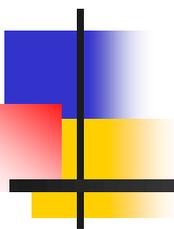


# DUBAI CHAPTER OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

## INTERNATIONAL TAXATION SEMINAR

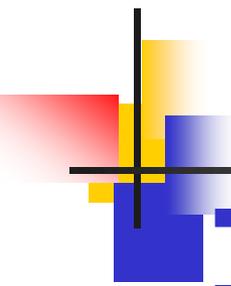


### FEMA – An Overview

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Presented by:  
Mr. Paresh P. Shah

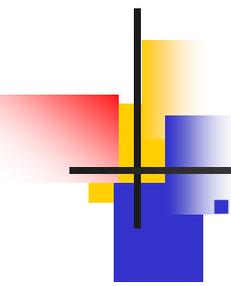
P.P. Shah & Associates  
Chartered Accountants  
Email: [ppshahandassociates@gmail.com](mailto:ppshahandassociates@gmail.com)



# Overview

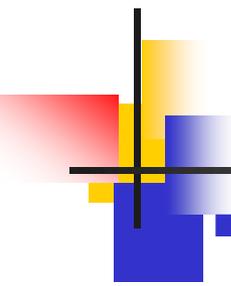
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- Foreign Exchange Management Act (FEMA) – Overview
- Important definitions under FEMA
- Fundamentals of FEMA
- FEMA Practice
- Schemes for Inbound Investment - FEMA Notification 20(R) / 2017- RB
- Foreign Direct Investment (FDI) in India – Automatic & Approval Routes
- FDI related compliances and reportings
- FDI Policy – Recent changes and select sectors
- Acquisition & transfer of different types of assets by Non Residents and Residents including by way of Gift / Inheritance
- Overview of important allied laws such as PMLA, BMA, Income-tax, FEMA Compounding and Prosecution and Case Study
- Check-list for returning Indians



# Overview

Abbreviations: Authorised Dealer(AD),  
Capital Account transaction (CAP),  
Current Account Transaction(CAT),  
Foreign Exchange(FE),  
Government of India (GOI) ,  
Notification no.(Notf.),  
Person Resident Outside India(PROI),  
Person Resident in India (PRII),  
Non Resident Indian (NRI),  
Person of Indian Origin (PIO),  
Overseas Citizen of India (OCI),  
Reserve Bank of India (RBI),  
Non-repatriable basis (NRB).  
Repatriable basis(RB).  
Subject to (SBT).  
Foreign Portfolio Investor (FPI),  
Alternate Investment Fund (AIF),  
Foreign Venture Capital Investor (FVCI),  
Indian Venture Capital Undertaking (IVCU)



# Overview

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- Rationale and Overview of FEMA
  - Manner of reading the FEMA
  - Nature of the Law – Civil / Criminal
  - Nature of Transactions
  - Mechanism of dealing in Transactions

Slides 5 - 25

# Overview of Foreign Exchange Management Act

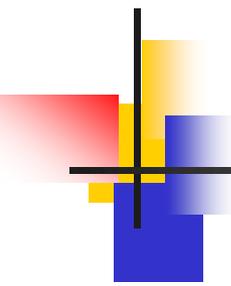
- Applies to whole of India and all branches, offices and agencies outside India, which are owned or controlled by person resident in India – Extra territorial jurisdiction
- Broadly, the objectives of FEMA are: (i) To facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the RBI in the administration of FEMA.
- FEMA has total 49 sections in which sections 1 to 9 are substantive and the rest are procedural /administrative to carry out function such as Appellate, Investigation, search and authorization to various statutory bodies to make rules, regulations, amendments
- Section 46 of the Act grants power to Central Government to makes rules and section 47 (as amended by Finance Act, 2015) of the Act grants power to RBI to make regulations to implements its provisions and the rules made there under; also provides that earlier regulations made by RBI, for which power now vests with Central Govt. remain valid until amended / rescinded by Central Govt.
- Every Rule and Regulation made under this Act shall be laid before each house of parliament Section 48.
- Section 49 deals with Repeal and savings
- **Finance Act, 2015 (r.w. Notification No.SO 2454(E) dt. 8-9-2015 has amended Sections 2, 13, 18 & 46 and inserted new Section 37A**

# Overview of Foreign Exchange Management Act

Section	Description
1	Application and commencement of FEMA w.e.f. 1/6/2000
2	Definitions (amended by Finance Act, 2015 to include "Authorised Officer" and "Competent Authority")
3 to 9	Substantive provisions, Dealing in FE, No drawal of FE, CAT, CAP, Export & Import, Repatriation, Possession of FE etc. (Section 6 amended by Finance Act, 2015 to provide that equity flows shall be under Central Govt.)
10 to 12	Authorized person Delegation of power by RBI ,ADs & Documents
13 to 15	Contraventions and penalties (Section 13 amended by Finance Act, 2015 for penalty for holding foreign exchange, security or property in excess of threshold specified in new S. 37A)
16 to 38	Adjudication, Appeal and Directorate of enforcement [new Section 37A vide Finance Act, 2015: Special provisions relating to assets held outside India in contravention of section 4]
39 to 49	Miscellaneous provisions, Power of RBI, Power of Government of India, Procedure for issue of Notification etc. Sunset clause for FERA upto 31 <sup>st</sup> May 2002, Repeal and Savings

# Overview of Foreign Exchange Management Act

Section	Description
3	Dealing in foreign exchange by any Person in India. Receipt by PRII without Remittance, Payment in India by PRII with a right O/I
4	Holding of foreign exchange, Security and Immovable property by PRII.
5	Current account transactions, List and Restrictions
6	Capital account transactions-Powers of RBI, Central Govt. and the list.
7	Export of goods and services- Declaration, Information, Direction to receive FE.
8	Realisation and repatriation of foreign exchange
9	Exemption from realization and repatriation in certain cases And possession of FE



# Fundamentals of FEMA

## **SEC. 3:** Dealing in foreign exchange, etc.

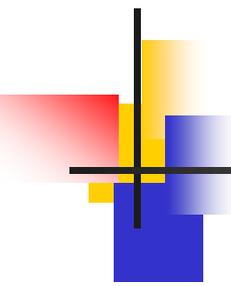
Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-

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

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

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

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



# Fundamentals of FEMA

## **SEC. 4:** Holding of foreign exchange, etc.

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

## **SEC. 5:** Current account transactions

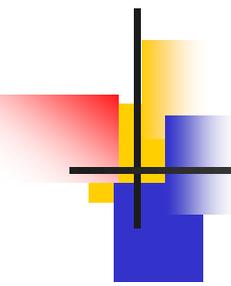
- **Any person may** sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction:

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

## **SEC. 6:** Capital account transactions

- (1) Subject to the provisions of sub- section (2), any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify-
  - (a) any class or classes of capital account transactions which are permissible;
  - (b) the limit up to which foreign exchange shall be admissible for such transactions:

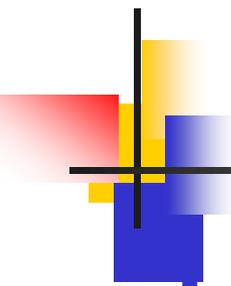
Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary courts of business.



# Fundamentals of FEMA

## **SEC. 6:** Capital account transactions (con't)

- (3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following-
  - (a) transfer or issue of any foreign security by a person resident in India;
  - (b) transfer or issue of any security by a person resident outside India;
  - (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
  - (d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;
  - (e) 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;
  - (f) deposits between persons resident in India and persons resident outside India;
  - (g) export, import or holding of currency or currency notes;
  - (h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
  - (i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
  - (j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred-
    - (i) by a person resident in India and owed to a person resident outside India; or
    - (ii) by a person resident outside India.



# Fundamentals of FEMA

## **SEC. 6:** Capital account transactions (con't)

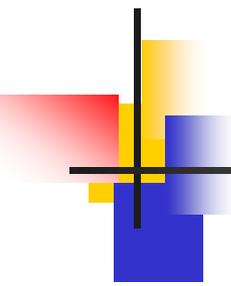
(4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India **or inherited from a person who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

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

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

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

- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

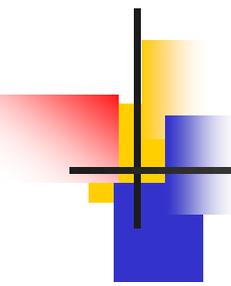


# Fundamentals of FEMA

## **SEC. 8: Realisation and repatriation of foreign exchange. –**

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

**Note:** The above is dealt with by Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 issued under Notification No. FEMA 9 (R)/2015-RB dt. December 29, 2015

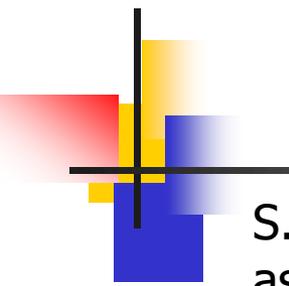


# Fundamentals of FEMA

**SEC. 9: Exemption from realization and repatriation in certain cases.** – The provisions of sections 4 and 8 shall not apply to the following, namely:-

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

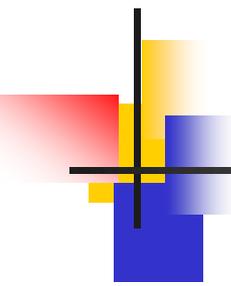
**Note:** The above is dealt with by Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 issued under Notification No. FEMA 11 (R)/2015-RB dt. December 29, 2015 and Foreign Exchange Management (Export & Import of Currency) Regulations, 2015 issued under Notification No. FEMA 6 (R)/2015-RB dt. December 29, 2015



# Important Definitions under FEMA

S. 2(e) "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6

- S. 2(j) "current account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,-
  - (i) payments due in connection with foreign trade, other current business, services, and short- term banking and credit facilities in the ordinary course of business,
  - (ii) payments due as interest on loans and as net income from investments,
  - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
  - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children



# Relevance of Capital Account & Current Account Transactions

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- **Capital account transactions are prohibited unless generally premitted**
- **Current account transactions are freely permitted unless prohibited**
- Capital Account transactions are covered (PRIIs in Schedule I; PROIs in Schedule II) of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 issued vide Notification No. FEMA 1/2000-RB dated 3rd May 2000.
- Current Account transactions are more specifically covered in Schedule I, II & III of Foreign Exchange Management (Current Account Transactions) Rules, 2000.

# Current Account vs Capital Account transactions

## ■ Current Account OR Capital Account?

Transaction	Type	Reasons
Gift from NRI by transfer from NRE account in India	Capital Account	Change in assets in India of a person resident outside India [Sec. 2(e) of FEMA]
Gift from NRI by way of remittance from abroad	Current Account	No change in assets in India of a person resident outside India [Sec. 2(e) of FEMA]
Payments towards Import & Export of Goods	Current Account	Payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in the ordinary course of business [Sec. 2(j) of FEMA]

# Current Account vs Capital Account transactions

## ■ Current Account OR Capital Account?

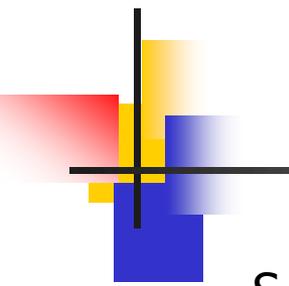
Transaction	Type	Reasons
Guarantee given by PROI in favour of PRII	Current Account	Does not change liabilities in India of a person resident outside India [Sec. 2(e) of FEMA] 'Contingent liabilities' in the definition of Capital account transactions is not applicable to PROIs
Guarantee given by PRII in favour of PROI	Capital Account	Changes contingent liability outside India of a Person resident in India [Sec. 2(e) of FEMA]

- *Recap:* Sec. 2(e) of FEMA: "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub- section (3) of section 6

# Important Definitions under FEMA (con't)

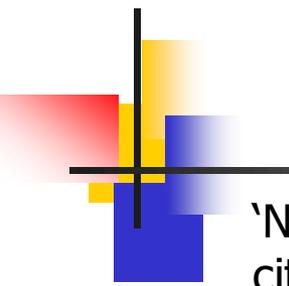
S. 2(v) " person resident in India" means-

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



# Important Definitions under FEMA

- S. 2(v) " person resident in India" means – (con't)
  - (ii) any person or body corporate registered or incorporated in India,
  - (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
  - (iv) an office, branch or agency outside India owned or controlled by a person resident in India
  
- S. 2(w) " person resident outside India" means a person who is not resident in India



# Important Definitions under FEMA

'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder ('OCI') within the meaning of section 7 (A) of the Citizenship Act, 1955.

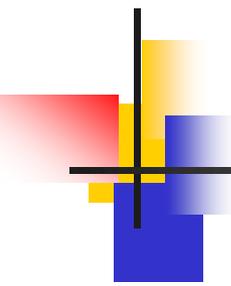
- OCI is now defined separately in new FEMA 20(R) as: 'Overseas Citizen of India (OCI)' means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.
- 'Persons of Indian Origin' cardholders registered as such under Notification No. 26011/4/98 F.I. dated 19.8.2002 issued by the Central Government are now deemed to be 'Overseas Citizen of India' cardholders w.e.f. 12.05.2015
- OCI is wider in scope than PIO which used to be up to 3 generations of foreign citizens. Now up to 4th generation of foreign citizens can be considered as OCI. Further, there are additional conditions in case of spouses that marriage should have subsisted for at least two years prior to application for OCI card.

# Important Definitions under FEMA

Following categories of foreign nationals are eligible for registration as Overseas Citizen of India (OCI) Cardholder:-

- (1) Who was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26.01.1950; or
- (2) who was eligible to become a citizen of India on 26.01.1950; or
- (3) who belonged to a territory that became part of India after 15.08.1947; or
- (4) who is a child or a grandchild or a great grandchild of such a citizen; or
- (5) who is a minor child of such persons mentioned above; or
- (6) who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or
- (7) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.

