PKM Advisory Services Pvt. Ltd.

KEY ASPECTS OF FOREIGN INVESTMENT IN INDIA

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2012-13

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Disclaimer:

The relevant information's laid down in this presentation is a compilation of salient features published in public domain database. Therefore we disown any propriety on compilation of information. The reader must apply his best judgment skills and cross verify any details before application of details .This is an attempt to facilitate the reader to have an overview of legal framework to be made investment in India.

KEY ASPECTS OF FOREIGN INVESTMENT IN INDIA

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2012-2013

1. OVERVIEW OF DOING BUSINESS IN INDIA :

International companies or investors seeking to set up operations or make investments in India need to appraise and structure their activities on three pillars:

1. Strategy:

Observing the economic and political environment in India from the perspective of the investment; Understanding the ability of the investor to carry out operations in India, the location of its customers, the quality and location of its workforce.

2. Law:

Exchange Control Laws:

Primarily the Foreign Exchange Management Act, 1999 (“**FEMA**”) and numerous circulars, notifications and press notes issued under the same;

Corporate Laws:

Primarily the Companies Act, 1956 and the regulations laid down by the Securities and Exchanges Board of India (“**SEBI**”);

Sector Specific Laws:

Specific Laws relating to Financial Services (banking, non-banking financial services), Infrastructure (highways, airports) and other sectors.

3. Tax:

Domestic Taxation Laws: The Income Tax Act, 1961; indirect tax laws including laws relating to value added tax, service tax, customs, excise;

International Tax Treaties: Treaties with favorable jurisdictions such as Mauritius, Cyprus, Singapore and the Netherlands.

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INCOME TAX RATES : ACCOUNTING YEAR 2012-2013(31/3/2013) ASST YR: 2013-14

Particulars	Thresholds limit for Surcharge	Tax Rates Without Surcharge	Tax Rates With Surcharge
Individual, HUF, AOP & BOI	N.A.		
Resident & Non-Resident Assessee			
Upto Rs 2,00,000		Nil	N.A.
Rs 2,00,001 to Rs 5,00,000		10.30%	N.A.
Rs 5,00,000 to 10,00,000		20.60%	N.A.
Rs. 10,00,001 onwards		30.90%	N.A.
Resident Senior Citizen Assessee aged fro m 60 years to 79 years			
Upto Rs 2,50,000		Nil	N.A.
Rs. 2,50,001 to 5,00,000		10.30%	N.A.
Rs. 5,00,001 to 10,00,000		20.60%	N.A.
Rs. 10,00,001 onwards		30.90%	N.A.
Resident Senior Citizen Assessee aged 80 years & above		Nil	N.A.
Upto Rs. 5,00,000		10.30%	N.A.
Rs. 5,00,001 to 10,00,000		20.60%	N.A.
Rs. 10,00,001 onwards			
Partnership firm	N.A.	30.900%	N.A.
Limited Liability Partnership	N.A.	30.900%	N.A.
Domestic company (Other than Foreign Company)	1,00,00,000	30.900%	32.445%
Company other than Domestic Company (foreign Company)	1,00,00,000	41.200%	42.024%
Local Authority	N.A.	30.900%	N.A.
Co-operative Society			
Upto Rs. 10,000		10.300%	N.A.
Rs. 10,001 to 20,000		20.600%	N.A.
Rs. 20,001 onwards		30.900%	N.A.
Minimum Alternate Tax			
Domestic Company	1,00,00,000	19.055%	20.008%
Company other than Domestic Company	1,00,00,000	19.055%	19.436%
Alternate Minimum Tax			
Any person including LLP (other than Company) Claiming certain deductions	N.A.	19.055%	N.A.
STCG on Listed Securities			
Individual, HUF, AOP, & BOI	N.A.	15.450%	N.A.
Partnership Firm / LLP	N.A.	15.450%	N.A.
Domestic company	1,00,00,000	15.450%	16.223%
Company other than Domestic Company	1,00,00,000	15.450%	15.759%
STCG on assets other than listed securities			
Individual, HUF,AOP & BOI	N.A.	As per slab	As per Slab
Partnership Firm / LLP	N.A.	30.900%	N.A.
Domestic Company	1,00,00,000	30.900%	32.445%
Company other than Domestic Company	1,00,00,000	41.200%	42.024%

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LTCG on assets other than Listed Securities			
Individual, HUF,AOP & BOI Partnership Firm / LLP Domestic Company Company other than Domestic Company	N.A. N.A. 1,00,00,000 1,00,00,000	20.600% 20.600% 20.600% 20.600%	N.A. N.A. 21.630% 21.012%
Rate of tax on Specific Income			
Interest from infrastructure debt fund received by non-Resident individual (section 115A)	N.A.	5.150%	N.A.
Interest from infrastructure debt fund received by non-Resident other than individual (section 115A)	1,00,00,000	5.150%	5.253%
Interest from External Commercial Borrowing (ECB) Payable by specified company to Non-Resident (section 115A)	1,00,00,000	5.150%	5.253%
Dividend Received by Indian company from Foreign Subsidiary (section 115BBD)	1,00,00,000	15.450%	16.223%

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3. NON RESIDENT INDIAN:

OVERVIEW OF THE DEFINATION OF NRI UNDER THE FEMA AND THE INCOME TAX ACT 1961:

There are two separate definitions on residential status , one under the Income tax Act 1961 and the other in FEMA. Section 2 (u) of FEMA defines the meaning of the term "PERSON". Section 2(v) of FEMA defines the meaning of the term "Person resident outside India". Section 2(w) defines "person resident outside India" as a person who is not resident in India. For all practical purpose, the term "Person resident outside India "is similar term with the "NON RESIDENT".

Person includes: —

(a) an individual
(b) a Hindu Undivided Family (HUF)
(c) a Company
(d) a firm
(e) an association of persons or body of individuals, whether incorporated or not
(f) every artificial juridicial person not falling in any of the above sub-clauses
(g) any agency, office or branch owned or controlled by such person.

2.4 Resident/Non-Resident:— If an individual stays in India for more than 182 days during the course of the preceding financial year, he will be treated as a **person resident in India**. There are a few exceptions as under:

· **If a person goes/stays outside India** for (a) taking up employment, or (b) carrying on business or vocation, or (c) for any other purpose for an uncertain period; he will be treated as a **person resident outside India (non-resident)**. (It has been clarified that students going abroad for further studies will be regarded as non-residents.)

