/ PIOs, on submission of documentary evidence, to remit up to USD one million, per financial year:

(i) out of balances in their non-resident (ordinary) (NRO) accounts/ sale proceeds of assets/ assets acquired in India by way of inheritance/ legacy;

(ii) in respect of assets acquired under a deed of settlement made by either of his/ her parents or a relative as defined in Companies Act, 2013. The settlement should take effect on the death of the settler;

(iii) in case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/ parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account.

In case the remittance is made in more than one instalment, the remittance of all instalments should be made through the same AD. Where the remittance is to be made from the balances held in the NRO account, the Authorised Dealer should obtain an undertaking from the account holder stating that the said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA.

Remittances by companies/ entities

ADs may allow remittances by Indian companies under liquidation on directions issued by a Court in India/ orders issued by official liquidator in case of voluntary winding up on submission of:

(i) Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.

(ii) Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act.

(iii) In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

ADs may also allow Indian entities to remit their contribution towards the provident fund/ superannuation/ pension fund in respect of their expatriate staff resident but "not permanently resident" in India.

Remittances/ winding up proceeds of branch/ office

ADs may permit remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office) on submission of the following documents:

(i) A copy of the Reserve Bank's permission for establishing the branch/ office in India.

(ii) Auditor's certificate:

  (a) indicating the manner in which the remittable amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;

  (b) confirming that all liabilities in India including arrears of gratuity and other benefits to the employees etc., of the branch/ office have been either fully met or adequately provided for;

  (c) confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India;

  (d) confirming that the branch/office has complied with all regulatory requirements stipulated by the Reserve Bank of India from time to time regarding functioning of such offices in India;

(iii) a confirmation from the applicant that no legal proceedings are pending in any Court in India and there is no legal impediment to the remittance; and

(iv) a report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.

Remittance of assets requiring RBI approval

Prior approval of the Reserve Bank is necessary for remittance of assets where:

(a) Remittance is in excess of USD 1,000,000 (US Dollar One million only) per financial year

  (i) on account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India;

  (ii) by NRIs/ PIOs out of the balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of inheritance/ legacy.

(b) Hardship will be caused to a person if remittance from India is not made to such a person.

Remittance of funds from the sale of assets in India held by a person, whether resident in or outside India, not covered under the directions stipulated above will require approval of the Reserve Bank.

Income-tax clearance

The remittances are subject to payment of applicable taxes in India. Reserve Bank of India does not issue any instructions under FEMA clarifying tax issues. It is mandatory on the part of Authorised Dealers to comply with the requirement of tax laws, as applicable.

EXEMPTION FROM REALISATION OR REPATRIATION

Section 9 of the Act contains exemptions from the application of provisions relating to holding of foreign currency and realisation and repatriation in certain circumstances, as provided under Sections 4 and 8 of the Act respectively. Accordingly, possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank. Foreign exchange acquired or received before 8th July, 1947, or any income arising or accruing thereon which is held outside India, in pursuance of a general or special permission of RBI, is also exempted.

Provisions relating to holding of foreign exchange, realisation and repatriation of foreign exchange are not applicable to person resident in India upto such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from certain persons mentioned above and any income arising there from. Reserve Bank may also specify the exemption limit upto which the foreign exchange earned by a person from employment, business, trade, vocation services, honorarium, gifts, inheritance or other legitimate means may be possessed. Reserve Bank may also exempt such other receipts as it thinks fit.

POSSESSION AND RETENTION OF FOREIGN CURRENCY OR FOREIGN COINS

Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 deals with limits on possession and retention of foreign currency or foreign coins. Under Regulation 3 the Reserve Bank has specified following limits for possession or retention of foreign currency or foreign coins, namely:

(i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;

(ii) possession without limit of foreign coins by any person;

(iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency travelers cheques not exceeding US $ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travelers cheques acquired during a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or from any person not resident in India and also who is on a visit to India, or as honorarium or gift or for services rendered or in settlement of any lawful obligation; or as a honorarium or gift while on a visit to any place outside India; or represents unspent amount of foreign exchange acquired from an authorised person for travel abroad.

Regulation 4 deals with possession of foreign exchange by a person resident in India but not permanently resident therein and provides that a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travelers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the law for the time being in force. Explanation to regulation 4 defines the term 'not permanently resident as to mean a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

MANNER OF RECEIPT AND PAYMENT

Regulation 3 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 states that save as otherwise in a manner as provided in the Foreign Exchange Management Act or the rules or regulations made or directions issued under the Act, no person resident in India shall make or receive payment from a person resident outside India:

It may be noted that the Reserve Bank may, on an application made to it, permit a person resident in India to make or receive payment under the Foreign Exchange Management Act

The receipt and payment between a person resident in India and a person resident outside India shall, unless provided otherwise, be made through an Authorised Bank or Authorised Person and in the manner as specified below:

I. Trade transactions –

(a) receipt/payment for export to or import from the countries given below of eligible goods and services shall be made as under:

(i) *Nepal and Bhutan* - in Indian Rupees provided that in case of exports from India where the importer in Nepal has been permitted by the Nepal Rashtra Bank to make payment in foreign currency, such receipts towards the amount of the export may be in foreign currency;

(ii) *Member countries of ACU, other than Nepal and Bhutan* - through ACU mechanism or as per the directions issued by the Reserve Bank to authorised dealer from time to time:

Provided that in case of imports where the goods are shipped to India from a member country of the ACU (other than Nepal and Bhutan) but the supplier is resident of a country other than a member country of the ACU, the payment may be made in a manner as specified at (iii) below.