- Note : No person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder.



# Fundamentals of FEMA

Foreign Exchange belongs to Govt. of India except permitted.(Sec 5 about Current Account Transaction and Sec 6 about Capital Account Transactions)

- Dealing in Foreign Exchange by PRII as well as by PROI is regulated(Section 3 of The FEMA )
- Dealing between PRII and PROI in Rupees is also regulated(Borrowing and Lending in Rupees, deposit in Rupees, Gifts in India by PROI except to relatives etc)
- Permissible Capital Account or Current Account Transaction -Drawal of Foreign Exchange are specific to purposes for which they are granted.

# FEMA Practice - Revised Notifications & Master Directions

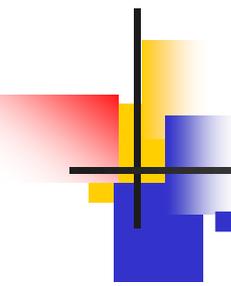
NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
1	Permissible Capital Account Transactions	-	-
2	Issue of Security in India by a branch, office or agency of a PROI	-	-
3	Borrowing and lending in Foreign currency	-	FED No. 5 / 2015-16
4	Borrowing and lending in Rupees	-	FED No. 6 / 2015-16
5	Deposits by NRs	FEMA 5(R)_ FEM (Deposit) Regn. 2016 dt. 01.04.2016	FED No. 14 / 2015-16
6	Export and Import of foreign currency	FEMA 06(R)_ FEM (Import & Export of Currency) Regn 2015 dt 29.12.2015	
7	Acquisition and transfer of immovable properties outside India	FEMA 7(R)_ FEM (Acquisition and Trnsfr of Immovable Properties outside India) Regn 2015 dt 21.01.2016	FED No. 12 / 2015-16
8	Guarantees	-	-
9	FE realisation, repatriation, surrender	FEMA 09(R)_ FEM (Realisation, repatriation, surrender of FX) Regn 2015 dt 29.12.2015	-
10	Foreign Currency Accounts by a PRII	FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016	FED No. 14 / 2015-16
11	Possession and retention of Foreign currency	FEMA 11(R)_ FEM (Possession and Retention of FC) Regn 2015 dt 29.12.2015	-
12	Insurance	FEMA 12(R)_ FEM (Insurance) Regn 2015 dt 29.12.2015	FED No. 9 / 2015-16
13	Remittance of assets in India	FEMA 13(R)_ FEM (Remittance of Assets) Regn 2016 dt 01.04.2016	FED No. 13 / 2015-16

# FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
14	Manner of receipt and payment	FEMA 14(R)_ FEM (Manner of Receipt and Payment) Regn 2016 dt 02.05.2016	-
15	Definition of Currency	FEMA 15(R)_ FEM (Currency) Regn 2015 dt 29.12.2015	-
16	Receipt and payment to person outside India	-	-
17	Transaction in Indian rupees with resident of Nepal and Bhutan	-	-
18	Post Office (Postal Money Orders)	FEMA 18(R)_ FEM (Postal Money Order) Regn 2015 dt 29.12.2015	-
19	Overseas Direct Investment	-	FED No. 15 / 2015-16
20	FDI, PIS	FEMA 20(R)_ (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 dt. 07.11.2017	FED No. 11 / 2017-18
21	Immovable property in India	FEMA 21(R)_ FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 dt. 26.03.2018	FED No. 12 / 2015-16
22	Branch etc in India	FEMA 22(R)_ FEM (Branch Liaison Project office) Regn 2016 dt 31.03.2016	FED No. 10 / 2015-16
23	Export of Goods & Services	FEMA 23(R)_ FEM (Export of Goods & Services) Regn 2015 dt 12.01.2016	FED No. 16 / 2015-16
24	Investment in Firm or Proprietary concern in India	SUBSUMED IN FEMA 20(R) w.e.f. 07.11.2017	-
25	Foreign exchange derivative contracts	-	-

# FEMA Practice - Revised Notifications & Master Directions

Subject	Master Direction
Import of Goods & Services	FED No. 17 / 2015-16
Liberalized Remittance Scheme	FED No. 7 / 2015-16
Compounding of Contraventions	FED No. 4 / 2015-16
Other Remittance facilities (current account)	FED No. 8 / 2015-16
Reporting under FEMA	FED No. 18 / 2015-16
Misc Directions that do not figure in other Master Directions (TDS on remittances, repatriation of assets abroad & under LRS, Medical expenses of NRI, Routing of funds to India, SIT - sharing of information, IFSC guidelines, FEMA & Black Money Act)	FED No. 19 / 2015-16
Money Changing Activities	FED No. 3 / 2015-16
Vostro Accounts by Non-Resident Exchange Houses	FED No. 2 / 2015-16
Gold Monetisation Scheme 2015 dt 22.10.2015_amended to 21.01.2016	DBR.IBD.No.45/ 23.67.003 / 2015-16



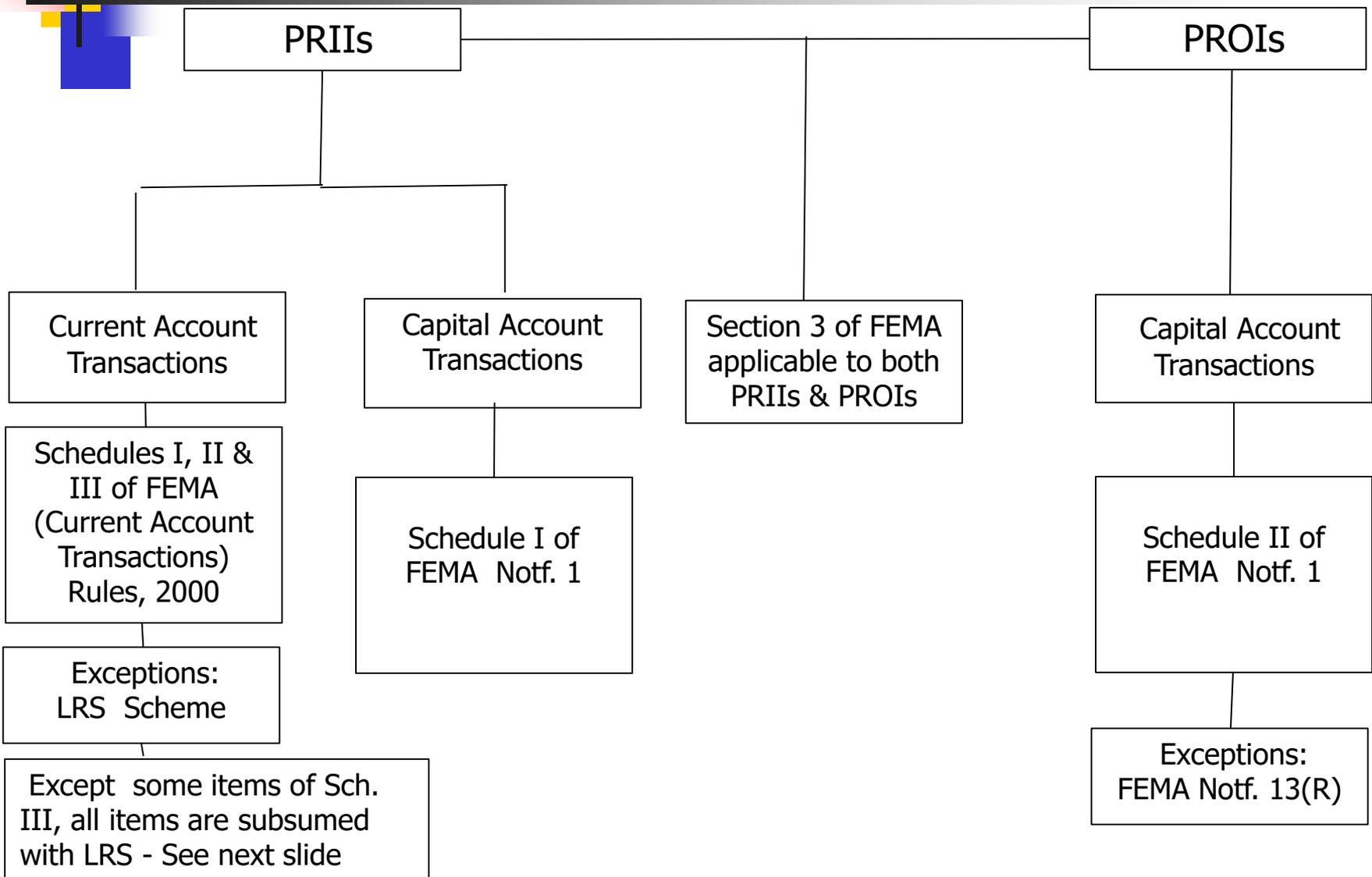
# FEMA – A promising service area

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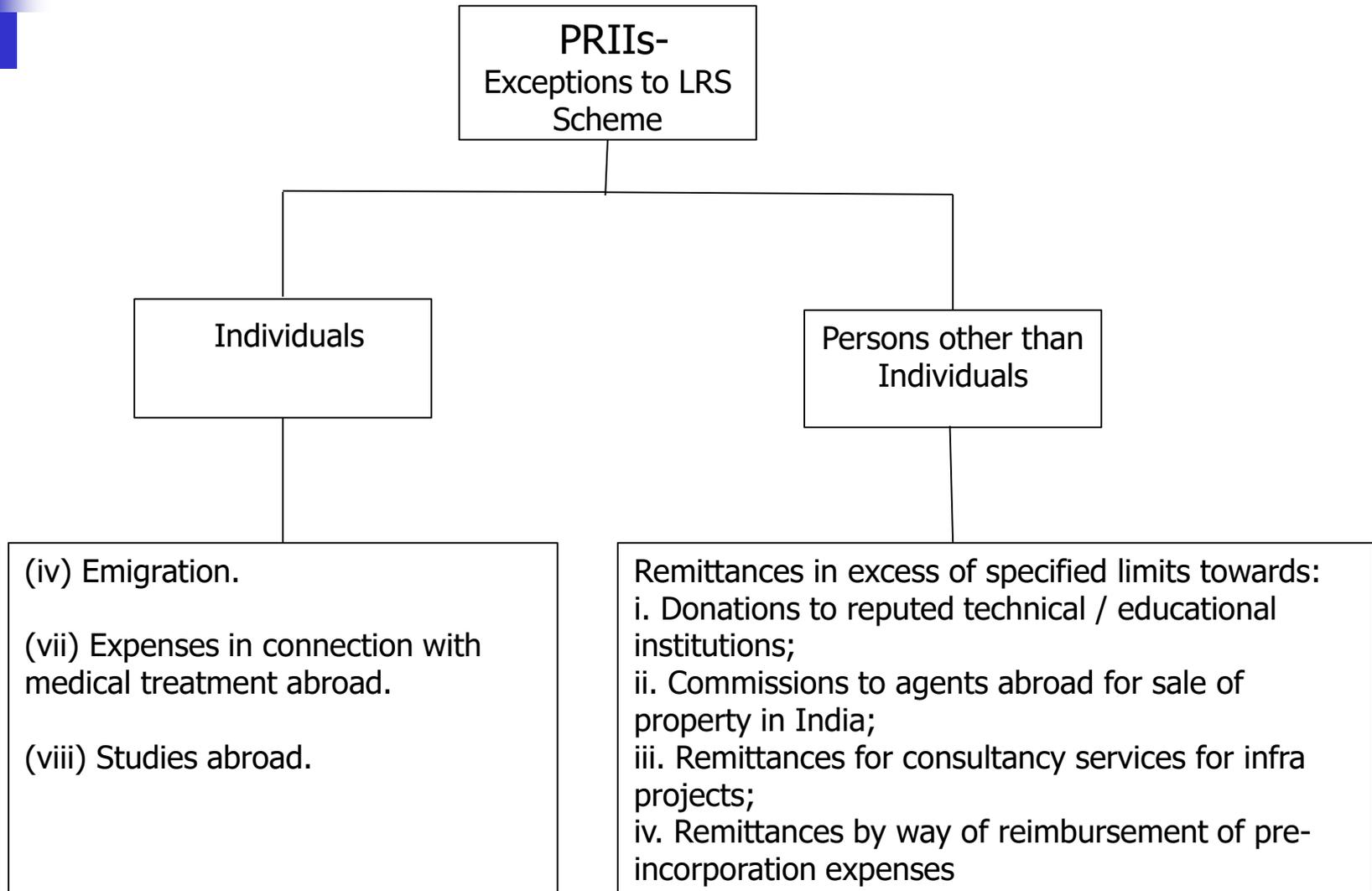
- Most prominent Practice Area
- Resolution Process
- Foreign Direct Investments (FDI) / Overseas Direct Investments (ODI) / External Commercial Borrowings (ECB)
- FDI – Types, Routes and conditions
- Issues arising out of sector specific guidelines