· **If a person who is residing abroad comes to/stays in India** only for (a) taking up employment, or (b) carrying on business or vocation, or (c) for any other purpose for an uncertain period; he will be treated as a **person resident in India**.

The term financial year means a twelve-month period beginning from April 01 and ending on March 31 next.

Following persons **(<u>other than individuals</u>**) will be treated as **person resident in India:**

· Person or body corporate which is registered or incorporated in India.
· An office, branch or agency in India, even if it is owned or controlled by a person resident outside India.
· An office, branch or agency outside India, if it is owned or controlled by a person resident in India.

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The definition is however inadequate to define residential status of a firm, an HUF, a trust or any entity which does not have to be registered.

Conversely, a non-resident means a person who is not a resident in India.

Thus Precisely, Section 2 of FEMA deals with the various definitions like person resident in India and person resident outside India but does not define the term Non Resident nor Non-Resident Indian(NRI).

However, notification No.5/2000- RB (Dealing with the various kinds of Bank Accounts) defines the term "Non –resident Indian (NRI)" to mean a person resident outside india, who is either a citizen of India or is a person of India origin.

DEFINATION AS PER INCOME TAX ACT:

The basis of determination of residential status in respect of each person is laid down under the provision of section 6 of the Income tax Act 1961.

1. **TEST OF RESIDENCE** –

A. Individuals

a. An Individual is regarded as 'Resident' of India if:

i. He stays in India for 182 days or more during a previous year;

OR

ii. He stays in India for 60 days or more during a previous year, and 365 days or more during the 4 years preceding that previous year.

The short period of stay in India of "60" days, however gets extended to 182 days in following conditions (i.e., even though an Individual is in India for 365 days or more during preceding 4 previous years).

1. An Indian citizen who leaves India in any previous year for employment or as a member of the crew of an Indian Ship;

2. An Indian citizen or a person of Indian origin, who is abroad, comes on visit to India in any previous year.

b. An Individual is regarded as 'Resident but not ordinarily Resident' if:

i. He is a non-resident in India in 9 out of 10 previous year preceding the previous year;

OR

ii. He has stayed in India for 729 days or less during 7 year preceding the previous year.

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c. An Individual is regarded as '<u>Non-Resident</u>' if:

He doesn't satisfy any of the conditions mentioned in * **(a)** above.

Example:

1. Mr. A a British National , comes to India for the first time during the year 2006-2007. During the Financial years 2007-08,2008-09,2009-2010,2010-2011, and 2011-2012 he is in india for 55 days, 60days, 80days 160 days and 70 days respectively. What is his residential status for the assessment year 2012-2013 financial year 2011-2012.

Ans: Mr. A does not stay for 182 days during the financial year 2011-2012.Therfore, he fails to fulfill the first basic condition. Having stayed for more than 60 days (actual stay 70 days) during 2011-2012, he has stayed only for 355 days during the preceding four financial years. Thus he fails to fulfill even the second basic condition .Consequently his residential status for the A Y 2012-2013 financial year 2011-2012 is that of "NON RESIDENT**".**

B. <u>HUF/FIRM/AOP</u>

i. Resident - They are regarded as resident, even if some control and management is in India.

[Note: An HUF will be 'Resident but not ordinarily resident' if it is a resident and its manager fulfils any one of the conditions as mentioned in A (b) above]

ii. Non-resident – They will be regarded as non-resident, if control and management is wholly outside India.

C. <u>Company</u>

An Indian company is always treated as resident in India. Any other company would be a resident if control and management of its affairs is situated wholly in India.

2. <u>TAX INCIDENCE</u>

A. Resident & Ordinarily Resident – Global Income is taxable.

B. Resident but not Ordinarily Resident – Income earned/ received in India; or income which accrues or arises or is deemed to accrue or arise in India or income arising abroad out of business controlled in India is taxable.

C. Non-resident – Only income earned/received in India and income deemed to accrue or arise in India is taxable.

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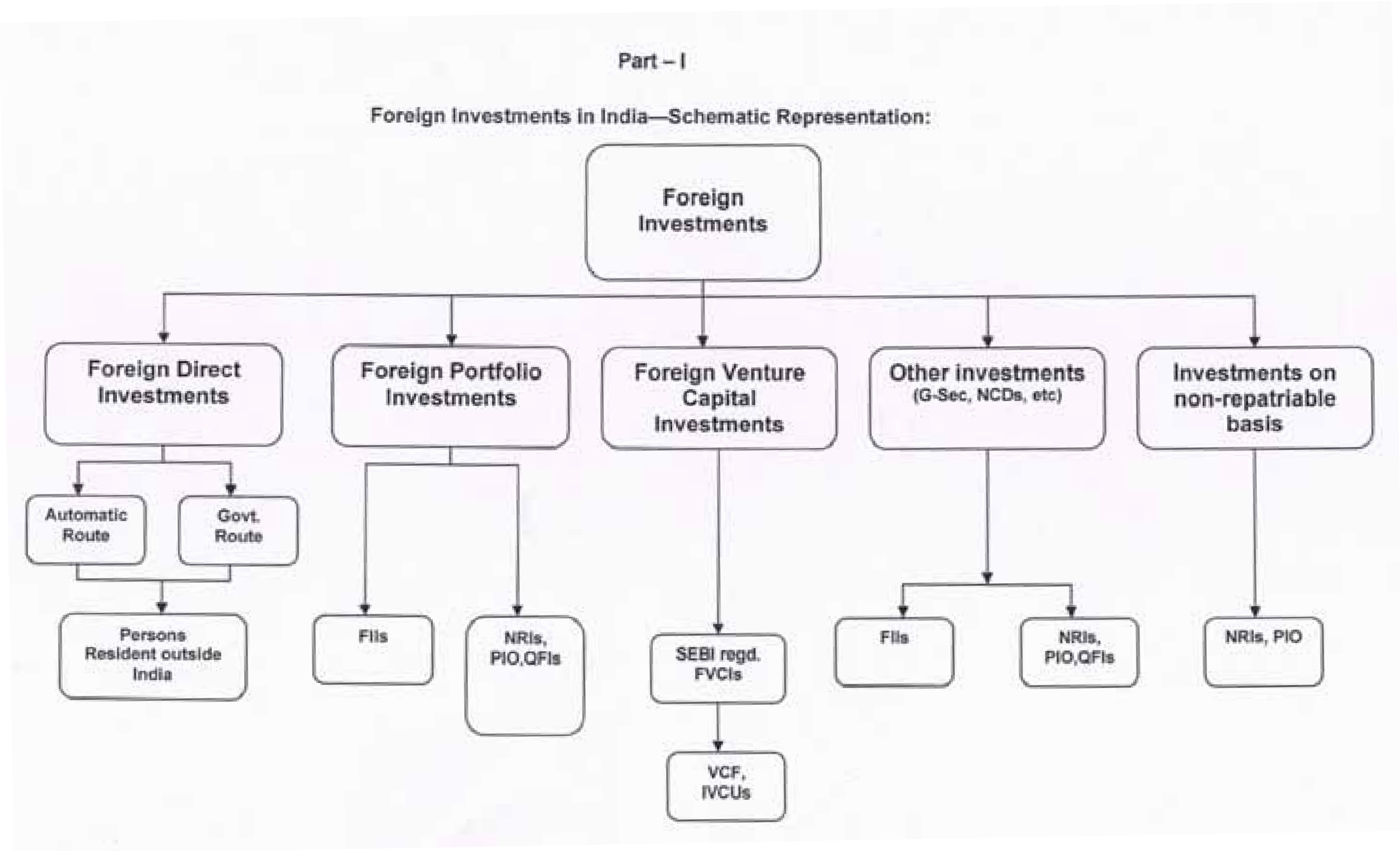
4. **FOREIGN DIRECT INVESTMENT In India by NRI , FII, QFI :**