(iii) *Countries other than member countries of ACU* - In Indian Rupees or in any foreign currency.

(b) Notwithstanding anything contained in this sub-regulation, receipts and payments may also be made in a manner as may be provided in the extant Foreign Trade Policy framed by the Central Government.

Explanation: The expression 'ACU' (Asian Clearing Union) shall have the same meaning assigned to it under Article I of the ACU agreement and the ACU mechanism shall be construed accordingly.

II. Transactions other than trade transactions - receipt and payment shall be made as under:

(i) *Nepal and Bhutan* - In Indian Rupees provided that in case of overseas investment in Bhutan, payment may also be made in foreign currency;

(ii) *Other Countries* – In Indian Rupees or any foreign currency.

Payment and receipt in India for any current account transaction, other than a trade transaction, between any person resident in India and a person resident outside India, who is on a visit to India, may be made only in Indian Rupees.

It may be noted that any payment or receipt under regulation 3 may also be made by debit/ credit to a bank account maintained in terms of the rules, regulations or directions issued under the Act.

ACQUISITION OR TRANSFER OF IMMOVABLE PROPERTY IN INDIA

As per section 6(5) of FEMA, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by him/ her when he/ she was resident in India or inherited from a person resident in India.

Acquisition/ Transfer of immovable property by NRI or an OCI

A 'Non-Resident Indian' (NRI) is a person resident outside India who is a citizen of India.

An 'Overseas Citizen of India (OCI)' is a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.

- An NRI or an OCI can acquire by way of purchase any immovable property (other than agricultural land/ plantation property/ farm house) in India.
- An NRI or an OCI can acquire by way of gift any immovable property (other than agricultural land/ plantation property/ farm house) in India from person resident in India or from an NRI or an OCI who is a relative as defined in section 2(77) of the Companies Act, 2013.
- An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired the property in accordance with the provisions of the foreign exchange law in force at the time of acquisition.

- An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident in India.
- An NRI or an OCI may transfer any immovable property in India to a person resident in India.
- An NRI or an OCI may transfer any immovable property (other than agricultural land or plantation property or farmhouse) to an NRI or an OCI. In case the transfer is by way of gift, the transferee should be a relative as defined in section 2(77) of the Companies Act, 2013.

Payment for Acquisition of Immovable Property

NRIs or OCIs may make payment, if any, for transfer of immovable property out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to their NRE/ FCNR (B)/ NRO account.

Such payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned above.

Joint acquisition by the spouse of an NRI or an OCI

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

Consideration for transfers should be out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to non-resident account of the person concerned maintained in accordance with the Act or the rules framed thereunder. Payments cannot be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned in this para.

The marriage should have been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.

The non-resident spouse should not otherwise be prohibited from such acquisition.

Acquisition by a Long-Term Visa holder

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

The property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas.

The person should submit a declaration to the Revenue Authority of the district where the property is located specifying the source of funds and that he/ she is residing in India on a LTV.

The registration documents of the property should mention the nationality and the fact that such person is on a LTV.

The property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities.

A copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division).

Sale of the immovable property so acquired is permissible only after such person has acquired Indian citizenship. However, transfer of such immovable property before acquiring Indian citizenship requires the prior approval of the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned.

Acquisition of immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals

Foreign Embassy/ Diplomat/ Consulate General, may purchase/ sell immovable property (other than agricultural land/ plantation property/ farm house) in India provided –

- ***Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase/sale, and***
- ***The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through the normal banking channels.***

Acquisition of Immovable Property by Person Resident outside India for Carrying on a Permitted Activity

A branch or office or any other place of business in India, other than a liaison office, established by a person resident outside India, may acquire immovable property in India which is necessary for or incidental to the activity carried on in India by such branch or office.

Such a person is required to file with the Reserve Bank a declaration in the form IPI (as given in the Master Direction on Reporting), not later than ninety days from the date of such acquisition.

The immovable property so acquired can be mortgaged to an Authorised Dealer as a security for any borrowing.

However, acquisition of immovable property in India by a branch, office or other place of business of persons of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea origin/ nationality/ ownership requires the prior approval of the Reserve Bank.

EXPORT OF GOODS & SERVICES

According to the Section 7(1) of the Act, every exporter of goods shall:

(a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, 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 realisation of the export proceeds by such exporter.