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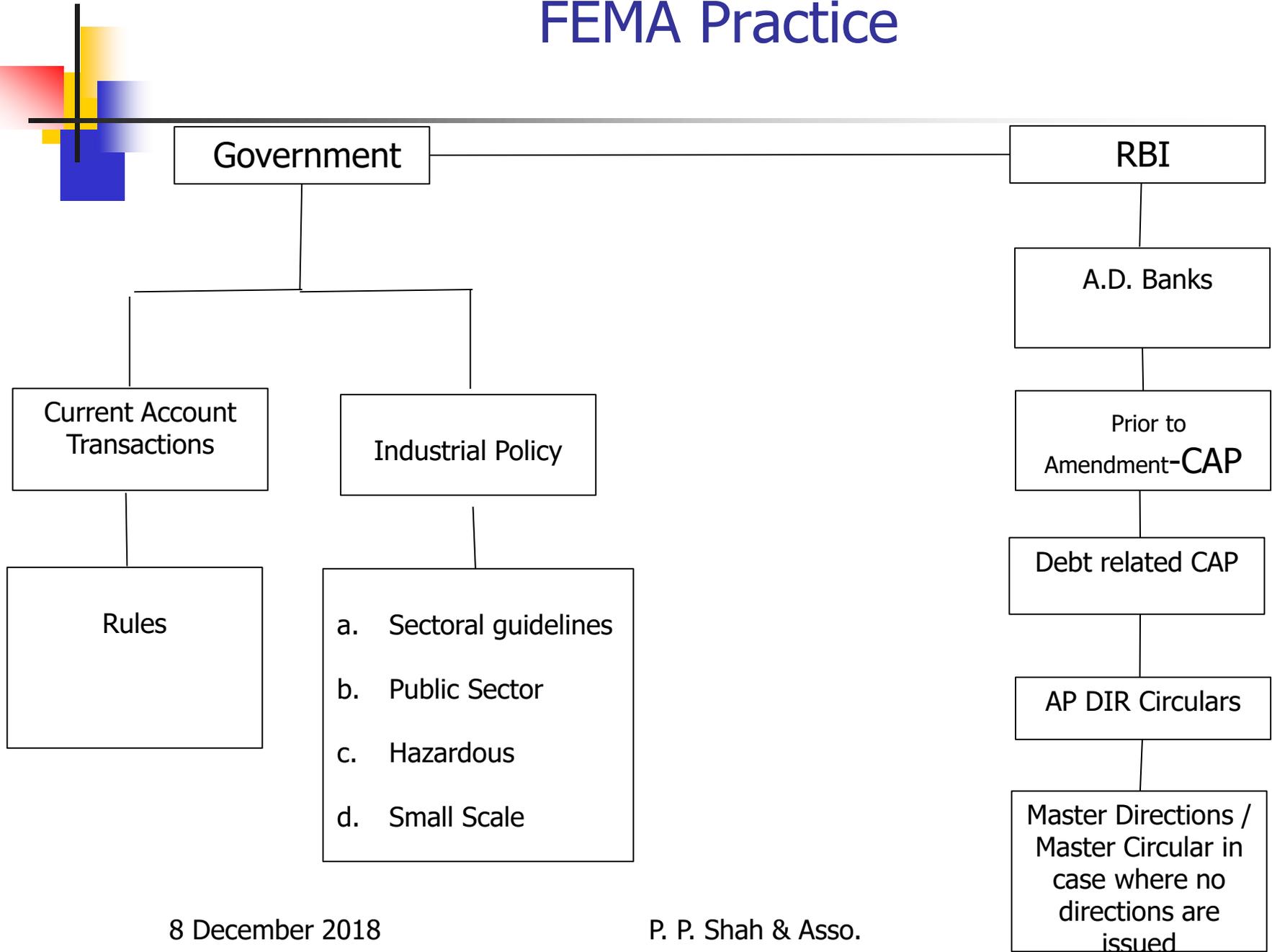
# FEMA Practice

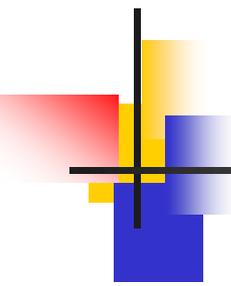


# FEMA Practice



# FEMA Practice





# FEMA NTF. 20(R) – FOREIGN INVESTMENT IN INDIA

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Investment in India generally, and particularly foreign investment, by non-resident investors is a capital account transaction regulated:

- a. by Government through Foreign Direct Investment (FDI) Policy (popularly known as sectoral policy) issued by the Government under Industrial Development (Regulation) Act, 1951; and
- b. by Reserve Bank of India through Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2017 issued under Notification No. FEMA 20(R)/2017-RB dated 7th November 2017 ('FEMA Ntf. 20(R)') as amended from time to time.

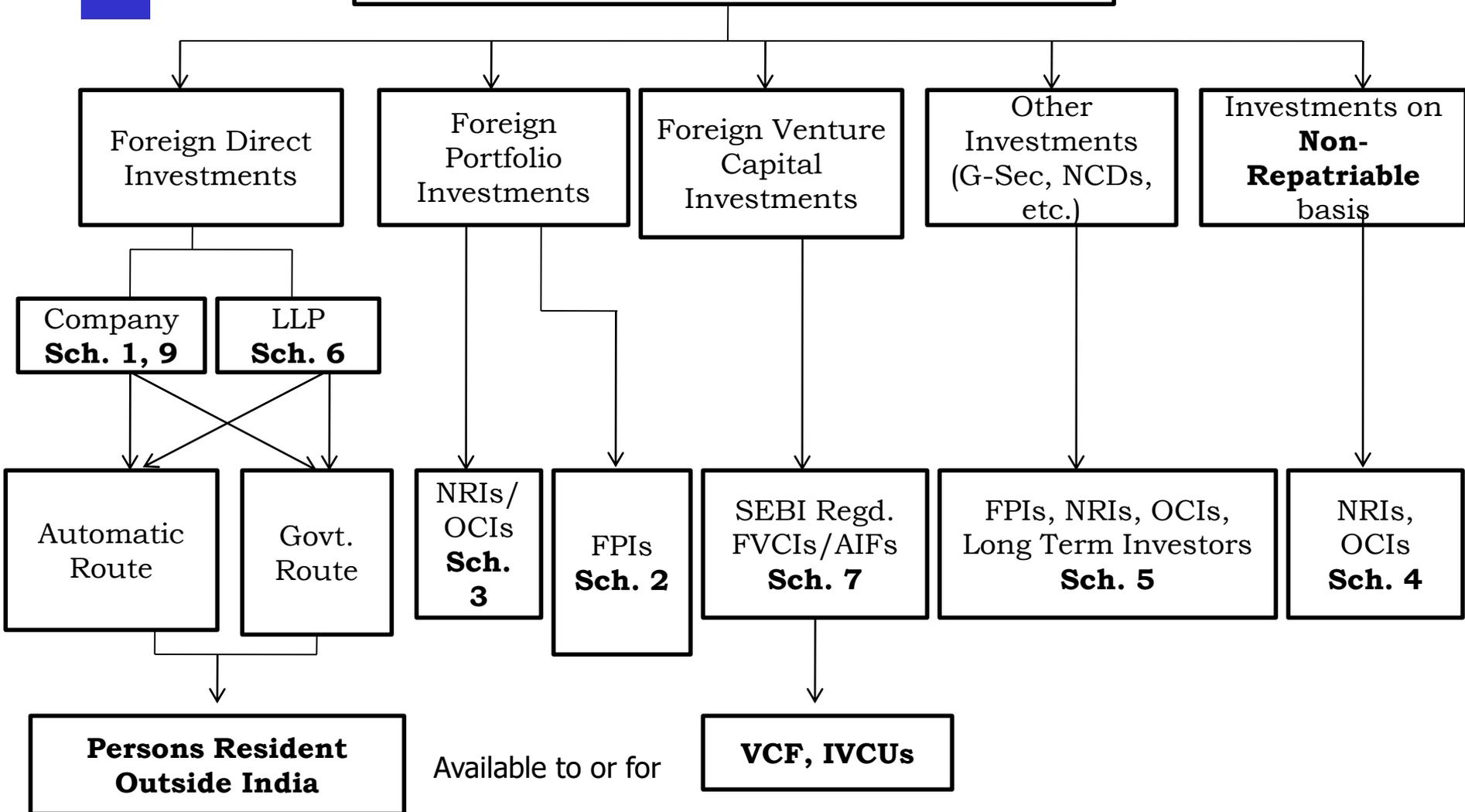
# FEMA NTF. 20(R) – FOREIGN INVESTMENT IN INDIA

## Schemes for Inbound Investment (NEW)

Sch. 1	Purchase / Sale of capital instruments of Indian company by PROI (i.e. Foreign Direct Investment ('FDI') Scheme)
Sch. 2	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Foreign Portfolio Investor (i.e. Portfolio Investment Scheme)
Sch. 3	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis (i.e. Portfolio Investment Scheme)
Sch. 4	Purchase/Sale of capital instruments or convertible notes of an Indian company or Units or contribution to capital of an LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on non-repatriation basis
Sch. 5	Purchase and Sale of Securities other than capital instruments by a person resident outside India
Sch. 6	Investment in a Limited Liability Partnership (LLP)
Sch. 7	Investment by a Foreign Venture Capital Investor (FVCI)
Sch. 8	Investment by a person resident outside India in an Investment Vehicle
Sch.9	Investment in Depository receipts by a person resident outside India
Sch. 10	Issue of Indian Depository Receipts (IDRs)

# Foreign Investment in India- Schematic Representation

## Foreign Inbound Investments



# Schemes for Inbound Investment – FEMA Ntf. 20(R)

Schedule No. →	1	2	3	4	6	7	8	9	10
Type of Investor →	PROI (repatriation)	FPI (repatriation)	NRI / OCI (repatriation)	NRI / OCI (non-repatriation)	PROI (repatriation)	FVCI (repatriation)	PROI (repatriation)	PROI (repatriation)	FPI / NRI / OCI (repatriation)
<b>Instrument</b>									
Equity Shares (incl. partly paid-up; 25% consideration up-front & balance within 12 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Share Warrants (25% consideration up-front & balance within 18 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Debentures (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Preference Shares (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Convertible Note				Y		Y			
Units in Investment Vehicle				Y		VCF, Cat-I AIF, Cat-II AIF	Y		
Capital in LLP				Y	Y				
Capital in Firm or proprietorship				Y					
Depository Receipts								Y	
Indian Depository Receipts									Y

# Schemes for Inbound Investment – FEMA Ntf. 20(R)

Schedule No. →	5	5	5	5	5
Type of Investor →	FPI (repatriation)	NRI / OCI (repatriation)	NRI / OCI (non- repatriation)	Foreign Central Bank or Multilateral Dev. Bank (repatriation)	Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds, Pension Funds (repatriation)
Govt. securities / Treasury Bills	Y	Y	Y	Y	Y
NCDs of Indian Companies	Y				Y (listed; unlisted in Infrastructure sector)
Commercial Paper of Ind. Co.	Y				Y
Units of domestic Mutual Funds	Y	Y	Y		Y
Security Receipts of ARCs	Y				Y
Perpetual Debt Instruments of banks	Y	Y			Y
NCDs of Infrastructure Finance Companies	Y				Y
Rupee denominated bonds/ units issued by Infrastructure Debt Funds	Y	Y			Y
Credit enhanced bonds	Y				Y
Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20	Y	Y	Y		Y
Security receipts issued by securitization companies	Y				Y
Securitized debt instruments issued by SPV set up by Banks, FIs, NBFCs for securitisation	Y				
Bonds of PSUs		Y			
Shares in Public Sector Enterprises being disinvested by the Central Government		Y			
National Pension Scheme		Y			
National Savings Certificates			Y		
Chit Funds (authorised)			Y		

# Schemes for Inbound Investment – FEMA Ntf. 20(R)

- **Important Regulations of FEMA Ntf. 20(R):**

### **3. Restriction on investment by a person resident outside India**

Save as otherwise provided in the Act, or rules or regulations made thereunder, no person resident outside India shall make any investment in India.

Provided that an investment made in accordance with the Act or the rules or the regulations framed thereunder and held on the date of commencement of these Regulations, shall be deemed to have been made under these Regulations and shall accordingly be governed by these Regulations.

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

### **4. Restriction on receiving investment**

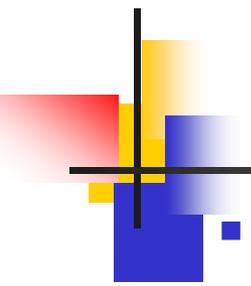
Save as otherwise provided in the Act, or rules or regulations made thereunder, an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern shall not receive any investment in India from a person resident outside India or record such investment in its books.

Provided that the Reserve Bank may, on an application made to it and for sufficient reasons, permit an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary.