Schematic Representation :



A. **INCORPORATION**

Once the foreign exchange regulations have been complied with, a foreign company must choose how it wishes to set up its operations in India. The1 entities that foreign companies may set up in India may either be unincorporated or incorporated.

UNINCORPORATED ENTITIES

Unincorporated entities permit a foreign company to do business in India via 'offices' of certain types. These options are as follows:

1. **Liaison Office**:

Setting up a liaison office requires the prior consent of the RBI. A liaison office acts as a representative of the parent foreign company in India. However, a liaison office cannot undertake any commercial activities and must maintain itself from the remittances received from its parent foreign company. The approval for setting up a liaison office is valid for 3 years. It is an option usually preferred by foreign companies that wish to explore business opportunities in India.

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2. **Branch Office**:

The branch office of a foreign company in India must be set up with the prior consent of the RBI. It can represent the foreign parent company in India and act as its buying or selling agent in India.

3. **Project Office**:

A foreign company may set up a project office in India under the automatic route subject to certain conditions being fulfilled. The activities of a project office must be related to or incidental to the execution of the relevant project. A project office is permitted to operate a bank account in India and may remit surplus revenue from the project to the foreign parent company.

4. **Limited Liability Partnership**:

A Limited Liability Partnership ("**LLP**") is a form of business entity which permits individual partners to be shielded from the liabilities created by another partner's business decision or misconduct. In India, LLPs are governed by The Limited Liability Partnership Act, 2008. The LLP is a body corporate and exists as a legal person separate from its partners. However, foreign investment is not permitted in LLPs.

5. **Partnership**:

A partnership is a relationship created between persons who have agreed to share the profits of a business carried on by all of them, or any of them acting for all of them. A partnership is not a legal entity independent of its partners.

6. **Trust**:
A trust arises when one person (the "**trustee**") holds legal title to property but is under an equitable duty to deal with the property for the benefit of some other person or class of persons called beneficiaries. Like a partnership, a business trust is not regarded as a legal entity.

B. INCORPORATED ENTITIES
Incorporated entities in India are governed by the provisions of the Companies Act, 1956. The authority that oversees companies and their compliances is the Registrar of Companies ("**RoC**"). Companies may either be 'private limited companies' or 'public limited companies':

1. **Private Limited Company**:

A private limited company must have a minimum paid-up share capital of INR 100,000 (approx. USD 22504). It carries out business in accordance with its memorandum and articles of association. A private limited company has certain distinguishing characteristics. It must, in its articles of association, restrict the

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right to transfer shares; the number of members in a private limited company is limited to 50 members (excluding the present and past employees of the company); its Articles of Association must prohibit any invitation to the public to subscribe to the securities of the company; the Articles of Association must also prohibit the invitation or acceptance of deposits from persons other than members. About 3-4 weeks is required to incorporate a private limited company, but this may vary from state to state.

2. **Public Limited Company**:

A public limited company must have a minimum paid-up share capital of INR 500,000 (approx. USD 11,2505). It is defined as a company which is not a private company (but includes a private company that is the subsidiary of a public company). A public company can only commence business after being issued a 'Certificate of Commencement of Business' by the RoC. A public limited company may have more than 50 shareholders and may invite deposits from the public.

A public limited company may also list its shares on a recognized stock exchange by way of an initial public offering ("**IPO**").

Prerequisites for setting up a Company:

Minimum paid up share capital of Rs. 100,000 (Rs. One lacs only) for Private Limited Company and Rs. 500,000 (Rs. Five Lacs Only) for Limited Company, except if require some key words e.g. India, Corporation, Bharat, Industry etc.

A minimum number of 2 (two) shareholders/ subscribers to Memorandum of Association for Private Limited Company and Three for Limited Company. For a company which is a wholly owned subsidiary of a Foreign Company, both the subscribers should be the bodies corporate. Any private limited company incorporated in India would be deemed to be a public company in case the following conditions are satisfied:

I. It is a subsidiary of a foreign company, which if incorporated in India would qualify as a Public company under the Companies Act; and

II. The entire share capital of the Indian company is not held by that foreign company, Whether alone or together with one or more foreign companies.

Also, the company law provisions do not enable the share capital being held in the name of Individual/s as nominees of the foreign body or bodies corporate owning the share capital of the Indian private limited company. In such a scenario any private limited company Incorporated in India would be deemed to be a public company, if the holding Foreign Company qualifies as a public company under the Companies Act, 1956 and it would have to comply with certain additional compliances and restrictions as are applicable to a Public Company in India.

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Having two foreign companies as subscribers is necessary in order to avoid the stringent Compliance requirements, which would otherwise be applicable to a public limited company.

Foreign investing company would be one of the subscribers (the majority subscriber holding 99.99% shares) and some other body corporate (possibly a sister concern of foreign investing company) could be the other subscriber (it need not have a significant shareholding and may hold only .01% shares).