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.

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.

Further, in exercise of the powers conferred by clause (a) of sub-section (1), sub-section (3) of Section 7 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) the Reserve Bank of India issued the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 for Export of Goods and Services from India.

Declaration of Exports

In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through 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 one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –

(i) the full export value of the goods or software; or

(ii) if the full export value 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 or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

Declarations shall be executed in sets of such number as specified.

For the removal of doubt, it is clarified that, 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 or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act and rules and regulations made thereunder.

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.

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.

The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India 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.

Project Exports

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.

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.

AUTHORISED PERSON

Authorised Person include an authorised dealer, money charger, offshore banking unit or any other person for the time being authorised to deal in foreign exchange or foreign securities.

Chapter III of the Act containing Sections 10-12 deals with the provisions relating to authorised person. Section 10 deals with the procedure of appointing authorised person by the Reserve Bank, Section 11 specifies the powers of the RBI to issue directions to authorised person and Section 12 prescribes the power of the RBI to inspect authorised person. An Authorised Dealer is any person specifically authorized by the Reserve Bank under Section 10(1) of FEMA, 1999, to deal in foreign exchange or foreign securities.

Under Section 10, any person who has made an application to the RBI may be authorised by it to act as an authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or offshore banking unit or in any other manner as the RBI deem fit. This authorisation is in writing and subject to the conditions laid down by the RBI. Basic function, organisation structure of RBI if provided at end to this lesson.

Normally, nationalised banks, leading non nationalized banks and foreign banks are appointed as authorized persons.

Authorised persons are required to comply with the directions of the Reserve Bank with regard to his dealing in foreign exchange or foreign security receipt with the previous permission of the Reserve Bank. However authorised person are required not to engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation.

Reserve Bank of India has been empowered to revoke the authorisation granted to any person at any time in the public interest. It may also revoke the authorisation after giving an opportunity, if the authorised person failed to comply with the conditions subject to which the authorisation was granted or contravened any of the provisions of the Act, rules, notifications or directions.

An authorised person, before undertaking any transaction on behalf of any person shall, require that person to make such declaration and give such information as will reasonably satisfy the authorised person that the transaction will not involve or is not intended to violate or contravene any provisions of the Act, rules, notification or directions. In case, the person refuses to comply with such requirements or makes only unsatisfactory compliances, the authorised person is duty bound to refuse in writing to act on behalf of such person in such transaction and report the matter to Reserve Bank.

Any person, other than an authorised person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to the authorised person does not use it for such purpose, or does not surrender it to authorised person within the specified period, or uses the foreign exchange for any other purpose, which is not permitted under the provisions of the Act, such person shall be deemed to have committed contravention of the provisions of the Act.

Power of the Reserve Bank to issue directions to authorised person

Section 11 of the Act empowers the RBI to issue directions to the authorised person in regard to making of payment or doing or desist from doing any act relating to foreign exchange or foreign security. Reserve Bank has also been empowered to issue directions to the authorised persons to furnish such information in such manner as it deems fit. If any authorised person contravenes any direction given by the RBI or fails to file the return as directed by RBI, he may be liable to a fine not exceeding Rs. 10,000/- and in the case of continuing contravention, with an additional penalty which may extend to Rs. 2,000 for every day during which such contravention continues. Power of Reserve Bank to inspect authorised person.

Section 12 of the Act empowers RBI to inspect the business of any authorised person for the purpose of verifying the correctness of any statement/information or particulars furnished. In case authorised person fails to furnish the information sought, the RBI can initiate inspection of the authorised person for obtaining such information. RBI may also inspect the business of an authorised person for securing compliance with the provisions of the Foreign Exchange Management Act or any of the Rules, Regulations or directions. The Reserve Bank may make an order in writing authorising any of its officer for this purpose.

When an inspection is initiated by the Reserve Bank, it shall be the duty of every authorised person (where the authorised person is a company or firm, every director partner or officer of such a company or firm), to produce before the inspecting officer, such books, accounts and other documents in his custody and to furnish any statement or information relating to the affairs of such authorised person within the time limit and the manner in which such inspecting officer may direct.

ADJUDICATION AND APPEAL

Chapter V containing Sections 16-35 deals with the adjudication and appeal.

Appointment of Adjudicating Authority

Section 16 empowers the Central Government to appoint by notification in the Official Gazette as many Adjudicating Authorities as it may think fit for holding enquiries under Section 13. The Central Government is, however under obligation to specify the jurisdiction of the Adjudicating Authority. The Adjudicating Authority has been empowered to hold any enquiry on a complaint made in writing by an officer authorised by a general or special order by the Central Government.

In case, a complaint has been made in respect of a person alleged to have committed the contravention, such person shall be given a reasonable opportunity of being heard before imposing any penalty under Section 13. The Adjudicating Authority has discretion to demand from the persons against whom a complaint is made a bond or guarantee for any such amount as he thinks fit, if he is of the opinion that such persons likely to abscond or evade the payment of penalty, if imposed.