# Schemes for Inbound Investment – FEMA Ntf. 20(R)

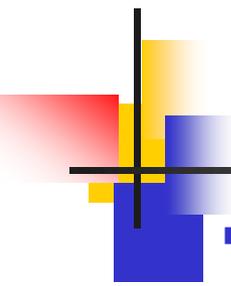
## • Important Regulations of FEMA Ntf. 20(R) (con't):

5. **Permission for making investment by a person resident outside India [Sch. 1 to 10].**
6. **Acquisition through a rights issue or a bonus issue.**
7. **Issue of shares under Employees Stock Options Scheme to persons resident outside India.**
8. **Issue of Convertible Notes by an Indian startup company.**
9. **Merger or demerger or amalgamation of Indian companies.**
10. **Transfer of capital instruments of an Indian company by or to a person resident outside India.**
11. **Pricing Guidelines.**
12. **Taxes and Remittance of sale proceeds.**
13. **Reporting requirements.**
14. **Downstream Investment.**
15. **Prohibited activities for investment by a person resident outside India.**
16. **Permitted sectors, entry routes and sectoral caps for total foreign investment.**



# Important conditions of Automatic Route of FDI

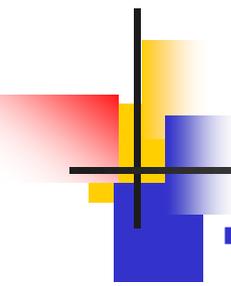
- Sectors
- Conditionalities
- Issue of shares against exchange of shares, swap of shares, incorporation and allied expenses, other entitlements in kind, ESOP shares, conversion of ECBs
- Issue and Transfer
- Valuation norms
- Re-lending or stock market operations or prohibited activities
- Payments to be received in FE
- Reporting as per Regulations
- FDI in LLP – not at par with Investee Indian company
- Investment under Schedule 4 – a deemed Resident investment – meaning
- Gift of shares
- Brownfield vs Greenfield



# Automatic Route of Investment to PROI

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- Main Conditions of issue of Shares (Reg. 5, Schedule 1, Notification No. FEMA 20(R)/2017-RB dated Nov 7, 2017).
- Eligible Persons:
  - PROI other than citizen of Pakistan, entities of Pakistan.
  - Bangladesh Citizens & entities only with prior approval of FIFP.
  - OCB: Bonus Shares permitted, Right Shares with RBI Approval.
  - A company, trust and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy



# Automatic Route of Investment to PROI

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- Eligible Investee Entities:
  - Indian companies
  - Partnership Firm / Proprietorship concern (only for NRI / OCI on non-repatriation basis)
  - Trusts in the form of SEBI regulated Venture Capital Fund
  - Limited Liability Partnerships
  - Investment Vehicles: SEBI registered and regulated Alternative Investment Funds, Real Estate Investment Trusts and Infrastructure Investment Trusts



# Approval Route of Investment to PROI

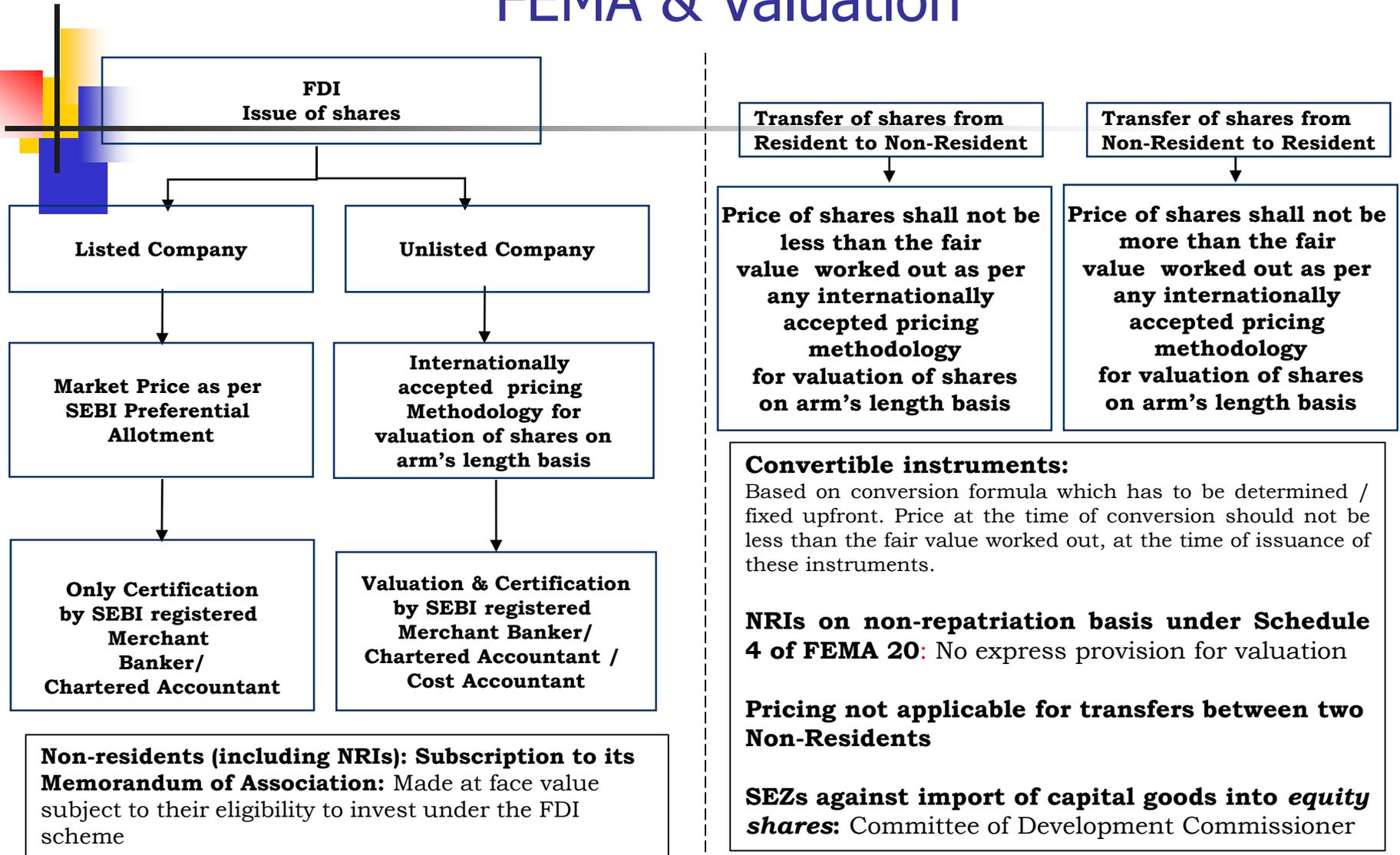
For FDI not eligible under the Automatic route / in sectors requiring prior government approval, the work of granting approval for foreign investment under the extant FDI Policy and FEMA Regulations, has been entrusted to the concerned Administrative Ministries / Departments after abolition of FIPB w.e.f. 05.06.2017

- The eleven notified sectors/activities requiring government approval are Mining, Defence/cases relating to FDI in small arms, Broadcasting, Print media, Civil Aviation, Satellites, Telecom, Private Security Agencies, Trading(Single, Multi brand and Food Products), Financial services not regulated or regulated by more than one regulator/ Banking Public and Private (as per FDI Policy) and Pharmaceuticals.
- The Department of Industrial Policy and Promotion, Ministry of Commerce & Industry has been given the responsibility of overseeing the applications filed on the **Foreign Investment Facilitation Portal (fifp.gov.in)** and to forward the same to the concerned Administrative Ministry.
- A Standard Operating Procedure (SOP) developed by DIPP in consultation with the concerned Administrative Ministries is being followed for processing of the FDI applications. Approval letters in Standard Format will be uploaded on the Portal itself for the benefit of the Investors.

# Types of instruments: 'Capital'

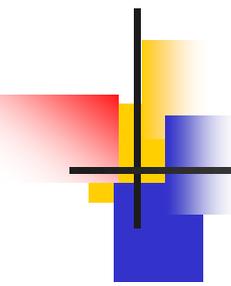
<b>Equity shares</b>	
Fully, compulsorily & mandatorily convertible <b>Preference Shares</b>	
Fully, compulsorily & mandatorily convertible <b>Debentures</b>	
<b>Differential voting rights shares as to dividend, voting or otherwise</b>	<b>Permitted</b>
<b>Non-convertible</b> , optionally convertible or partially convertible instruments considered as debt	▪ To comply with <b>ECB norms</b>
<b>Warrants:</b> Upfront 25% of consideration and the balance amount within eighteen months of issuance of share warrants ▪Upfront pricing/ conversion formula	
<b>Partly paid 'Equity Shares' only:</b> Upfront 25% of consideration including premium; Full payment in 12 months	
<b>Optionality clauses:</b> <b>Capital instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.</b>	

# FEMA & Valuation



## Preferential Allotment Pricing Guideline under SEBI (ICDR) Regulations 2009:

"Price not less than the higher of Avg. weekly high and low closing price over a trailing six month period, or a trailing two week period, from the "relevant date of transaction." "Relevant Date" means date thirty days prior to the date of GM of shareholders



# Issue of Shares- Other modes

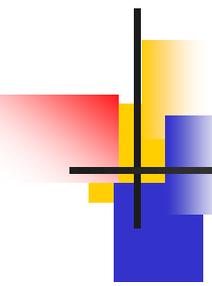
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- Issue of Bonus Shares allowed.
- Issue of Right Shares
  - Price offered to PROI can not be lower than that offered to PRII.
  - Additional Shares allowed within FDI Ceiling.
  - Existing OCB allowed with prior approval.
- Amalgamation / Demerger
  - Amalgamating/ transferee company can issue shares if it is engaged in eligible sector and observes FDI ceiling.
  - Reports the transaction to RBI within 30 days of such NCLT order of amalgamation with percentage of capital held by PROI in transferor, transferee or new company before or after the transfer.

# Issue of Shares - Other modes – ESOP / Sweat Equity

**Indian company** may issue “employees’ stock option” and/or “sweat equity shares” to **its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India**, provided that :

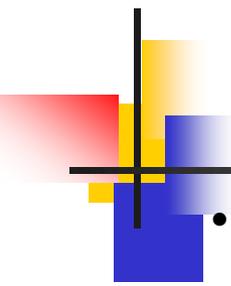
- a) The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the **Companies (Share Capital and Debentures) Rules, 2014** notified by the Central Government under the Companies Act 2013, as the case may be.
- b) The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the **sectoral cap** applicable to the said company.
- c) Issue of “employee’s stock option”/ “sweat equity shares” in a company where foreign investment is under the **approval route** shall require prior Government approval.
- d) Issue of “employee’s stock option”/ “sweat equity shares” to a citizen of **Bangladesh/Pakistan** shall require prior Government approval.



# Mode of Payment

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- (i) **Inward remittance** through normal banking channels
- (ii) Debit to **NRE / FCNR** account of a person concerned maintained with an AD category I bank
- (iii) **Conversion** of royalty / lump sum / technical knowhow fee/ legitimate due for payment or conversion of ECB, shall be treated as consideration for issue of shares
- (iv) **Conversion** of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares provided the Indian investee company is engaged in an automatic route sector, else Govt approval is required
- (v) Debit to non-interest bearing **Escrow account** in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration



# Other important conditions in FDI Policy

- **Caps in Investments:**

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The caps in various sector(s) are detailed in the Consolidated FDI Policy and in Regulation 16 of FEMA Ntf.20(R)

- **Entry conditions:**

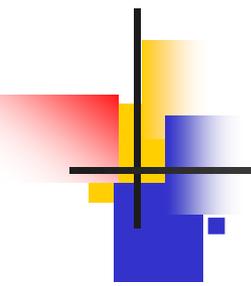
Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc. and are specified in the Consolidated FDI Policy

- **Other conditions:**

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

- **Foreign Investment into/downstream Investment by eligible Indian entities:**

The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company/LLP, at every stage of investment, including downstream investment are specified in the Consolidated FDI Policy and in Regulation 14 of FEMA Ntf.20(R)



# Reporting of FDI

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- **Offline reporting & online e-Biz portal reporting**

Physical filing of FC-GPR, ARF and FCTRS forms was discontinued from **February 8, 2016** and online filing through government's e-Biz portal was made mandatory.

- **Sept. 2018 onwards, Online reporting is through a new dedicated portal viz. FIRMS (Foreign Investment Reporting & Management System) where each Indian Company with foreign investment has to create an Entity Master and thereafter report all events through Single Master Form (comprising FC-GPR, FC-TRS, etc.)**

# Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

NRIs, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians, may without any limit, acquire & hold **on non-repatriation basis**, (i) shares or convertible debentures / preference shares, warrants of an Indian company issued whether by public issue or private placement or right issue (2) Units issued by an Investment vehicle

- Investment prohibited in chit fund or a nidhi company or company engaged in agricultural / plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights
- Investment should be by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO account
- **Investment by NRIs under Schedule 4 of (erstwhile) FEMA 20 will be deemed to be domestic investment at par with the investment made by residents.** (*Press Note No.7 dated 3rd June, 2015*)
- 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No.26011/4/98 F.I, dated 19.8.2002, issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders. (*Vide The Citizenship (Amendment) Act 2015 w.e.f. 06 January 2015 read PN7 dated 03 June 2015*)

# Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

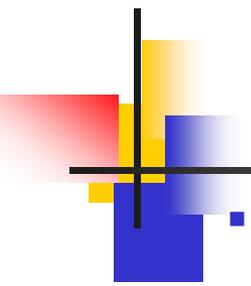
Accordingly, now Overseas NRI Entity will be eligible for investment under Schedule 4 and such investment will be deemed domestic investment at par with investment made by Residents.

- Similarly, under FDI policy/scheme under Schedule 1, Overseas Entity can invest in India with the special dispensation as available to NRIs, e.g. (a) Scheduled Air Transport Services/Domestic Scheduled Passenger Airlines, (b) Regional Air Transport Service, (c) Condition of lock-in period in Construction-development projects. This dispensation is not available for investment by NRIs under Schedule 3.
- The concept of 'owned and controlled by NRIs' has not been defined under Schedule 4; but may be borrowed from Regulation 14. 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. A company is considered as 'Owned' by NRIs if more than 50% of the capital in it is beneficially owned by NRIs. A Partnership Firm will be considered as owned by NRIs if more than 50% of the investment in such firm is contributed by NRIs and such NRIs have majority of the profit share.

# Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

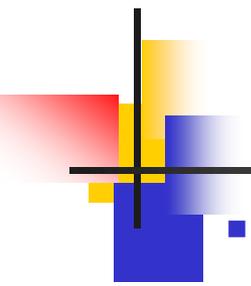
**Implications for investments made under Schedule 4** as they are deemed domestic investments:–

- Following restrictions which are applicable on investment made by non-residents under Schedule 1 are not applicable:
  - Investment restrictions on sectoral/statutory cap /conditionalities, entry route, pricing guidelines;
  - Reporting requirement (e.g. Advance Remittance Form, FC-GPR, FC-TRS, Form-ESOP, FDI- LLP (I), Form FDI- LLP (II), Annual Return on Foreign Liabilities and Assets, Downstream Investment Reporting), documentation, etc.;
  - Investments under schedule 4 are not counted for direct and indirect foreign investment;
  - Acquisition of Rights Shares/Bonus Shares/Shares after merger, demerger, amalgamation /ESOP/Pledge of shares: Limitations/restrictions contained in FEMA 20 may not apply to investments made under Schedule 4
  
- However, implications under Section 56(2) of Income-Tax Act, 1961 to be kept in view regarding fair price of shares



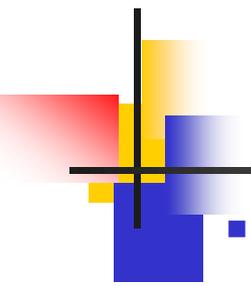
# FDI Policy – Recent changes

- **FDI Policy liberalized in key sectors in Jan 2018 as approved by the Union Cabinet (Press Release dt. 10.01.2018)**
- **Review of FDI Policy by DIPP vide Press Note No. 1 (2018 series) dt. 23.01.2018**
- **Based on above changes, RBI issued amendment to Regulation 16.B of FEMA Notification 20(R) dt. 26.03.2018**
- **Major changes are relating to:**
  - NBFCs
  - Audit of Investee companies with FDI
  - Air Transport services
  - Real Estate Broking services
  - Single Brand Product Retail Trading
  - Pharmaceutical sector (Definition of Medical devices)
  - Power Exchanges (FIIs/FPIs permitted to invest through primary market and secondary market)
  - Schedule 1 Para 1(4)



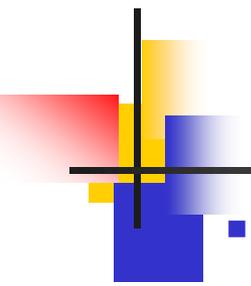
# FDI Policy – Recent changes

- **Foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian company(s) - changes in Regulation 16.B(5)**
- **Prior position:** Foreign investment into an Indian company, engaged only in the activity of investing in the capital of other Indian company(s)/ LLP and in the Core Investing Companies was allowed up to 100% with prior Government approval.
- **Amendments:**
  - Foreign Investment in investing companies registered as NBFCs with RBI, being overall regulated, would be under 100% automatic route.
  - Foreign Investment in investing companies not registered as Non-Banking Financial Companies (NBFCs) with RBI and in Core Investment Companies (CICs), both engaged in the activity of investing in the capital of other Indian entities, will require prior Government approval.



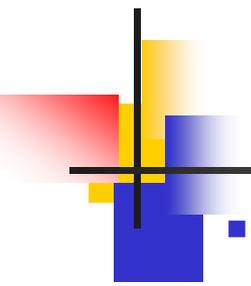
# FDI Policy – Recent changes

- **Audit requirements for Investee company with FDI - changes in Regulation 16.B(7)**
  - **Prior position:** The existing Regulations do not have any provisions in respect of specification of auditors that can be appointed by the Indian investee companies receiving foreign investments.
  - **Amendment:** Wherever the person resident outside India who has made foreign investment specifies a particular auditor/ audit firm having international network for the audit of the Indian investee company, then audit of such investee company shall be carried out as joint audit wherein one of the auditors is not part of the same network.
  - **Remarks:** Aim is to provide level playing field to Indian audit firms and to ensure that auditors of Indian investee companies are not as per the foreign investors dictates.



# FDI Policy – Recent changes

- **Air Transport Services (Civil Aviation) - changes in Regulation 16.B S.No. 9.5(c)**
  
- **Prior position:** As per the existing Regulations, foreign airlines were allowed to invest under Government approval route in the capital of Indian companies operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. However, this provision was not applicable to Air India, thereby implying that foreign airlines could not invest in Air India.
  
- **Amendment:** As an enabling provision towards privatization of debt-laden Air India, foreign investment in M/s Air India Ltd. is permitted subject to the following conditions:
  - (i). Foreign investment(s) in M/s Air India Ltd., including that of foreign airline(s), shall not exceed 49% either directly or indirectly
  - (ii). Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals



# FDI Policy – Recent changes

- **Construction Development: Townships, Housing, Built-up Infrastructure and Real Estate Broking - changes in Regulation 16.B S.No. 10.2**
- **Amendment:** New Note 7 inserted:  
Real-estate broking services shall be excluded from the definition of “real estate business” and 100% foreign investment is allowed in real estate broking services under automatic route
- **Remarks:** Amendment is clarificatory in nature.

# FDI Policy – Recent changes

- **Single Brand Product Retail Trading (SBRT) - changes in Regulation 16.B S.No. 15.3**
  
- **Prior position:** Existing regulations on SBRT allows 49% FDI under automatic route, and FDI beyond 49% and up to 100% through Government approval route.
  
- **Amendments:**
  - FDI in SBRT is now permitted up to 100% under automatic route
  - SL.No.15.3.1. of other conditions under FDI in Single Brand product retail trading are amended by way of insertion / substitution / deletion of sub-clauses (d), (g) & (h) and Notes 2, 3 & 5
  
- amended and read as follows (insertions in bold and substitutions/ deletions in strikethrough)

# FDI Policy – Recent changes

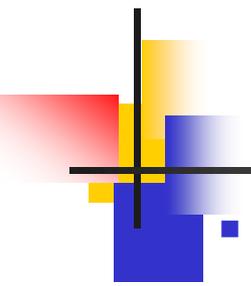
- **Single Brand Product Retail Trading (SBRT) - changes in Regulation 16.B S.No. 15.3 (con't)**
  
- Amendments read as follows (insertions in bold and substitutions/ deletions in strikethrough):-
  - d) A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, **either** directly or through a legally tenable agreement by ~~with~~ the brand owner for undertaking single brand product retail trading by the brand owner or **through a legally tenable agreement executed between the Indian Entity undertaking single brand retail trading and the brand owner**. ~~The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single brand product retail trading in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the licensing/ franchise/ sub-license agreement, specifically indicating compliance with the above condition. The requisite evidence should be filed with the RBI for the automatic route and the Government for cases involving approval. A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake „single brand“ product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner."~~

# FDI Policy – Recent changes

- **Single Brand Product Retail Trading (SBRT) - changes in Regulation 16.B S.No. 15.3 (con't)**
- Amendments read as follows (insertions in bold and substitutions/ deletions in strikethrough):-
  - ~~g) Applications seeking permission of the Government for foreign investment exceeding 49 percent in a company which proposes to undertake single brand retail trading in India shall be made to the Department of Industrial Policy & Promotion. The applications would specifically indicate the product/ product categories which are proposed to be sold under a „Single Brand“. Any addition to the product/ product categories to be sold under „Single Brand“ would require a fresh Government approval. In case of foreign investment up to 49 percent, the list of products/ product categories proposed to be sold except food products shall be provided to the Reserve Bank.~~
  - ~~h) Applications would be processed in the Department of Industrial Policy and Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered for Government approval.~~

# FDI Policy – Recent changes

- **Single Brand Product Retail Trading (SBRT) - changes in Regulation 16.B S.No. 15.3 (con't)**
- Amendments read as follows (insertions in bold and substitutions/ deletions in strikethrough):-  
Notes:
  - ~~2. An Indian manufacturer is permitted to sell its own branded products in any manner i.e. wholesale, retail, including through e-commerce platforms.~~
  - ~~3. Indian manufacturer would be the investee company, which is the owner of the Indian brand and which manufactures in India, in terms of value, at least 70 percent of its products in house, and sources, at most 30 percent from Indian manufacturers.~~
  - 5. Sourcing norms will not be applicable up to three years from commencement of the business i.e. opening of the first store for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. Thereafter, condition mentioned at 15.3.1 (e) above will be applicable. A Committee under the Chairmanship of Secretary, DIPP, with representatives from NITI Aayog, concerned Administrative Ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of "state-of-art" and "cutting-edge" technology where local sourcing is not possible and give recommendations for such relaxation."



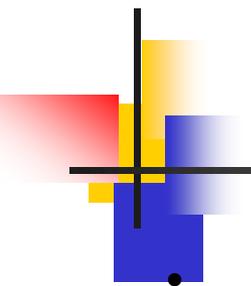
# FDI Policy – Recent changes

## ■ **Amendment to Schedule I - changes in Para 1(4)**

- (i) The existing Para 1 (4), shall be substituted by the following namely:
  - (4) An Indian company may issue, subject to compliance with the conditions prescribed by the Central Government and/or the Reserve Bank from time to time, capital instruments to a person resident outside India, if the Indian investee company is engaged in an automatic route sector, against:
    - (a) Swap of capital instruments; or
    - (b) Import of capital goods/ machinery/ equipment (excluding second-hand machinery); or
    - (c) Pre-operative/ pre-incorporation expenses (including payments of rent etc.).

Provided Government approval shall be obtained if the Indian investee company is engaged in a sector under Government route. The applications for approval shall be made in the manner prescribed by the Central Government from time to time.

- (ii) The existing Para 1 (6), shall be deleted
- **Remarks:** Issue of shares under conditions 4(a) to (c) now permitted under the Automatic route whereas earlier it required prior approval



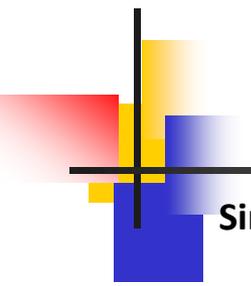
# FDI Policy – Select sectors

## **Definition of ‘Manufacture’ inserted which is same as under Section 2(29BA) of the Income-tax Act:**

Manufacture with its grammatical variations means a change in a non-living physical object or article or things – (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

### **• Key issues**

- As the definition of Manufacture is wide in scope and no norms are prescribed for minimum investment or value-addition, etc., this may give rise to interpretation issues.
- Therefore, can reliance be placed on judicial precedents under the Income tax Act to determine the eligibility for FDI under the FDI policy?
- Moreover, the earlier provisions for FDI in sectors reserved for Micro, Small & Medium enterprises is also dropped. It therefore implies that FDI exceeding 24% is now permitted without Govt. approval even in such reserved sectors.

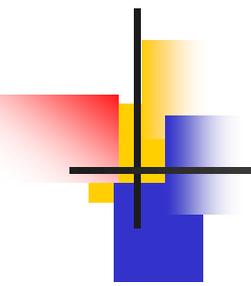


# FDI Policy – Select sectors(con't)

## Single Brand Retail Trading ('SBRT') and 'Manufacture'

With the addition of 'Manufacture' sector, when read with the existing provisions relating to FDI in SBRT, these recent changes raises the following issues:

- If a Single Brand owner qualifies as 'Manufacturer' by undertaking processing in India (norms of which are not specified), then it may fall outside the purview of SBRT norms and undertake effectively the same retail business including through all routes - wholesale, retail, brick & mortar stores, eCommerce.
- When an SBRT seeks FDI beyond 51%, it is required to source 30% of the goods purchased from MSMEs in India and such brand is the one of manufacturer only. But SBRT means retail trading in single brand only, and it does not seem to imply manufacture (due to recent inclusion of 'manufacture' sector), so the question is what can it out-source from India for trading purposes, especially since it can engage only in single-brand retail trading of the goods branded during manufacturing such goods?
- Also, if the brand owner licenses the same to a third party for undertaking retail trading in India, how can such third party source 30% of the goods from India when it is not undertaking any part in the manufacture of the branded goods in the first place? Or does this sourcing requirement imply that a third party retailer should at least source 30% of the goods from India other than the branded goods which it is sourcing from the foreign brand owner-manufacturer?



# FDI Policy – Select sectors (con't)

## 'Other Financial Services'

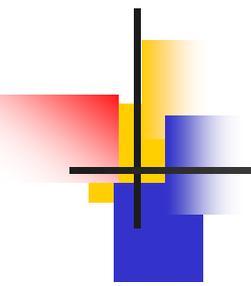
FEMA Notification no.FEMA.375/2016-RB dated September 9, 2016 amended the sectoral cap for 'other financial services' thereby doing away with the minimum capitalization norms.

Instead of specifying various activities, the provision has been simplified to mean Financial Services activities regulated by financial sector regulators, viz., RBI, SEBI, IRDA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government of India. Financial service activities governed by aforesaid regulators will be permitted to bring 100% FDI under automatic route.

FDI in unregulated/ partly regulated financial sector activities or where there is doubt regarding the regulatory oversight, FDI will be permitted under approval route subject to conditions including minimum capitalization requirement, as may be decided by the Government.

Key issue:

- A number of financial services (e.g. non-fund based services) are now inadvertently brought under Govt. approval route as such services do not have any Regulator / Govt. agency monitoring the activities.



# FDI Policy – Select sectors (con't)

## 'Defense Sector'

As per Consolidated FDI Policy, in Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959, FDI is permitted upto 49% in automatic route and upto 100% through Govt. route if it is likely to result in access to modern technology or for other reasons to be recorded.

Licence applications will be considered and licences given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.

Foreign investment in the sector is subject to security clearance and guidelines of the M/o Defence.

### Key issues:

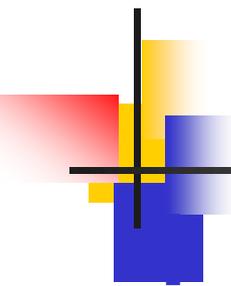
- In case of items related to Defense sector but not falling under Industrial Licensing or Arms Act such as electronic components used in defense products as well as in other industries, how will the FDI Policy apply?
- In such cases, will security clearance from M/o Defense still be required?