Director Identification Number ("DIN"):
Every director of a company is required to obtain a unique identification number called DIN from Ministry of Corporate Affairs ("MCA").

Digital Signature Certificate ("DSC"):
The MCA, India launched an e-governance Project in the beginning of year 2006. With the implementation of this project e- filing of all the documents with the Registrar of Companies ("RoC") has been made mandatory using digital signatures with effect from 16 September 2006. Consequently, the person authorized to sign any document under the company law would be required to obtain DSC to digitally sign the same.

Process of Company Incorporation:
Step 1 - Name approval :

Submission of application for name availability:

- An application is required to be submitted online in Form No. 1A to RoC to ascertain the availability of the name along with filing fee of Rs 500.
- The application should mention at least four names up to a maximum of six 6 names, in orderof preference. It is at the discretion of the RoC which of these four they choose to allot. Itmay be noted that the RoC usually insists that the name of any Indian company should be reflective of the main activities carried on by it. The significance and use of the word '(Brand name)' should be justified.

- Board resolution should be passed by the promoter companies considering following matters:

- Incorporation of a company in India.
- Allowing the usage of "Brand name" in the name of Indian company (this will be required to be stated in the board resolution of the promoter company whose name is proposed to be used in the Indian company).
- authorization of an individual (representative of Promoter Company) to:
- sign all documents and to do all acts necessary for the incorporation;

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- for subscribing to the Memorandum and Articles of Association of the proposed Indian Company; and sign and execute a Power of Attorney for & on behalf of the company
- Power of Attorney should be executed in favour of person to act as an authorized representative on behalf of promoters (this would be signed by the individual authorized by the company in the Board resolution).

Please note that Power of Attorney and Board Resolution would be required to be notarized and consularised in the country in which these documents are executed. However, if the country is a member of commonwealth, then there is no requirement for consularisation and the documents would only have to be notarized. Further, if the power of attorney is signed in India by the individuals authorized in the Board resolution, there will be no requirement for notarization and consularisation of the same. In such a case the copy of the passport of the individuals would have to be furnished to the RoC. The RoC may also require the individuals to be personally present in his office (this depends on the official examining the documents and it is possible that this step may not be required)

Approval of name by RoC :
The RoC verifies the application and communicates his decision regarding the availability of the name generally by 8-10 working days. The name approval is valid for a period of 30 days and formalities regarding registration should be completed within that period.

Step 2 – Steps for incorporation post name approval
On receipt of name approval from RoC the following steps should be taken for the incorporation of the company:

Drafting of Memorandum of Association ("MoA") and Articles of Association ("AoA") of the company:

The draft MoA and AoA should be prepared. MoA and AoA should be printed, divided into paragraphs and numbered consecutively.

Stamping of MoA and AoA :

The MoA and AoA should be stamped as per the Indian Stamp Act and at the notified rate as per provisions of Stamp Duty rates of that state in which Proposed Registered Office Lies.

Subscription to MoA and AoA

- The MoA and AoA should be subscribed by at least two persons in case of Private Limited Companies and Three in case of Limited Company.

- Each subscriber should take at least 1 share and shall write opposite to his name the number of shares he takes.

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- Each subscriber should also sign and add his address, description and occupation (if any) in the presence of at least one witness who shall likewise add his address, description and occupation, if any.

- It is important to note that the details in the subscribers' sheet are required to be filled by the subscribers in their own handwriting.

- MoA and AoA should then be dated. It should be ensured that the date mentioned on MoA and AoA is any date after the date of stamping and not before that date.

- The subscription table of MoA and AoA will then have to be notarized and consularised in the country in which these documents are executed. In case the country is a member of common wealth, then there is no requirement for consularisation and the documents will only have to be notarized.

Stamping of Power of Attorney

Obtain the stamping on duly notarised and consularised Power of Attorney upon receipt in India, as per the Indian Stamp Act or the relevant State Act.

Submission of Documents

Online filing

Within 30 days from the date of intimation of name clearance by the RoC, following documents are required to be filed online with RoC:

1. Declaration of compliance in Form No. 1 duly signed using DSC by a person named in the AoA as a director or manager or secretary of the company.

2. Situation of the registered office of the company in Form No. 18.

3. Particulars of Directors, Managers and Secretary in Form No. 32.

4. Duly signed and stamped MoA and AoA of the company.

5. Power of attorney in favour of Company secretary or CA to act as an authorized representative on Behalf of promoters.

6. RoC Registration fee. All these documents are required to be digitally signed by a Proposed Director of the Company and certified by counter signature of a Practicing Chartered Accountant or a Company Secretary.

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Manual Filing:

Following documents shall be further required to be submitted manually with concerned office of RoC after online filing:

1. Form 1 (Declaration of Compliance on incorporation of the company) executed on a non judicial stamp paper of appropriate duty amount.
2. Form 18 (Notice of situation of the registered office of the company).
3. Form 32 (Particulars of the first Directors of the company).
4. Duly executed stamped copy of MoA and AoA.
5. Stamped copies of Power of Attorneys ..
6. Proof of payment of RoC registration fee i.e. RoC Challans.

Certificate of Incorporation :

The RoC shall verify the documents and suggest modifications wherever required. The authorized person should duly carry out such modifications. The modified documents should be e – filed again. Thereafter, Registrar on being satisfied that all the requirements for the registration of the company as laid down under the Act and rules made there under have been duly complied with shall certify under his hand that company is incorporated and issue a certificate of incorporation to the company.

Foreign Direct Investment ("FDI") up to 100% is allowed under the automatic route in all Activities/sectors except certain specified activities/sectors which require prior Foreign Investment Promotion Board ("FIPB") approval. Following activities/sectors require prior FIPB approval:

- Manufacture of cigars & cigarettes of tobacco and manufactured tobacco substitutes.
- Manufacture of Electronic Aerospace and Defence Equipments of all types.
- Manufacture of items exclusively reserved for Small Scale Sector with more than 24% FDI.
- All proposals in which the foreign collaborator has an existing venture/ tie-up or technology transfer/ trademark agreement in India in the same field (not applicable to proposals for investments made by multinational financial institutions and investment made in IT sector and mining sector for same area/mineral).
- All proposals relating to acquisition of shares in an existing Indian company in the financial services sector and where SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 is attracted.