Appeal to Special Director (Appeals)

Section 17 of the Act provides for appointment of one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities. In this context, the Central Government has been empowered to appoint by notification Special Directors (Appeals) specifying their jurisdiction over matters and places.

An appeal to the Special Director (Appeals) may be made against the orders of the Assistant Director or Deputy Director of enforcement, acting as Adjudicating Authority. The appeal against the order of Adjudicating Authority shall be made in the prescribed form along with requisite fee, within forty five days from the date of the receipt of the order by aggrieved person. The Special Director (Appeals) has however, been empowered to entertain appeal after the expiry of the said period of forty five days.

Establishment of Appellate Tribunal

Section 18 of the Act provides that the Appellate Tribunal constituted under sub-section (1) of section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, 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.

Appeal to Appellate Tribunal

According to Section 19(1) the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in section 17(1), or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal:

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

Section 19 (2) states that every appeal under sub-section (1) 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 and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

As per Section 19(3), on receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

Section 19(4) provides that the Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.

Section 19(5) states that the appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that 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 off the appeal within the said period.

As per Section 19(6) the Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

In the case of *Bank of Baroda v. Appellate Tribunal for Foreign Exchange, WP(C) 2570 & CM 1848/05,* the Hon'ble Delhi High Court has held as below:

"7. From the foregoing judicial pronouncements, as noted above, the position, which emerges is that the Tribunal while considering any application for waiver of deposit is to take into account firstly the existence of a prima facie case. In case, it is found that a party has a very strong prima facie case, and/or where the errors in the impugned order are writ large on the record, in such a case, it would be competent for the court in the exercise of its jurisdiction to grant waiver of predeposit since in such a case requiring a pre-deposit itself would amount to undue hardship. What is a prima facie case is well settled? It refers to an arguable or triable case. The Tribunal once it comes to the conclusion on perusal of the pleadings, documents and on hearing of the parties that there is a good prima facie case to be considered, the next step in exercise of discretion is determining the quantum of waiver to be granted. In determination of the quantum of waiver, factors, such as, balance of convenience, financial hardship of the parties, it capacity to pay or secure the amount and irreparable loss are to be considered. The said discretion is to be exercised in accordance with well settled principles for exercise of judicial discretion."

In the case of *Monotosh Saha v. Special Director of Enforcement,* Civil Appeal No. 5188 of 2008 (Arising out of SLP(C.) No. 1830 of 2007 judgement dated 21.08.2008, the Apex Court has held as below:

"11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the realization of penalty". Therefore, while dealing with the application twin requirements of considerations i.e., consideration of undue hardship aspect and imposition of conditions to safeguard the realization of penalty have to be kept in view.

12. As noted above there are two important expressions in Section 19(1). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. (AIR 1994 SC 923) that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be `undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the realization of penalty. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the realization of penalty."

Appeal to High Court

According to Section 35 of the Act, a right to appeal to High Court lies with the appellant who is aggrieved by the decision of the Tribunal. Such appeal must be filed within 60 days from the date of communication of the decision or order of the Tribunal. The appeal to the High Court can be made on any question of law arising out of such order. A relaxation for a maximum period of sixty days for making an appeal may be granted by the High Court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the specified period.

Directorate of Enforcement

Section 36 of the Act empowers the Central Government to establish a Directorate of Enforcement with a Director and other officers or class of Officers, for the purposes of the enforcement of the Act. The Central Government has also been empowered to authorise Director, Additional Director, Special Director or Deputy Director to appoint officers of enforcement below the rank of Assistant Director of Enforcement to exercise the powers and discharge the duties conferred or imposed on him under the Act.

The Central Government, may, by order and with prescribed conditions and limitations, authorise any officers of customs or Central Excise or any police officer or officers of Central or State Government to exercise such powers and discharge such duties of the Director of Enforcement or any other officer of the Enforcement as stated in the order.

Investigation

Section 37 of the Act empowers the Director of Enforcement and other officers below the rank of Assistant Director to take up for investigation the contravention referred to in Section 13 of the Act. In addition, the Central

Government may also authorise any officer or class of officers in the Central Government, State Government, Reserve Bank of India, not below the rank of Under Secretary to Government of India, to investigate any contravention under Section 13 of the Act. The officers so appointed shall exercise the like powers which are conferred on income tax authorities under the Income Tax Act, 1961, subject to such conditions and limitations as laid down under that Act.