# FDI Policy – Select sectors(con't)

## Broadcasting Sector and Print Media Sector

FDI Policy on Broadcasting Sector applies to Broadcasting Carriage Services (such as Cable Networks, DTH, Mobile TV, etc.) and Broadcasting Content Services being FM Radio, Up-linking of 'News & Current Affairs' and 'Non-News & Current Affairs' TV Channels / Downlinking of TV Channels

- FDI Policy on Print Media Sector applies to Publishing of newspaper and periodicals dealing with news and current affairs, Publication of Indian editions of foreign magazines dealing with news and current affairs, Publishing/printing of scientific and technical magazines/specialty journals, etc. and Publication of facsimile edition of foreign newspapers
- Detailed conditions including sectoral cap, entry route, etc. are specified for these sectors. Operational conditions seek to regulate the activities of the journalists through sector-specific laws & guidelines.
- It can be observed that both sectors deal with different methods of dissemination of information which may be News & Current Affairs or non-News & Current Affairs.
- However, Internet-based journalism and online dissemination of information through portals which is rapidly proliferating is not specifically covered under the FDI Policy under the above Sectors
- **Key Issue:** Can an Indian company proposing to engage in collection of news & current affairs, analysis & reporting / publishing of same through internet online portals invite FDI under automatic route? Is this a loop-hole in the law as the intention of the FDI Policy is to regulate foreign investment in sensitive sectors which deal with matters of national interest?



# FDI Policy – Select sectors – Real Estate

## Real Estate Sector

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

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

Earlier, such conditionalities did not apply to investment by NRIs. Now, with the removal of this exception, provisions have become more stringent for NRIs. Was this the intention?

# FDI Policy – Select sectors – Real Estate (con't)

## **Overview of legal provision:**

1. As per FDI POLICY 2017 FDI means - Investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000
- 2. As per schedule 4 of FEMA Notf.20(R) – a NRI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by non-resident Indians may purchase and sale shares/Convertible debentures, warrants or units on Non- repatriation basis which will be deemed to be domestic investment at par with the investment made by residents.  
However, no purchase of shares or convertible debentures, etc of an Indian company shall be made under this Scheme if the company concerned is a Nidhi company or is engaged in agricultural/plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.
- Explanation: For the purpose of this paragraph, "Real estate business" means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent income on lease of the property, not amounting to transfer, will not amount to "real estate business". Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) regulations 2014 shall also be excluded from the definition of "real estate business"

# FDI Policy – Select sectors – Real Estate (con't)

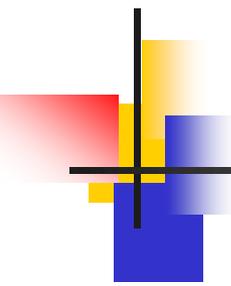
- 3. As per para 5.2.10 of FDI policy 2017 – 100% FDI under automatic route is allowed in Construction Development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships) subject to conditions specified in the policy. Conditions relating to lock-in period of 3 years do not apply to investment by NRIs.
- 4. Further as per Regulation 3 of Foreign Exchange Management (Acquisition and transfer of Immovable property in India) – Notf.21  
A person resident outside India who is a citizen of India may -
  - a) acquire immovable property in India other than an agricultural property, plantation, or a farm house:
    - Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.
    - Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause'.
  - b) transfer any immovable property in India to a person resident in India.
  - c) transfer any immovable property other than agricultural or plantation property or farm house to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India

# Real Estate – Select sectors (con't)

## **Repatriation of sale proceeds**

In the event of sale of immovable property other than agricultural land/farm house /plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

- (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property;
- (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.



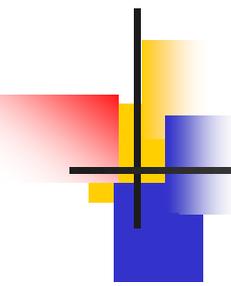
# Practical Issues - FDI Policy

## **100% FDI in LLP under Automatic Route**

- ❑ 100% FDI in LLP is permitted under Automatic Route provided the sectors /activities are falling under Automatic Route and there are no FDI-linked performance conditions.
- ❑ Further, downstream investment by LLPs in Indian Company / LLP under Automatic Route is also permitted provided sectors /activities are falling under automatic route and there are no FDI-linked performance conditions.
- ❑ Definition of Control is introduced – right to appoint majority of Designated Partners where such designated partners, with specific exclusion to others, have control over all the policies of the LLP
- ❑ Definition of Ownership is introduced – percentage of the investments in LLPs

### **Key issues**

- Whether LLP can be capitalized on non-cash basis (against import of goods, services, etc.) in the same way as an Indian Company?
- With control and ownership criteria now defined, whether basis exists to deny FDI to LLP in all sectors / activities even with performance conditions?



# Practical Issues - FDI Policy (con't)

## **Acquisition by NRIs on non-repatriation basis as per PN 7 of 2015**

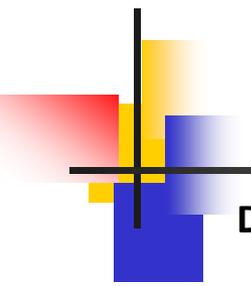
- NRI definition which includes PIOs amended to include Overseas Citizens of India (OCI) whose ambit is wider than PIOs.
- NRI Investments under FEMA 20 / Schedule 4 (Non-Repatriation basis) deemed to be domestic investment on par with residents

## ■ **Benefits conferred to NRIs by PN 12 of 2015**

- A Company, Trust and Partnership Firm incorporated outside India and owned and controlled by NRIs can invest in India with the special dispensation as available to NRIs under the FDI Policy
- Sectors relevant : Schedule Air Transport (NRI 100%/ FDI 49%); Construction-Development
- Similar Benefits to investments under Schedule 4 of FEMA 20 – Non Repatriation Basis

## ■ **Key Issues**

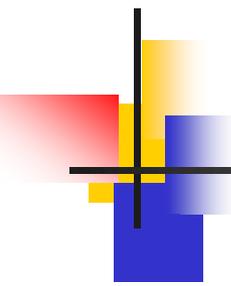
- Is this a change in policy to now allow erstwhile OCBs for FDI and other investments in India??
- How does one determine ownership and control in oversea Trust and Partnership?
- Is conversion of NRI investment from Repatriable to Non-Repatriable basis possible?



# Practical Issues - FDI Policy (con't)

## Direct & Indirect Foreign Investment (IFI) by Resident Foreign citizens:

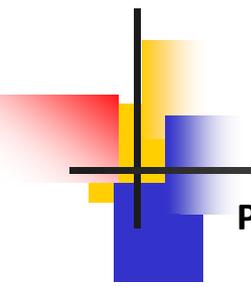
- FEMA rules generally do not apply based on citizenship but applies only when a transaction is between a resident and a non-resident. In case an Indian resident invests in an Indian company, FEMA Notification no. 20(R) also does not apply as the provisions are applicable only to PROIs.
- However, when it comes to downstream investments by IC, the regulations make a clear difference between Indian Company (IC) owned and controlled by resident Indian citizens or owned / controlled by non-residents.
- **Key Issues:**
  - If a foreign citizen who is resident in India is making direct investment in an Indian Company (i.e. first level IC), it appears that such a transaction shall not be regulated by FEMA (or FEMA Notification No. 20(R)). Is this the intention of the law and regulations?
  - If the IC is considered as Indirect Foreign Investment (as it is not owned and controlled by resident Indian citizen but by foreign citizen resident in India), then it gives rise to a situation where investment in IC is not regulated, whereas downstream investment is regulated. Is that the intention?



# Practical Issues - FDI Policy (con't)

## FDI for earning rent / income on lease of property:

- The Consolidated FDI Policy of 2016 clarifies in Paragraph 5.2.10 relating to FDI in Construction Development that FDI in Real Estate business is not permitted but earning of rent / income on lease of property will not amount to real estate business. It is reproduced for convenience as under:  
“(i) It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs).  
“Real estate business” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business.”
- **Key Issues:**
  - As against construction and subsequent lease of the property by the FDI recipient Indian Company, if FDI is instead made directly by FDI recipient Indian Company by way of investments in constructed property such as townships / residential / commercial premises, etc. with a view to lease the same in order to earn rent / income, would it be permissible under the FDI guidelines? The economic benefits to the country would be the same as local developers would have exit route of sale of constructed property to PROIs under FDI route.



# Practical Issues - FDI Policy (con't)

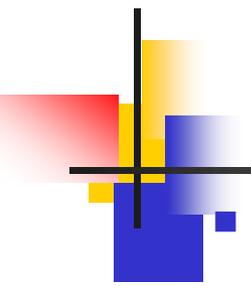
## Pricing of Compulsorily Convertible Debentures:

- As per the prevalent pricing guidelines of instruments under FDI, the pricing of shares / convertible debentures / preference shares should be decided / determined upfront at the time of issue of the instruments.
- The price for the convertible instruments can also be a determined based on the conversion formula which has to be determined / fixed upfront, however the price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments, in accordance with the extant FEMA regulations.
- **Key Issues:**
  - If the conversion formula is specified upfront as say e.g. “conversion shall be based on the price / earnings ratio at the time of conversion to be decided by the management subject to minimum issue price of Rs. 50/- per share being the fair value worked out at the time of issuance of these instruments”, would it be in compliance with the pricing guidelines?
  - The price for conversion into shares may be determined based on future profits. Hence till the FCDs are converted into shares, the exact foreign shareholding in the company cannot be determined. How can this be resolved when the Indian company is undertaking downstream investments in order to determine indirect foreign holding?

# Practical Issues – Escrow mechanism in FDI transactions

Escrow mechanism has been permitted to facilitate FDI transactions in cases where parties to the share purchase agreement desire to complete the due diligence process before they finalize the agreement for the same and accordingly, there is a time lag between payment of purchase consideration and the receipt of the shares.

- AD Category – I banks have been given general permission to open and maintain non-interest bearing Escrow account in Indian Rupees in India on behalf of residents and non-residents, towards payment of share purchase consideration. Also, SEBI authorised Depository Participant are permitted to open and maintain, without approval of the Reserve Bank, Escrow account for securities.
- The detailed stipulations relating to opening of Escrow account are specified in Regulation 5(5) read with Schedule 5 of FEMA Ntf. 5(R)
- Regulation 5(5) of FEMA Ntf. 5(R) stipulates that “Resident or non-resident acquirers may, subject to the terms and conditions specified in Schedule 5, open, hold and maintain Escrow Account with Authorised Dealers in India”.
- **Key Issues:**
  - If the FDI transaction involves opening of Escrow account, is there a compulsion to open the same only in India?
  - Can a Cash Escrow account be opened abroad in which the Indian resident is not undertaking any transaction of remittance but it is only going to receive remittance in India as and when the transaction is finally consummated on completion of due diligence procedures?



# Immovable Properties and other aspects

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- Immovable Properties in India
  - Nature of the Transaction – Business, Bonafide use and non-repatriation
  - Gift & Inheritance of Assets
  - Prevention of Money Laundering Act (PMLA)
  - Penalties, Prosecutions and Compounding

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# Acquisition & Transfer of Immovable Property in India

**Summary of the provisions applicable to NRIs and OCI under FEMA 21 for acquisition and transfer of Immovable Property in India:**

Particulars	NRI	PIO
<b>Purchase (other than agricultural land/ farmhouse/ plantation etc) from</b>	Resident/ NRI	Resident/ NRI
<b>Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from</b>	Resident / NRI/ PIO	Resident/ NRI/ PIO
<b>Acquire (any IP) as inheritance from</b>	(a) Any person who has acquired it under laws in force (b) under section 6(5) of FEMA	
<b>Sell (other than agricultural land/ farmhouse/ plantation etc) to</b>	Resident / NRI/ PIO	Resident
<b>Sell (agricultural land) to</b>	Resident	Resident who is a citizen of India
<b>Gift (other than agricultural land) to</b>	Resident / NRI/ PIO	Resident / NRI/ PIO
<b>Gift (agricultural land) to</b>	Resident	Resident who is a citizen of India
<b>Gift residential/ commercial property to</b>	Resident / NRI/ PIO	Resident / NRI/ PIO

# Acquisition & Transfer of Immovable Property outside India

## Gift and Inheritance of Immovable Property outside India by persons resident in India:

From	To	Remarks
Resident	Resident	<p>Permitted under per Ntf. 7(R) as follows:</p> <ul style="list-style-type: none"> <li>a. Regulation 5(1)(a) which applies to Section 6(4) cases: "A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India".</li> <li>a. Regulation 5(1)(b) which applies to purchase out of RFC accounts</li> </ul>
Non Resident	Resident	No general permission
Resident	Non Resident	No general permission

# Gift and Inheritance of other assets

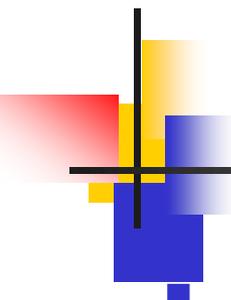
## Gift and Inheritance of sum of money:

From	To	Remarks
Resident	Non Resident	Current account transaction permitted within overall LRS Limit of US\$ 250,000 per financial year
Non Resident	Resident	Current account transaction not specifically prohibited

# Gift and Inheritance of other assets (con't)

## Gift and Inheritance of foreign securities:

From	To	Remarks
Gift from Non Resident	Resident	Capital account transaction permitted under Regn. 22(1)(i) of Ntf. 120
Gift from Resident	Resident	Not covered by general permission
Gift from Resident	Non Resident	Not covered by general permission
Inheritance from Non Resident	Resident	Capital account transaction permitted under Regn. 22(1)(iii) of Ntf. 120
Inheritance from Resident	Resident	Capital account transaction permitted under Regn. 22(1)(iii) of Ntf. 120
Inheritance from Resident	Non Resident	Not covered by general permission