- All proposals falling outside notified sectoral policy/ caps or under sectors for which FDI is not permitted and/ or whenever any investor chooses to make an application to the FIPB and not to avail of the automatic route.
- All proposals requiring an Industrial License.

FDI in sectors/activities to the extent permitted under the automatic route does not require any prior approval either by the Government or Reserve Bank of India ("RBI"). The investors are only required to undertake the following compliances with the RBI relating to the remittance of money as share capital into the Indian subsidiary:

A. Within 30 days from the receipt of the consideration, the company issuing the shares is required to submit a report to the RBI, indicating the following:

- Name and address of the foreign investor.
- Date of receipt of the funds and the rupee equivalent of the same.
- Name and address of the authorized dealer ('banker') through whom the funds have been received.
- Details of Government approval, if any.

B. Within 30 days from the date of the issue of shares, the following documents are required to be submitted through AD Category – I bank, to the concerned Regional Office of RBI:

Ø A report in form FC-GPR.

Ø A certificate from the Company Secretary of the company issuing the shares, certifying

Ø that: all requirements of the Companies Act have been complied with;

Ø terms and conditions of the Government approval(s), if any, have been Compiled with;

Ø The company is eligible to issue shares under the foreign exchange regulations; and the company has all the original certificates issued by the authorized dealers (bankers) in India evidencing receipt of the consideration in convertible foreign exchange.

Ø A certificate from the Statutory Auditors of the company issuing the shares or any Chartered Accountant indicating the manner of arriving at the issue price of the shares.

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5. TAX TREATY JURISDICTION IN INDIA :

Any Income earned by a Non resident shall be subject to tax in India in accordance with the Provisions of Section 5. Section 7 which deals with the any income received or deemed to be received in Indian and section 9 deals with any Income accruing or arising or deemed to accrue or arise in India are subject to tax in the hand of Nonresident and shall fulfill the test of existences of business connection in India.

Where there exists a Double taxation Avoidance Agreement between India and other foreign country the same shall super cede the Indian Income tax law to the extent of Income which is the subject matter of such double taxation between India and such country.

The following chart summarizes the methodology of taxability of income derived by a Nonresident:

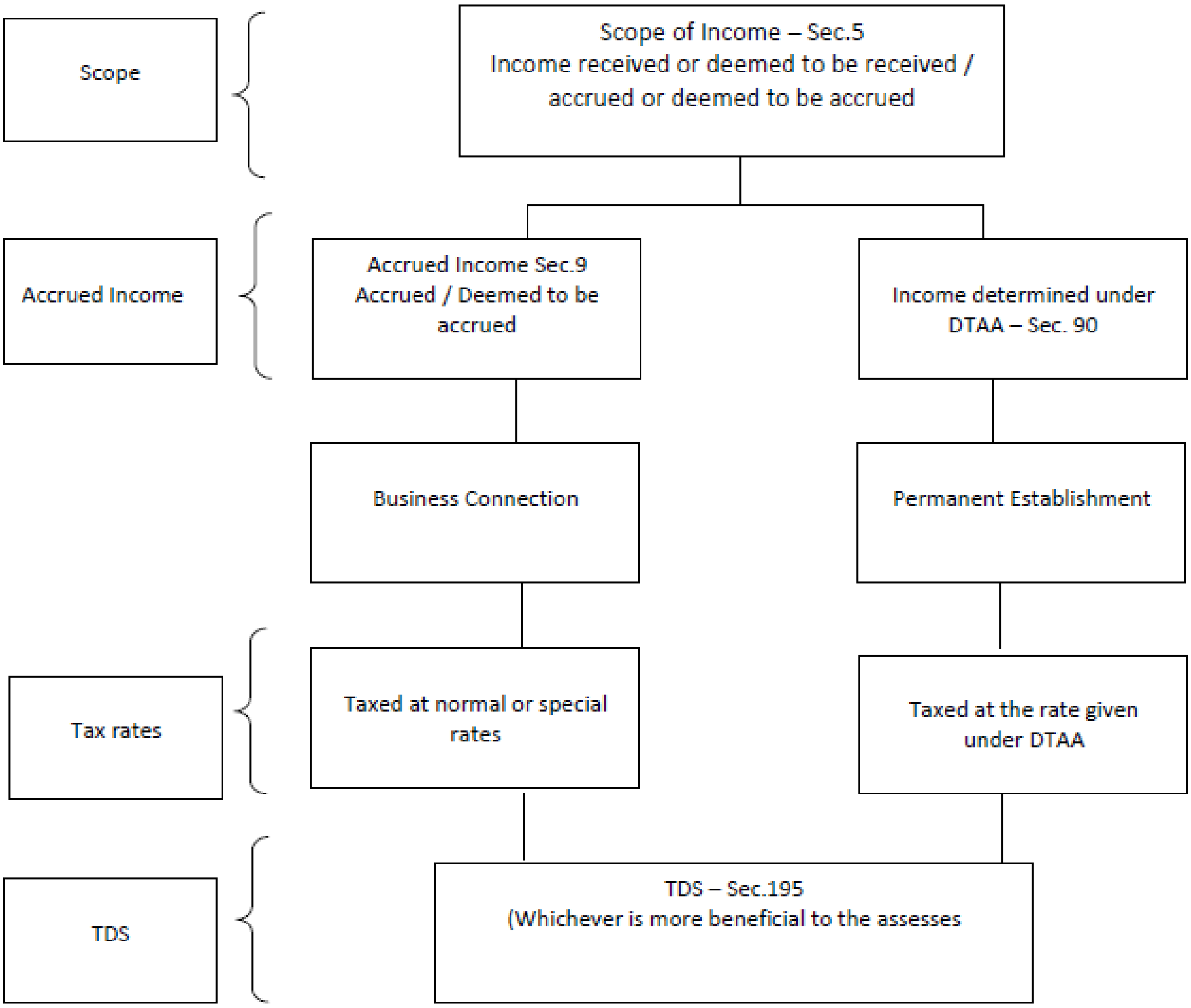

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Table : 1 Withholding tax rates (tax rates applicable in India under DTA Agreements)