CONTRAVENTION AND PENALTIES

Section 13(1) of the Act states that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(1A) If any person is found to have acquired 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, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

(1C) If any person is found to have acquired 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, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

Any Adjudicating Authority adjudging any contravention under sub-section (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 persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

In the case of *Union of India, through Deputy Legal Adviser, Directorate of Enforcement (Appellant) Vs. Kamal Chand (Respondent) FPA-FE-28/CHN/2020 Order dated 30.05.2023,* the Hon'ble Appellate Tribunal observed that on reading of Section 13 (1) FEMA it is obvious that the maximum amount of penalty which can be imposed under the Section is three times the amount of contravention involved. From the language of the Section, it is clear that the Section has not prescribed either a fixed amount of penalty or minimum amount of penalty. It therefore, follows that the amount of the penalty which is to be imposed by the Adjudicating Authority is a matter of discretion which, of course, is necessarily required to be exercised judiciously after taking into account the facts of the case and the evidence placed before him. The appellant has failed to place any reason in the pleadings as to show that the discretion has not been exercised judiciously by the Adjudicating Authority.

The question as to when a penalty is to be regarded as either low or high is at best answered subjectively. In the present case it is seen that the Adjudicating Authority has not only taken notice of the facts of the case but also has evaluated the evidence on record to infer that the outward remittances in 39 tranches occurred without corresponding imports of goods. Consequently, he has upheld the two charges of contraventions and imposed slightly over hundred percent of penalty of the total amount involved in the said 35 tranches. The Adjudicating Authority has complied with the provisions of the Section by imposing penalty for contravention of section 10 (6) FEMA r/w Regulation 6 (1) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations 2000 and as well as imposing penalty for contravention of Section 3 (b) of FEMA. For contravention of each of these Sections he has chosen to impose slightly over fifty percent thus totaling a penalty of over hundred percent. Any insistence to impose higher penalty for contraventions of each of the Section arising from the same set of transactions may introduce element of subjectivity. In any case, there is no such requirement under the statute as long as each contravention has been examined and if found established has attracted penalty. The reading of the Adjudication Order, therefore, reflects objectivity and judiciousness on the part of the Adjudicating Authority.

The Appellate Tribunal referred the case of *State of MP and Ors. Vs. Bharat Heavy Electricals [(1997) 7 Supreme Court Cases 1]* where in Hon'ble Supreme Court its order dated 14.08.1997 held that in a statute prescribing the provision for penalty equal to ten times the amount of entry tax, the statute prescribed only a maximum limit and did not prescribe an irreducible amount depriving the assessing authority of any discretion in this regard. The stand of the State in the case supra conceded that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax. In fact, in the present case the statute (FEMA) itself provides for a penalty up to thrice the sum involved in such contravention and thereby gives explicit scope to the Adjudicating Authority to exercise his discretion, albeit judiciously, for imposition of penalty.

In view of the appeal having failed to bring out the reasons that why the penalty imposed is low and as to how the Adjudicating Authority has not exercised his discretion judiciously, Appellate Tribunal observed that the order of the Adjudicating Authority cannot be interfered with. In view of the aforementioned discussions and observations, the appeal fails and is dismissed.

Further in the case of *Shri Kumar Satur Nathani (Appellant) Vs. The Special Director Directorate of Enforcement, Mumbai (Respondent), FPA-FE-41/MUM/2018 Order dated 26.07.2023,* Appellate Tribunal Under SAFEMA referred the decision dated 23.05.2006 of the Hon'ble Supreme Court in *Civil Appeal Nos. 9523-9524 of 2003* in the case of *The Chairman, SEBI vs*. *Shriram Mutual Fund & Ors*. His Lordships stated in para 20 of the judgment: -

"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with quilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not."

Appellate Tribunal observed that perusal of Section 13 of FEMA which is the Section under which penalty is imposed for contravention of any of the provisions of the Act or any rule, regulation, notification, direction, order or any condition subject to which an authorization is issued by the Reserve Bank of India makes it obvious that the language of the Section does not require mens rea for penalizing of contravention.

Thus, there is nothing in the Section which can indicate directly or indirectly requirement of mens rea. Words like "willful", "deliberately", "intentionally" etc. are missing. The Hon'ble Supreme Court in the Judgment supra has cited the judgment in *Director of Enforcement vs. MCTM Corporation Pvt. Ltd. and Ors. Manu/SC/0300/1996* wherein even for FERA 1947 it was held that the contravention shall be breach of a civil obligation which would attract penalty irrespective of the fact whether the contravention was made with any guilty intention or not. The Judgment supra cited a number of previous judgments wherein it was held that mens rea is not an essential element for imposing penalty for breach of civil obligations.

Contravention by Companies

Section 42 of the Act deals with contravention of the provisions of the Act by the Companies and provides that where the person committing the contravention of the Act or Rules happened to be 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 shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.

In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge, consent and connivance or is attributed to the neglect on the part of any director, manager or secretary or other officer of the company, they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.

COMPOUNDING OF CONTRAVENTIONS

Contravention is a breach of the provisions of the Foreign Exchange Management Act (FEMA), 1999 and rules/regulations/notification/orders/directions/circulars issued there under. Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal.

The provisions of section 15 of Foreign Exchange Management Act, 1999 (42 of 1999) hereinafter referred to as FEMA, 1999, permit compounding of contraventions and, as such it empowers the Reserve Bank to compound any contravention as defined under section 13 of the FEMA, 1999, except the contraventions under section 3 (a) of FEMA, 1999, on an application made by the person committing such contravention.