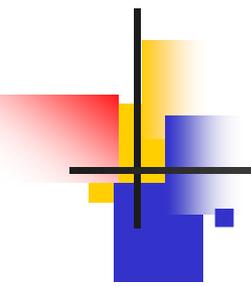


# Other Allied Laws

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■ Recap of important aspects of other allied laws :

- Prevention of Money Laundering Act, 2002 ('PMLA')
- Money Laundering & FEMA (violations, seizures, penalties & compounding)
- The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
- Income-Tax Act, 1961



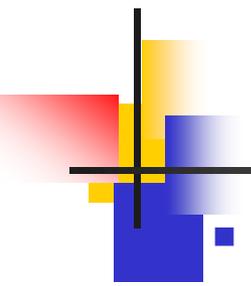
# PMLA OBJECTIVES

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- Preamble of PMLA

'An Act 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'

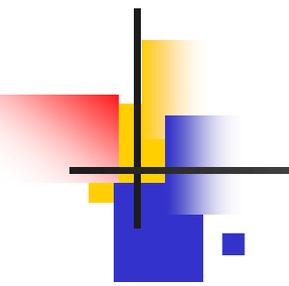
- The PML Act seeks to combat money laundering in India and has three main objectives:
  - To prevent and control money laundering
  - To confiscate and seize the property obtained from the laundered money; and
  - To deal with any other issue connected with money laundering in India.
- The Act also proposes punishment under sec.4



# MONEY LAUNDERING & WHY

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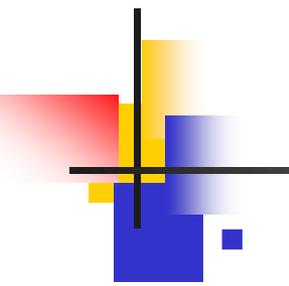
- Illegal arms sales, smuggling, and other organized crime, including drug trafficking and prostitution rings, can generate huge amounts of money.
- Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to “legitimize” the ill-gotten gains through money laundering.
- The money so generated is tainted and is in the nature of ‘dirty money’.
- Money Laundering is the process of conversion of such proceeds of crime, the ‘dirty money’, to make it appear as ‘legitimate’ money.



# WHAT IS MONEY LAUNDERING

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- Sec. 3 of PMLA defines offence of money laundering as: “whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.”
- Definition: Proceeds of crime (Sec. 2(u)):  
"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result, of criminal activity relating to a scheduled offence or the value of any such property

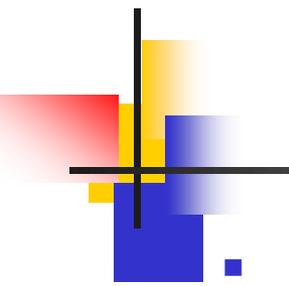


# WHAT IS MONEY LAUNDERING (con't)

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- **Scheduled Offence:**

- The offences listed in the schedule to PMLA, 2002 are scheduled offence. There are 2 parts – Part A & Part C
- Part A comprise of offences under: IPC, NDPC, Explosive Substances Act, Unlawful Activities (Prevention) Act, Arms Act, Wild Life (protection) Act, Immoral Traffic (Prevention) Act, Prevention of Corruption Act, Antiquities and Arts treasures Act etc
- Part C deals with trans border crimes



# STRUCTURE OF PMLA

## ■ Structure

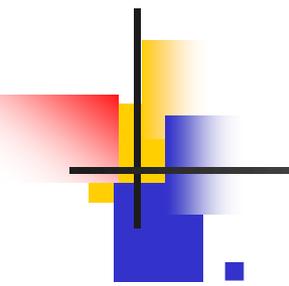
<b>Section No.</b>	<b>Description</b>
3	Offence of Money-laundering
4	Punishment for Money-laundering
5	Attachment of Property involved in Money-laundering
6	Adjudicating authorities, composition, powers, etc.
7	Staff of Adjudicating authorities
8	Adjudication
9	Vesting of Property in Central Government
10	Management of Properties confiscated
11	Power regarding summons, evidence, etc.
12	Obligation of Banking companies, FIs & intermediaries
12A	Access to information from reporting entity

# STRUCTURE OF PMLA (con't)

- Structure of PMLA

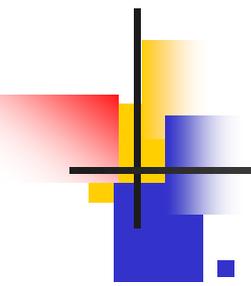
Section No.	Description
17	Search & Seizure
18	Search of persons
19	Power to arrest
26	Appeal to Appellate Tribunal
50	Powers of authorities regarding summons, production of documentation and to give evidence, etc.
58	Assistance to a Contracting State in certain cases
58A	Special Court to release Property
58B	Letter of request of a Contracting State or authority for confiscation or release of Property

# PMLA - OVERVIEW OF ENFORCEMENT PROCESS



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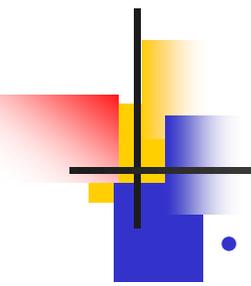
- PMLA empowers Enforcement Directorate to carry out investigations in cases involving offence of money laundering and also to attach the property involved in money laundering.
- PMLA envisages setting up of an Adjudicating Authority to exercise jurisdiction, power and authority conferred by it essentially to confirm attachment or order confiscation of attached properties.
- It also envisages setting up of an Appellate Tribunal to hear appeals against the order of the Adjudicating Authority and the authorities like Director FIU-IND



# Financial Intelligence Unit-India (FIU)

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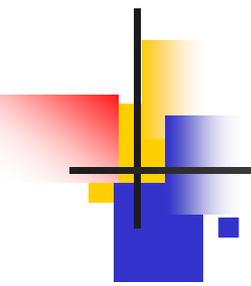
- FIU is the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspected financial transactions.
- Powers and functions include:
  - receiving information and reports from Reporting Entities
  - processing, analysing and disseminating information to any authority in law in relation to suspected financial transactions.



# Directorate of Enforcement

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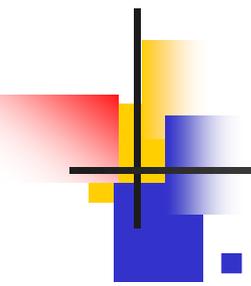
- Responsible for investigating cases of money laundering, initiate proceedings for attachment of property and to launch prosecution in the Special Court.
- Powers and functions include:
  - survey, search, seizure, arrest, attachment, prosecution against offender;
  - providing and seeking mutual legal assistance to/from contracting states in respect of attachment/confiscation of proceeds of crime and transfer of accused persons;
  - rendering cooperation to foreign countries in matters related to money laundering and restitution of assets.



# Adjudicating Authority

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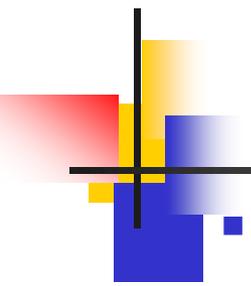
- The adjudicating authority consists of a chairperson and 2 members. It functions within Department of Revenue, Ministry of Finance.
- The Adjudicating Authority is not bound by the procedure laid down in the CPC but “*shall be guided by the principles of natural justice*” and shall be entitled to regulate its own procedure.
- The role of Adjudicating Authority is to consider attachments made by authorities and grant or refuse permission for retention and confiscation of seized property.
- The Director or any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Appellate Tribunal. Appeal has to be filed within a period of forty-five days.



# Appellate Tribunal

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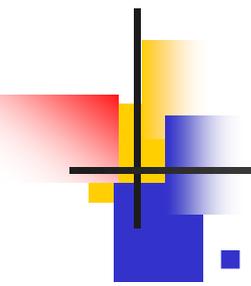
- Appellate Tribunal: is empowered to hear appeals against the decision of Adjudicating Authority and other authorities under this Act. It consists of a Chairperson and two other members.
- Further appeal can be made against the order of the Tribunal to High Court within 60 days.
- Appellate Tribunal is vested with powers of a civil court. It can also review its decisions and decide cases ex parte.



# Special Court

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- For trial of offence punishable under section 4 of PMLA, 2002, the Central Government, in consultation with the Chief Justice of the respective High Courts, by notification, has designated one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as specified in the notifications.
- While trying an offence of money laundering under PMLA, 2002, a Special Court has also to try the offences, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial [Section 43] i.e. offence under PMLA plus the offence at the trial court
- The Special court can take cognizance of any offence of money laundering upon a complaint being made by an authority, without the accused being committed to it for trial.
- The provisions of the CrPC shall apply to the proceedings before a Special Court.



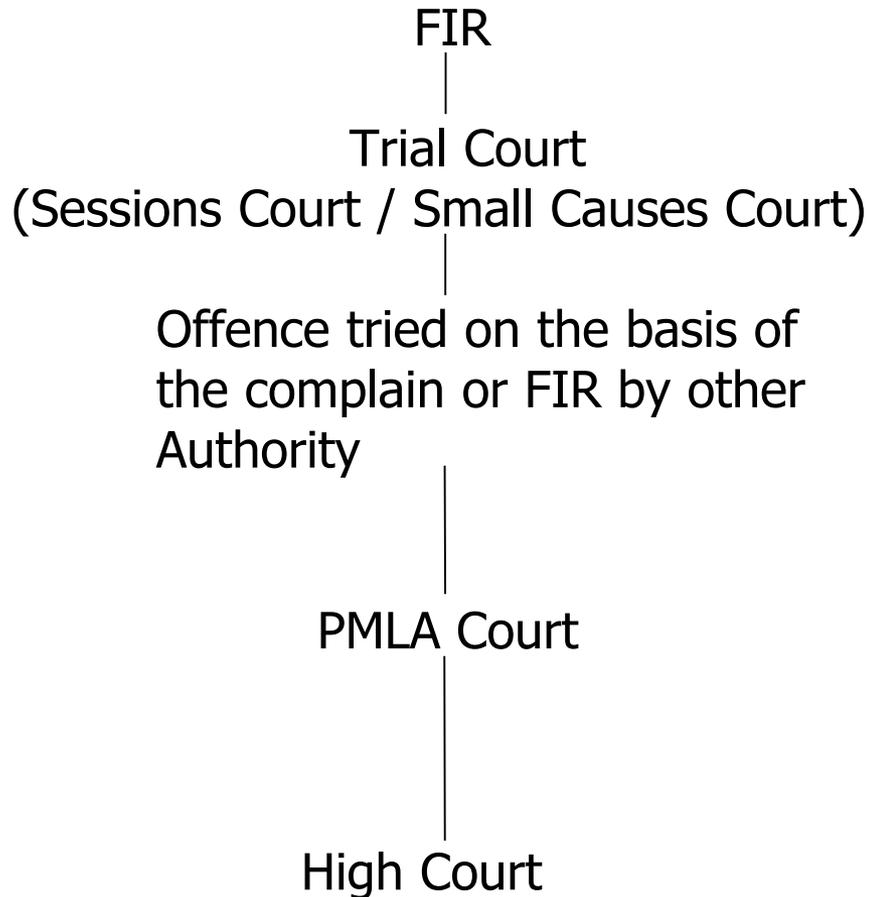
## Special Court (con't)

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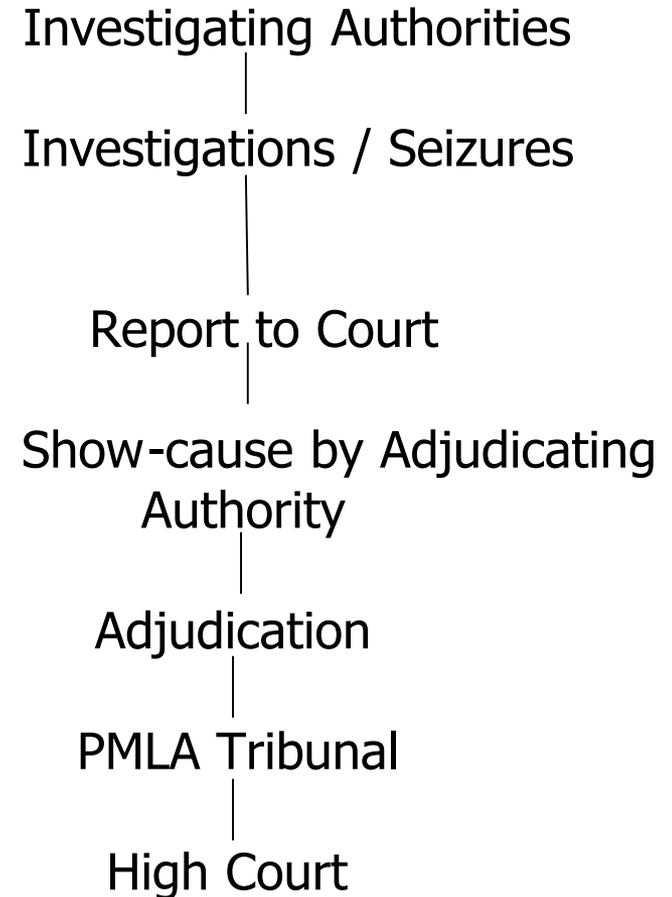
- In case a trial court has taken cognizance of a scheduled offence, then in such cases, on an Application by the authority authorized to file a complaint under PMLA, the trial court (which has taken cognizance of the scheduled offence) shall commit the case relating to the scheduled offence to the Special Courts under PMLA.
- The Special Court, PMLA, on receipt of such case committed to it, shall proceed to deal with it from the stage at which it is committed [Section 44(1)(c)].
- The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court [Section 47].