SR NO	Country DTAA Between India and	Tax rates	Tax rates	Tax rates	Tax rates
		Dividend(other than u/s 115O)	Interest (%)	Royalties(%) SEE NOTE -2	Fees for Technical services(%) SEE NOTE -2
1	Australia	15%@	15%@	NOTE-1	NOTE- 1
2	Canada	15 %; @if at least 10% of capital is owned by the Company ;25% @in other case	15%@	Note 1	Note 1
3	Germany	10%@	10%@	10%@	10%@
4	France	10%@	10%@	10%@	10%@
5	Japan	10% @	10% @	10% @	10% @
6	Mauritius	5% @ 15% @	* @ * Interest exempt if beneficially owned by government or bank carrying bonafide banking business NIL- Other case	15%	No separate provision
7	Netherland	10% @	10% @	10% @	10% @
8	New Zealand	15% @	10% @	10% @	10% @
9	Singapore	10% -if at least 25% of the capital is owned by the company. in other case: 15%	10% @ 15% @	10% @	10% @
10	South Africa	10% @	10% @	10% @	10% @
11	United Kingdom(U K)	15% @	15% 10% If interest paid to bank which is beneficial owner which is resident	NOTE 1	NOTE 1
12	USA	15% _ if at least 10% of the capital is owned by the company In other case 25% @	10% 15%	NOTE 1	NOTE 1
13	UAE	10%	5% If loan granted by bank 12.5% for others	10%	No separate provision

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NOTE 1:

In the Country of Source, Royalties and Fees for Technical Services are taxed at the following rates:

i. 10% for Equipment Rental and for services ancillary or subsidiary thereto.

ii. For other cases.

a. During 1st to 5 years of Agreement
b. 15% if Government or Specified organization is payer 20% for other payers.
c. Subsequent years, 15% in all cases.

@ REFFERED TO AS – BENEFICIAL OWENERSHIP REQUIRED.

NOTE-2

The rate of tax under the IT Act on Royalty or fees for technical services receivable by a Foreign company is as below:

- For agreements made on or before 31st MAY 1997-30%
- For agreement made after 31st MAY 1997 BUT BEOFRE 1ST JUNE 2005 -20%.
- For agreements made on or after 1st June 2005-10%
- As per section 90(2) of the income tax Act 1961 this rate may be adopted if it is lower than rate under DTAA.

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6. **INCOME TAX COMPLIANCES FOR NRI"S , JV –FOREIGN COMPANIES :**

Hereby reproduced the FAQ "S BY QFI , PRESS RELAEASE DATED 26/12/2012 , BY INCOME TAX DEPARTMENT AND FAQ"S FOR FOREIGN INVESTMENTS IN INDIA BY RBI

I. FREQUENTLY ASKED TAX QUESTIONS BY QUALIFIED FOREIGN INVESTORS (QFIs)[1]

PRESS RELEASE, DATED 26-12-2012

Q.1. What is Permanent Account Number (PAN) Card?

Ans: Permanent Account Number (PAN) is a ten-digit alphanumeric number, issued by the Income Tax Department of India to any "person" to facilitate him in making tax payments filing, returns and claiming refunds. The number, along with other relevant details, is printed on a card called PAN card.

Q.2. Are QFIs required to obtain PAN Card to comply with tax norms in India?

Ans: Yes. Under the current provisions, QFIs would be required to obtain PAN card. The process of obtaining a PAN card is simple, and user friendly. An application can be filed by a foreign investor online and the process can be completed within 2 to 3 weeks.

Q.3. What are the benefits to QFIs of having a PAN Card?

Ans: QFIs who have a PAN card would be eligible for tax deduction at source (TDS) as per the rates applicable in the Double Taxation Avoidance Treaty (DTAA) of the country of which the QFI is a resident, if it is more beneficial than the rate prescribed under the domestic law. If a QFI has not obtained a PAN card it would be subject to a higher rate of tax deduction under Section 206 AA of Income Tax Act, 1961.

Q.4. How QFIs can apply for a PAN Card?

Ans: In order to facilitate QFIs in applying for a PAN as well as to comply with Know your Customer (KYC) norms of the Securities Exchange Board of India (SEBI), a combined form (FORM 49 AA) has been notified by the Central Board of Direct Tax (CBDT). Form 49 AA and detailed instructions regarding how it is to be filled up are available at :

http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/itr62form49 aa.pdf
http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/Not58_2011. pdf

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Q.5. Can QFIs make an On-line application for PAN Card?

Ans: Yes, application for allotment of PAN can be made online through the Internet. Further, requests for changes or correction in PAN data or request for reprint of PAN card (for an existing PAN) may also be made through the Internet. Online application can be made either through the portal of National Securities Depository Limited (NSDL) (https://tin.tin.nsdl.com/pan/index.html) or portal of UTI Infrastructure Technology and Services Limited (UTITSL) (http://www.utitsl.co.in/utitsl/uti/newapp/new-pan-application.jsp). Supporting documents required to be submitted by QFIs to obtain PAN card are listed at the following link:

http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/Not58_2011. pdf

Q.6. What are the attestation requirements for a QFI for obtaining PAN card?

Ans: For a QFI who is an individual, Rule 114 of the Income Tax Rules, 1961 read with Form No. 49AA, requires a copy of the passport to be filed (without any attestation), this will be taken as both proof of identity and proof of residence. For QFIs other than individuals, the process requires filing of copy of certificate of registration duly attested by an "apostille" or at the Indian Embassy in that country.

In order to meet the know you client (KYC) requirements as prescribed by Securities Exchange Board of India (SEBI), the list of documents to be submitted by a QFI for KYC are available at:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1340167306959.pdf

Q.7. What are the tax related responsibilities of Qualified Depository Participants (QDPs)?

Ans: In order to facilitate investments by QFIs, the QDPs have been assigned the responsibility to act as a single point of contact for QFIs for all purposes including tax. For tax purposes, a QDP will facilitate the QFI to obtain a PAN card. QDPs will be responsible for any withholding tax in India before making remittance to QFIs. QDPs will also be treated as a representative assessee/agent of the QFI. For this purpose QDPs would be required to submit a declaration that they have no objection to being treated as a representative assessee/agent of QFI. A QDP may ensure that the broker engaged by it for undertaking QFI transactions deducts and deposits tax at source failing which the QDP should deduct and deposit the tax on such transactions.

Q.8. Can QFIs claim refund from Income Tax Department in India?

Ans: Yes. QFIs can claim refund from Income Tax Department for which the QFI would have to file its return of Income in India for that year.

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Q.9. Can a QFI carry forward losses over the years?