Foreign Exchange (Compounding Proceedings) Rules, 2024

In exercise of powers given under section 46 read with section 15 of the Foreign Exchange Management Act (FEMA), 1999, Central Government notified the Foreign Exchange (Compounding Proceedings) Rules, 2024. The Foreign Exchange (Compounding Proceedings) Rules, 2024 superseded the existing Foreign Exchange (Compounding Proceedings) Rules, which were issued in 2000.

Compounding Authority

- An officer of the Directorate of Enforcement not below the rank of Deputy Director or Deputy Legal Adviser; or
- An officer of the Reserve Bank not below the rank of the Assistant General Manager.

Compounding Authorities of Reserve Bank to Compound various Contraventions (other than a contravention of section 3(a) of FEMA)

Compounding Authorities of Reserve Bank	Sum involved in Contravention
Assistant General Manager	Does not exceed sixty lakh rupees
Deputy General Manager	Does not exceed two and a half crore rupees
General Manager	Does not exceed five crore rupees
Chief General Manager	Above five crore rupees

Compounding Authorities of Directorate of Enforcement to Compound Contraventions of section 3(a) of FEMA)

Compounding Authorities of Directorate of Enforcement	Sum involved in Contravention
Deputy Director	Five lakh rupees or below
Additional Director	More than five lakh rupees but less than ten lakh rupees
Special Director	Ten lakh rupees or more but less than fifty lakh rupees
Special Director along with the Deputy Legal Adviser	Fifty lakh rupees or more but less than one crore rupees
Director of Enforcement along with the Special Director	One crore rupees or more

Application for Compounding

- An applicant may submit a compounding application, along with the relevant documents, physically or through PRAVAAH Portal of the Reserve Bank, either suo moto or based on a Memorandum of Contraventions issued by the Reserve Bank.
- Where an applicant, after issue of the Memorandum of contraventions issued by the Reserve Bank, does not opt for compounding within the period as may be stated in the Memorandum of Contravention, the relevant provisions of the FEMA, 1999, shall apply.
- All compounding applications shall be submitted along with the prescribed fee of ₹10,000/- (plus applicable GST, which at present is 18%) by way of demand draft in favour of "Reserve Bank of India" and payable at the concerned Regional Office/ CO Cell, New Delhi/ Central Office or through National Electronic Fund Transfer (NEFT), or other permissible electronic or online modes of payment.
- It may be ensured that intimation of payment of application fee, to respective Regional Office, CO Cell, or Central Office, as the case may be, shall be made as soon as possible but not later than 2 hours from time of payment, through an email. In such cases, the compounding application must be accompanied by the payment details including the UTR number evidencing the payment of the application fee.
- Applications submitted to the Reserve Bank must contain the contact details i.e., Name of the applicant/ Authorised official or representative of the applicant, telephone/ mobile number and email ID.
- Along with the compounding application in the prescribed format, the applicant shall also furnish the details relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office/ Liaison Office, as applicable; a copy of the Memorandum of Association, if available, and an undertaking regarding enquiry/ investigation/ adjudication by Directorate of Enforcement (DOE).
- A compounding application shall be returned where administrative action has not been completed by the applicant or the application is incomplete, or the application fee has not been paid by the applicant. The application fee, if paid, shall not be returned in case of return of the compounding application. However, in case such applications are re-submitted, then the application fee need not be paid again.

- The applicants are also advised to bring changes, if any, in the address/ contact details of the applicant to the notice of the compounding authority, during the pendency of the compounding application with the Reserve Bank.
- In case of an incomplete application, wherever the applicant is allowed by the Reserve Bank to submit any necessary information or documents within a reasonable time, then the date of receipt of such information or documents, as the case may be, shall be taken as the date of receipt of the application.

Procedure for Compounding

- On receipt of an application, the Reserve Bank shall examine the application based on the documents and submissions made in the application and assess whether contravention can be compounded in accordance with the Compounding Rules, 2024 and, if so, the sum involved in the contravention.
- The Compounding Authority may call for any information, or any other documents relevant to the compounding proceedings. In case the contravener fails to submit the additional information/documents called for within the specified period, the application for compounding shall be liable to be returned.
- The following factors, which are only indicative, shall be taken into consideration for the purpose of passing compounding order and determining amount on payment of which contravention shall be compounded:

  a. Undue gains i.e., the amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention (or) economic benefits accruing to the contravener from delayed compliance or compliance avoided;

  b. the amount of loss caused to any authority/ exchequer as a result of the contravention;

  c. the repetitive nature of the contravention, the track record and/or history of non- compliance of the contravener;

  d. contravener's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and any other factor as considered relevant and appropriate.