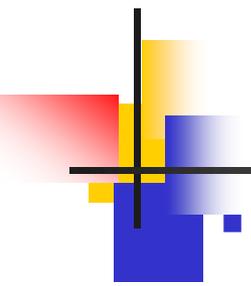
# Parallel Streams of Proceedings

## PMLA COURT



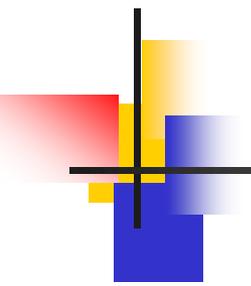
## ED





## Parallel Streams of Proceedings (con't)

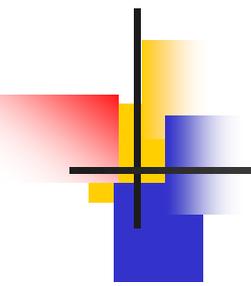
- Once the Complaint Report is filed with the Special Court by the office of the ED, the investigation / attachment proceedings before the Director and/or the Adjudicating Authority will continue and in parallel, trial proceedings before the Special Court will also be continuing by the prosecution for determining proof of guilt of the accused 'beyond reasonable doubt' and the establishment of 'mens rea' in order to demonstrate that there is "substantial probable cause" to form opinion that the property under attachment is proceeds of crime.
- Thus, there is the possibility of a matter under PMLA going from Special Court to High Court and in parallel, going from adjudicating officer to Appellate Tribunal to High Court. The matter may continue under both the streams of proceedings unless the Special Court decides in favour of the accused. In such a case, probably the adjudicating officer during adjudication process or at the stage of Appellate Tribunal, as the case may be, will have to consider the findings of the Special Court to decide the matter.



# Civil Courts and PMLA

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- No suit can be brought in any civil court to set aside or modify any proceeding taken or order made under PMLA, 2002 and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything done or intended to be done in good faith under the PMLA, 2002 [Section 67].
- Thus, jurisdiction of civil courts is barred. The offence of money laundering is triable only by a special court constituted for the area in which the offence has been committed.

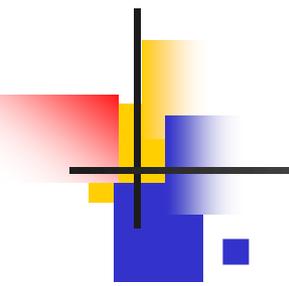


# PMLA and Other Acts / Laws

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- **Conflict between PMLA and Other Acts / Laws**

The provisions of PMLA, 2002 have over-riding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force [Section 71].



# MONEY LAUNDERING & FEMA

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- Violations of FEMA provisions
  - Compounding Procedure
  - Compounding with RBI & ED
  - Seizures & Penalties under FEMA

# Penalties under S.13 of FEMA

- Penalties.

13. (1) 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, of the foreign exchange, foreign security or immovable property.

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fit, 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.

# Penalties under S.13 of FEMA (con't)

- Penalties (con't)

13.(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).

(2) 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.

# Penalties under S.13 of FEMA (con't), S.14 & S.14A

- Penalties (con't)

Explanation.—For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include—

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

Sections 1A – 1D of Section 13 inserted by the Finance Act, 2015, w.e.f. 9-9-2015

## **S.14: Enforcement of the Orders of the Adjudicating Authority**

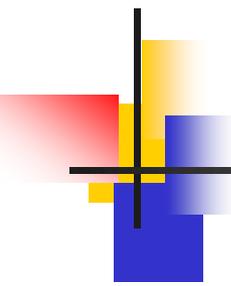
### **S.14A: Power to recover arrears of penalty**

# Power to Compound contravention under S. 15 of FEMA

- **Power to compound contravention**

15. (1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

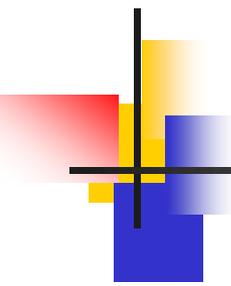
(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.



# Appeals & Adjudication under FEMA

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- **S. 16: Appointment of Adjudicating Authority**
- **S. 17: Appeal to Special Director (Appeals)**
- **S. 18: Appellate Tribunal**
- **S.19: Appeal to Appellate Tribunal**
- **S. 34: Civil Court not to have jurisdiction**
- **S. 35: Appeal to High Court**



# S. 36: Directorate of Enforcement

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## Directorate of Enforcement.

- **36.** (1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act<sup>36</sup>.
- (2) Without prejudice to the provisions of sub-section (1), the Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.
- (3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

# Power of search, seizure, etc. under S. 37 of FEMA

- **Power of search, seizure, etc.**

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

(2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.

(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.

# Special provisions relating to assets held outside India under S. 37A of FEMA

- **Special provisions relating to assets held outside India in contravention of section 4**

37A. (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

# Special provisions relating to assets held outside India under S. 37A of FEMA (con't)

37A. (3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1): Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

# Special provisions relating to assets held outside India under S. 37A of FEMA (con't)

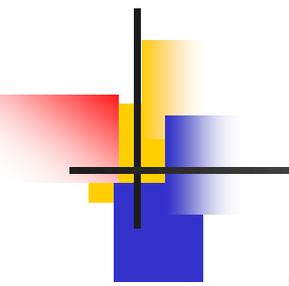
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37A.

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(6) Nothing contained in section 15 shall apply to this section.

***Section 37A inserted by the Finance Act, 2015, w.e.f. 9-9-2015***

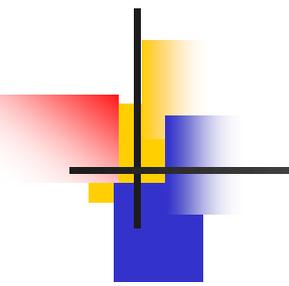


# FEMA implications under other Laws

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- Black Money Act
- Income-Tax Act
- Returning Indians – Do's & Dont's

Slides 111 - 118



# Overview of Black Money Act

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**Black Money Act** applies to all persons who are 'resident and ordinarily resident' in India.

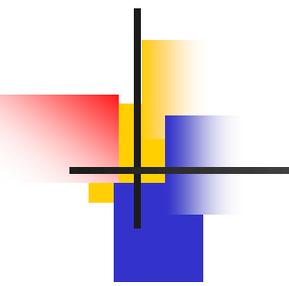
**“Undisclosed asset located outside India”** means an asset (including financial interest in any entity) located outside India:

held by the assessee in his name or where he is a 'beneficial owner';

AND

he has no explanation about the source of investment in such asset; OR  
the explanation given by him is in the opinion of the assessing officer unsatisfactory.

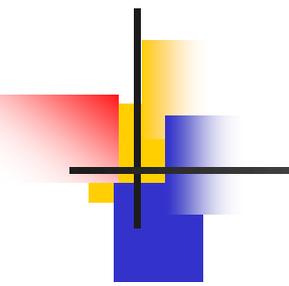
**“Undisclosed foreign income and asset”** means the total amount of undisclosed income of an assessee from a source located outside India and the value of an undisclosed asset located outside India.



# Overview of Black Money Act (con't)

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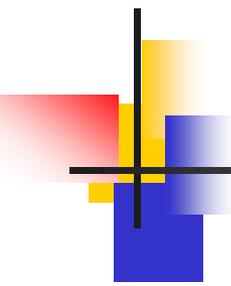
- The Act applies from FY 2015-16 (AY 2016-17).
- Scope covers –
  - Income in respect of which no return is filed within time allowed u/s 139(1), 139(4) & 139(5) of the ITA;
  - Value of an undisclosed asset located outside India
- Tax on Undisclosed Income and Assets is @ 30% & charged to tax in the previous year in which it has come to the notice of the assessing officer.
- Penalty for attempt to evade tax, interest, penalty is 300% of the tax payable
- Any variation made in the income from a source outside India in the Assessment or Reassessment of the total income of any previous year, in accordance with section 29 to 43C (Business Income), 57 to 59 (Income from Other Sources) or 92C of the ITA shall not be considered as Undisclosed Income.



## Overview of Black Money Act (con't)

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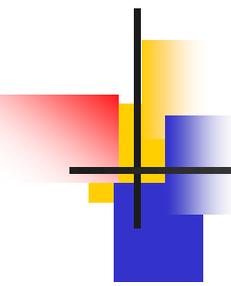
- No requirement to file a separate return under Black Money Act.
- The assessing officer on receipt of information from Income Tax Authority under the ITA or any other authority under any law or on coming of any information to his notice (source of information not specified) shall serve a notice requiring assessee to produce such information and document as he may require.
- Issue of notice for assessment/reassessment (no timeline provided), opportunity of being heard and furnishing of evidences/documents will be given – principles of natural justice to be followed
- Inquiry or investigation by Tax Authorities into matters of the assessee even though there are no proceedings pending before it
- Time limit for completion of assessment and reassessment shall be 2years from the end of the financial year in which notice was issued
- Remedial measures provided - appeal to CIT(A) / ITAT / High Court and Supreme Court (for substantial question of law), rectification of mistakes, revision of orders, recovery of arrears



# Sections 68 to 69B of Income-Tax Act

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- The following amounts are chargeable to Income tax as income of the assessee:
  - Cash credits where nature and source thereof is not explained to the satisfaction of the Assessing Officer (Section 68)
  - Unexplained investments which are not recorded in the books of accounts and no explanation is offered about nature and source of the same (Section 69)
  - Unexplained money, bullion, jewellery or valuable articles which are not recorded in the books of accounts and no explanation is offered about nature and source of the same (Section 69A)
  - Amounts of investments, money, bullion, jewellery, etc. not fully disclosed in books of accounts and no satisfactory explanation is offered for such excess amounts (Section 69B)



# Case Studies for implications under FEMA & allied laws

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- Bank account transactions (such as remittance into India) from own account as against from 3<sup>rd</sup> party account
  - Discuss implications under FEMA, PMLA, BMA and Income-Tax
  
- Remittances of Exports and Payments of Import through 3<sup>rd</sup> party
  - Discuss implications under FEMA, PMLA, BMA and Income-Tax

# Check-list for returning Indians (change of status from NRI / OCI to Resident)

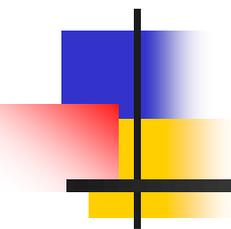
No.	Nature	Action Points
1.	Directorships	<ul style="list-style-type: none"> <li>- One may take up position of Managing / Whole time / Executive Director of a company in India and remuneration for the same.</li> <li>- To intimate to other Indian companies (where presently Director) about change of status from NRI to Resident.</li> </ul>
2.	Bank Account	<ul style="list-style-type: none"> <li>- Open Bank account or in case of existing NRO Bank Accounts, to intimate the concerned bank(s) about change of status as NRO Accounts will be re-designated as regular bank accounts.</li> <li>- In case of existing NRE / FCNR deposits, the same be continued till the date of maturity at the contracted rate of interest. On maturity, the proceeds can be transferred to regular bank account or can be converted to Resident Foreign Currency Account.</li> </ul>
3.	Resident Foreign Currency Account ('RFC')	<ul style="list-style-type: none"> <li>- For other funds, if any, being remitted to India which are desired to be held on repatriable basis, it would be useful to open RFC bank account and credit (i) amount of foreign exchange brought to India at time of return to such account, (ii) entire income from overseas assets in the form of dividend, rent, interest, etc, (iii) sale proceeds of such overseas assets, (iv) balances out of NRE / FCNR deposits.</li> <li>- The above may be done as funds in RFC accounts are free from all restrictions regarding utilization of foreign currency balances including any restriction on investment in any form, by whatever name called, outside India. Thus RFC balances can be remitted abroad for any bona fide purpose such as purchase of shares, immovable properties abroad and can also be withdrawn freely for local payments in rupees.</li> </ul>

# Check-list for returning Indians (change of status from NRI / OCI to Resident)

No.	Nature	Action Points
4.	Residence	Acquire / lease residential property in India
5.	Memberships of Clubs / Associations Medical & Life Insurance	Acquire the same as required
6.	Foreign travel from India	Bookings / arrangements such as Airline tickets, Travel agents, Overseas Medical Insurance, etc. may be done from India
7.	Existing Domestic and International Credit Cards, if any, issued by Indian Banks	To intimate the concerned bank(s) about change of status
8.	Existing Stock broking, PMS & Demat accounts, if any, in India	To intimate the concerned Broker(s) and DP about change of status
9.	In case of existing holding of shares & debentures / deposits of Indian Companies	To intimate to the concerned companies about the change of status along with the effective date of becoming resident.
10.	Existing Insurance Policies, in any, in India	To intimate to the concerned insurer about change of status
11.	Partnerships	One can become a partner in a firm that is engaged in real estate business. Also to intimate to existing firms where partner, about change of status

# Check-list for returning Indians (change of status from NRI / OCI to Resident)

No.	Nature	Action Points
12.	Import of Jewellery as baggage	A passenger who has been residing abroad for over one year is allowed to bring jewellery, free of duty in his bonafide baggage up to weight of 20 gms with a value cap of Rs. 50,000/- (in the case of a gentleman passenger) or up to weight of 40 gms with a value cap of Rs.1,00,000/- (in the case of a lady passenger).
13.	Import of Foreign currency	Can be imported without limit. However, declaration in Currency Declaration Form is required to be made to the Customs officials in case of (a) foreign currency notes exceeding US\$ 5,000/- or equivalent; (b) aggregate value of foreign exchange (in the form of currency notes, bank notes, traveler cheques etc.) exceeding US\$ 10,000/- or its equivalent
14.	Import of Indian currency	May bring into India currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs.25,000.



# Thank You

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