Ans: Yes. QFIs are allowed to carry forward losses over years provided the QFI files its return of income declaring the loss for the relevant year within the stipulated time limits.

Q.10. Whether profits earned by QFI from their investments in Indian securities market would be treated as Capital Gain or business income?

Ans: As per the Income-Tax Act, 1961, whether the profits earned from transaction in securities would be capital gains or business income will depend on facts and circumstances of each case like the number and frequency of transactions etc. Please refer to circular No.4/2007 dated 15/6/2007 issued by the Central Board of Direct Taxes.

Q.11. Whether QDPs should compute tax deduction at source (withholding tax) on QFI income for one settlement period on settlement basis or on transaction basis?

Ans: Currently, settlement on Indian stock exchanges is done at the end of every trading day. Tax deducted at source under the Income-tax Act, 1961 is to be deposited by the seventh day succeeding the end of each month. The withholding tax on QFI income will be computed on settlement basis and not on transaction basis since the stock broker would credit the net proceeds of all transactions to QFIs on settlement basis for one settlement period.

Q.12. For determining the tax deducted at source (withholding tax) liability, can QDPs set off losses of QFIs against profits earned on monthly basis in a given year?

Ans: As per TDS provisions, the deductor has to deduct tax either at time of payment of the amount or at time of credit of such amount (whichever is earlier). Therefore, any loss of current year available at such time of deducting tax would be eligible to be set off against the sum payable and the TDS shall be effected on net basis. However, TDS once effected cannot reduced by the deductor even if there is loss in subsequent transaction.

Example, in a given year, a QFI makes three settlements, it earns profit of Rs. 200 on day one settlement, incurs a loss of Rs. 250 on day two settlement and earns profit of Rs. 100 on day three settlement. The TDS would be deducted on credit of net profit of Rs 200 whereas, no TDS shall be effected against profit of Rs. 100 as at time of credit of Rs. 100 a loss of Rs. 250 is available for set off and net basis there is no amount chargeable to tax.

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Q.13. For the purpose of computing tax deducted at source (withholding tax) Can QDPs set off in the case of QFIs, the profits earned in one security against losses earned in another security during a given year?

Ans: Yes. For computing tax deducted at source (withholding tax) QDPs can set off profits earned by the QFI in one security against losses earned in another security as long as these securities are subject to Securities Transaction Tax (STT). Therefore, this would not be applicable in case of QFI investments in bonds as bond transaction are not subject to Securities Transaction Tax Such setting off for computing tax deduction at source would therefore be permissible only in the case of listed securities and mutual fund Units and redemption by mutual funds as these are subject to STT. The set off would again be subject to the general principle that an earlier loss of current year can be set off against subsequent profit which is credited or paid to the QFI. However, if tax deduction at source (TDS) has already been effected for a particular credit or payment, it cannot be reduced by subsequent loss. A QFI is, however, eligible to claim refund of excess amount of tax deducted at source (withholding) by filing a return of income for the relevant year.

Q.14. For the purpose of computing tax deducted at source (TDS), can QFIs Set off of profits earned by a QFI in the current year against losses incurred in previous years?

Ans: No, A QDP cannot set off losses of a previous year of a QFI against profits earned in the current year by the QFI while computing the tax liability for deduction at source, which would therefore be based only on the profits of the year. However, QFIs can themselves set off their profits earned in the current year against losses incurred in previous years. For the purpose, the QFI would need to file its return of income within the time limits stipulated in the Income-tax Act, 1961. For this purpose, QFIs need to file return for the relevant year within the time limits stipulated in the Income-tax Act, 1961.

Q.15. What would be the applicable rates of taxation if a QFI comes from a jurisdiction with which India has a Double Taxation Avoidance Agreement (DTAA) as against one which comes from a non-DTAA Jurisdiction?

Ans: The applicable rates of taxation in the case of investment from a country will be at the rate provided in the Income-tax Act or the rate provided in the Double Taxation Avoidance Agreement, whichever is more beneficial to the investors.

Q.16. Whether the capital gains arising on sale of shares are computed in Indian currency or in other currency?

Ans: The capital gains arising on sale of shares shall be computed by converting the cost of acquisition, expenditure incurred and full value of consideration in the same currency, as was initially utilized for purchase of shares and the gains so computed shall be reconverted in India currency.

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Q.17. Whether DTAA provisions will apply while deducting tax at source?

Ans: Yes. Also see answer to question No. 15.

Q.18. Will the QDPs be held responsible for withholding taxes against profits on mutual fund investments by QFI's?

Ans: Income from investment from mutual fund may arise by way of distribution of profits by the fund or by way of redemption by the fund or by way of sale of units of the fund. In case of distribution of profits by the mutual fund, the mutual fund itself pays tax on distribution of profits. In case of sale of units of the fund, the QDP would be required to withhold tax if the buyer of the mutual fund units has not deducted tax. In case of redemption of units by the fund or sale of units of the fund, the QDP would be required to withhold the tax.

Q.19. If the QFI is no longer the client of the QDP, then can the QDP be called upon to make good the shortfall in tax and liable to interest and penalty having acted in bonafide and good faith?

Ans: QDP, being a deductor, shall be liable for any short deduction or non-deduction of tax even after the QFI ceases to be the client of QDP.

Q.20. What are the deductible expenses that may be incurred by QFI for purchase & sale of shares and Mutual Funds?

Ans: The deductibility of expenses would depend on the fact that whether the income on the sale of shares is treated as business income or capital gains. In general if the income is treated as capital gains expenses like brokerage fees would be allowed.

Q.21. Whether QDP should treat residence certificate as a sufficient proof of residence and beneficial ownership of the shares in India by the QFI?

Ans: Prima facie, the Tax Residency Certificate is evidence of residence in a particular country and the QDP may rely on such a certificate. However, as per Explanatory Memorandum to the Finance Bill, 2012, the amended section 90 and 90A of the Income-tax Act makes submission of Tax Residency Certificate containing prescribed particular, as a necessary but not sufficient condition for availing benefits of the tax treaties.

Q.22. Whether the QDP is required to obtain an Income Tax Order under Section 195(2) of the Act for determining the income component (capital gains) on the sale of shares?