  It may be noted that as per provisions under section 13 of FEMA,1999, the compounding amount can be up to three times the sum involved in the contravention

Issue of the Compounding Order

- The Compounding Authority shall pass a compounding order after affording an opportunity of being heard to the applicant as expeditiously as possible and not later than 180 days from the date of receipt of such compounding application by Reserve Bank and complete in all respects, on the basis of the averments made in the application as well as other documents and submissions made in this context by the contravener during the personal hearings.
- If the applicant opts for the personal hearing, the Reserve Bank would encourage the applicant to appear either personally or through a virtual mode rather than being represented / accompanied by legal experts / consultants, as compounding is a voluntary process and only for admitted contraventions. Appearing for or opting out of personal hearing does not have any bearing whatsoever on the compounding amount that may be specified in the compounding order. If the applicant does not opt for personal hearing or absents on the day of hearing, Compounding Authority may pass the order based on available information/ documents.
- The Compounding Order shall specify the provisions of the FEMA, 1999 or any rule, regulation,

notification, direction, or order issued in exercise of the powers under FEMA, 1999 in respect of which contravention has taken place along with details of the contravention.

- One copy of the compounding order shall be provided to the applicant and another copy shall also be provided to the Adjudicating Authority, where the compounding of any contravention is made after making of a complaint under sub- section (3) of section 16 of the FEMA, as the case may be.

RESERVE BANK OF INDIA

Section 11 of the Foreign Exchange Management Act empowers the RBI to issue directions to the authorised person in regard to making of payment or doing or desist from doing any act relating to foreign exchange or foreign security. The Reserve Bank of India was established on April 1, 1935 in accordance with the provisions of the Reserve Bank of India Act, 1934. The Preamble of the Reserve Bank of India describes the basic functions of the Reserve Bank as:

"to regulate the issue of Bank notes and keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage; to have a modern monetary policy framework to meet the challenge of an increasingly complex economy, to maintain price stability while keeping in mind the objective of growth."

Central Board of Director

The Reserve Bank's affairs are governed by a Central Board of Directors. The board is appointed by the Government of India in keeping with the Reserve Bank of India Act. They are appointed/nominated for a period of four years. Constitution of Central Board of Directors are as under:

Official Directors: Full-time: Governor and not more than four Deputy Governors.

Non-Official Directors:

- Nominated by Government: ten Directors from various fields and two government Official
- Others: four Directors - one each from four local boards

Organisation Structure

Central Board of Directors

Governor

Deputy Governor

Executive Directors

Principal Chief General Managers

Chief General Managers

↓

General Managers

↓

Deputy General Managers

↓

Asstt. General Managers

↓

Managers

↓

Asstt. Managers

↓

Support Staff

Board for Financial Supervision

The Reserve Bank of India performs the supervisory function under the guidance of the Board for Financial Supervision (BFS). The Board was constituted in November 1994 as a committee of the Central Board of Directors of the Reserve Bank of India under the Reserve Bank of India (Board for Financial Supervision) Regulations, 1994.

The primary objective of BFS is to undertake consolidated supervision of the financial sector comprising Scheduled Commercial and Co-operative Banks, All India Financial Institutions, Local Area Banks, Small Finance Banks, Payments Banks, Credit Information Companies, Non-Banking Finance Companies and Primary Dealers.

Main Functions Reserve Bank of India

The main Functions of Reserve Bank of India are as follows:

Monetary Authority:

- Formulates, implements and monitors the monetary policy.
- Objective: maintaining price stability while keeping in mind the objective of growth.

Regulator and Supervisor of the Financial System:

- Prescribes broad parameters of banking operations within which the country's banking and financial system functions.
- Objective: maintain public confidence in the system, protect depositors' interest and provide cost-effective banking services to the public.

Manager of Foreign Exchange:

- Manages the Foreign Exchange Management Act, 1999.
- Objective: to facilitate external trade and payment and promote orderly development and maintenance of foreign exchange market in India.

Issuer of Currency:

- Issues, exchanges and destroys currency notes as well as puts into circulation coins minted by Government of India.
- Objective: to give the public adequate quantity of supplies of currency notes and coins and in good quality.

Developmental Role:

- Performs a wide range of promotional functions to support national objectives.

Regulator and Supervisor of Payment and Settlement Systems:

- Introduces and upgrades safe and efficient modes of payment systems in the country to meet the requirements of the public at large.
- Objective: maintain public confidence in payment and settlement system.

Related Functions:

- Banker to the Government: performs merchant banking function for the central and the state governments; also acts as their banker.
- Banker to banks: maintains banking accounts of all scheduled banks.

In the case of *Akshay N Patel (Appellant) Vs. Reserve Bank of India & Anr. (Respondents), Civil Appeal No. 6522 of 2021 Judgement dated December 06, 2021,* Hon'ble Supreme Court of India inter alia observed that the RBI was established by the Reserve Bank of India Act, 1934. By way of an amendment in 2016, the preamble of the statute was amended to reflect the importance of a modern monetary policy framework in an increasingly complex economy. The RBI has been entrusted with the exclusive authority to operate the monetary policy framework of India.

Further, Apex Court Constitution Bench in *Joseph Kuruvilla Vellukunnel v. Reserve Bank of India, AIR 1962 SC 1371* considered a challenge to certain statutory provisions introduced in the Banking Companies Act 1949 which vested the RBI with the powers to file an application for winding-up of any company. Before conducting an analysis of the constitutional challenge under Articles 14 and 19, the Constitution Bench prefaced its analysis with the *raison d'etre* and importance of the RBI as a regulatory body. Justice M Hidayatullah (as the learned Chief Justice then was) observed the following:

"16. Before we consider the arguments of the two sides in detail, we wish to say a few words about the position of the Reserve Bank in the financial affairs of India and also about its place in the scheme of the law. The Reserve Bank of India was established on April 1, 1935 by the Reserve Bank of India Act, 1934. Even before the establishment of the Reserve Bank, suggestions were made that there should be a central bank in India, and the Royal Commission on Indian Currency and Finance had recommended in 1926 that the currency and credit of the country could only be put on a firm foundation, if a central bank was established. The first Bill introduced in 1927 by Sir Basil Blackett was dropped. The Indian Central Banking Inquiry Committee, however, reported in 1931 that there was a need for a central banking institution in India "for securing the development of the Indian banking and credit system on a sound and proper basis". The Committee pointed out that some of the Provincial Committees had also suggested the establishment of the Reserve Bank. The Committee ended by saying:

"We accordingly consider it to be a matter of supreme importance from the point of view of the development of banking facilities in India, and of her economic advancement generally, that a Central or Reserve Bank should be created at the earliest possible date. The establishment of such a bank would by mobilization of the banking and currency reserves of India in one hand tend to increase the Vol. of credit available for trade, industry and agriculture and to mitigate the evils of fluctuating and high charges for the use of such credit caused by seasonal stringency." (Vol. I, Part I. Chap. XXII, para 605)

The White Paper on Indian Constitutional Reforms also recommended the establishment of a Reserve Bank "free from political influence". As a result of these findings, when a fresh Bill was introduced by Sir George Schuster on September 8, 1933 it was accepted and received the assent of the Governor-General on March 6, 1934.

17. The functions of the Reserve Bank were generally indicated in the preamble as the regulation of the issue of the Bank notes and the keeping of the reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage. But to enable the Reserve Bank tofunction in this manner, it had to be given other powers, so that it may function effectively as a central bank. To this end, the Reserve Bank was given the right to hold the cash balances of important commercial banks, a right to transact Government business in India which was also its obligation, and to enter into agreements with State Governments to transact their business.

[......]

18. But the most important function of the Reserve Bank is to regulate the banking system generally. The Reserve Bank has been described as a Bankers' Bank. Under the Reserve Bank of India Act, the scheduled banks maintain certain balances and the Reserve Bank can lend assistance to those banks "as a lender of the last resort". The Reserve Bank has also been given certain advisory and regulatory functions. By its position as a central bank, it acts as an agency for collecting financial information and statistics. It advises Government and other banks on financial and banking matters, and for this purpose, it keeps itself informed of the activities and monetary position of scheduled and other banks, and inspects the books and accounts of scheduled banks and advises Government after inspection whether a particular bank should be included in the Second Schedule or not. [.....]"

LESSON ROUND-UP

- Foreign exchange means 'foreign currency' and includes:- (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.
- Capital Account transactions means any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Sub-section (3) of Section 6 of the Act.
- Current Account Transaction means a transaction other than a capital account transaction and includes payments due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business; payments due as interest on loan and as net income from investments; remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.
- In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, the Reserve Bank issued the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in respect of remittance outside India by a person whether resident in India or not, of assets in India.
- Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. The Reserve Bank is empowered to compound any contraventions as defined under section 13 of FEMA, 1999 except the contravention under section 3(a) for a specified sum after offering an opportunity of personal hearing to the contravener. It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention. It provides comfort to any person who contravenes any provisions of FEMA, 1999 [except section 3(a) of the Act] by minimizing transaction costs.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define the Capital Account Transactions and enumerate permissible capital account transactions in relation to persons resident in India and resident outside India?
2. Discuss the Acquisition and Transfer of Immovable Property outside India under FEMA?
3. Discuss the establishment of branch or office or place of business in India under FEMA.
4. Define Authorised person? Briefly discuss the powers of RBI to give directions to Authorised persons?
5. Write short notes on the following:

   (i) Compounding of Contraventions

   (ii) Current Account Transactions

   (iii) Investigation

LIST OF FURTHER READINGS

- Bare Act - Foreign Exchange Management Act, 1999 (FEMA), rules and regulations made thereunder.
- Foreign Exchange Management Manual – Snow White

OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- https://www.rbi.org.in/scripts/Fema.aspx
- https://rbi.org.in/home.aspx
- https://rbi.org.in/Scripts/Bs_FemaNotifications.aspx