Ans: Central Board of Direct Taxes (CBDT) Circular No. 4/2009 dated 29/06/2009, clarifies that the term 'payer' also means a remitter. As the QDP is making the payment of the income to the QFI, the QDP could be considered as a 'payer'

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Under Section 195(2) of the Act, if any person responsible for paying any sum chargeable under the Act to a non-resident, considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer(AO) to determine the appropriate proportion to such sum on which tax is to be deducted (TDS).

The requirement of obtaining CA Certificate is only in the context of remittance of money outside India. It is not in the context of TDS liability. The QDP is custodian of all data in respect of transactions on which income has arisen to a QFI. It will also maintain the QFI account, wherein the QFIs' income is determined. Therefore, the QDP is supposed to deduct tax on the basis of sum chargeable to tax. In normal situations such as working out the capital gains on a transaction, there would not be any difficulty and QDP can itself determine the amount chargeable to tax and deduct tax thereon or take help of Chartered Accountant in this behalf. However, in case there is complexity in determining such income the QDP should approach the Assessing Officer for determination u/s 195(2). Even for other deductees, it is not mandatory that in each and every case, they should obtain 195(2) order before deducting TDS. However, in case a complex issue, it is advisable to do so. This is because the liability to deduct proper taxes remains on the deductor (i.e. QDP).

Q.23. For the purpose of computing tax deduction at source (withholding tax), what is the proof and declaration that the QDP can rely upon for allowing the full time benefit of a DTAA to a QFI?

Ans: There is no standard set of documents on the basis of which the DTAA treaty benefit can be said to have been rightly allowed. It depends on the facts of each case. The treaty benefit is to be claimed by the person concerned before it can be allowed. For this purpose, the QDP should obtain the Tax Residency Certificate from the QFI.

Q.24. Having relied on the documentations and given the treaty benefits, if later the same is held not allowable by the tax officer, can the QDP be held responsible and called upon to pay for any shortfall in tax, interest and penalties?

Ans: The liability to deduct and pay proper taxes remains that of the QDP as a deductor. Therefore, for any shortfall in tax QDP can be held responsible. The responsibility remains both for non-deduction or short deduction of tax if it is found that the treaty benefit have been incorrectly claimed or considered.

Q.25. What is the maximum number of years in which an assessment can be done or reopened in case of TDS returns filed by the QDP?

Ans: As the payment would be made to QFIs, who are non-residents, the Act does not prescribe any time limit for scrutiny of transaction for TDS purposes under section 201 of the Act.

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Q.26. Can the QDP be held responsible for withholding of tax at source in case of a QFI on sale considerations received under an open offer or buy back of shares where the purchaser of the shares is responsible for withholding tax and complying with the TDS filings under the Act?

Ans: Under the Income-tax Act, any person responsible for paying to a non-resident (not being a company) or to a foreign company, any sum chargeable under the provisions of the Act, has to deduct tax at the time of credit of such income to the account of the payee or at the time of payment, whichever is earlier. The responsibility of tax deducted at source by the QDP in the case of sale consideration received by a QFI on account of an open offer or a buyback of shares would depend upon the facts of the case. In case the purchaser of shares is crediting the sum to the account of the QFIs or making payment to QFIs, the purchaser would be required to deduct the tax. However, if the QDP is crediting the sum to the account of the QFIs or making payment to the QFIs, the QDP would be required to deduct the tax. Please also refer to question no. 7.

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II. <u>FAQ"S RELATING TO FOREIGN INVETMENT IN INDIA</u>
<u>SOURCE : WWW.RBI.ORG FAQ"S DATED 12/10/2012</u>
<u>(UPDATED UPTO 11 TH OCT 2012</u>)

<u>Foreign Direct *Investment* (FDI)</u>

Q. 1. **What are the forms in which business can be conducted by a foreign company in India?**

Ans. A foreign company planning to set up business operations in India may:

- Incorporate a company under the Companies Act, 1956, as a Joint Venture or a Wholly Owned Subsidiary.
- Set up a Liaison Office / Representative Office or a Project Office or a Branch Office of the foreign company which can undertake activities permitted under the Foreign Exchange Management (Establishment in India of Branch Office or Other Place of Business) Regulations, 2000.

Q.2. What is the procedure for receiving Foreign Direct Investment in an Indian company?

Ans. An Indian company may receive Foreign Direct Investment under the two routes as given under:

i. Automatic Route

FDI is allowed under the automatic route without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time.

ii. Government Route

FDI in activities not covered under the automatic route requires prior approval of the Government which are considered by the Foreign Investment Promotion Board (FIPB), Department of Economic Affairs, Ministry of Finance. Application can be made in Form FC-IL, which can be downloaded from http://www.dipp.gov.in. Plain paper applications carrying all relevant details are also accepted. No fee is payable.

The Indian company having received FDI either under the Automatic route or the Government route is required to comply with provisions of the FDI policy including reporting the FDI to the Reserve Bank. as stated in Q 4.

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Q.3. **What are the instruments for receiving Foreign Direct Investment in an Indian company?**

Ans. Foreign investment is reckoned as FDI only if the investment is made in equity shares, fully and mandatorily convertible preference shares and fully and mandatorily convertible debentures with the pricing being decided upfront as a figure or based on the formula that is decided upfront. Any foreign investment into an instrument issued by an Indian company which:

- gives an option to the investor to convert or not to convert it into equity or
- does not involve upfront pricing of the instrument as a date would be reckoned as ECB and would have to comply with the ECB guidelines.

The FDI policy provides that the price/ conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA regulations [the DCF method of valuation for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies].

Q.4. What are the modes of payment allowed for receiving Foreign Direct Investment in an Indian company?

Ans. An Indian company issuing shares /convertible debentures under FDI Scheme to a person resident outside India shall receive the amount of consideration required to be paid for such shares /convertible debentures by:

(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 know how fee 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 with the approval of FIPB.

(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.

If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE / FCNR (B) / Escrow account, the amount shall be refunded. Further, Reserve Bank may on an application made to it and for sufficient reasons permit an Indian Company to

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refund / allot shares for the amount of consideration received towards issue of security if such amount is outstanding beyond the period of 180 days from the date of receipt.

Q.5. Which are the sectors where FDI is not allowed in India, both under the Automatic Route as well as under the Government Route?

Ans. FDI is prohibited under the Government Route as well as the Automatic Route in the following sectors:

i) Atomic Energy
ii) Lottery Business
iii) Gambling and Betting
iv) Business of Chit Fund
v) Nidhi Company
vi) Agricultural (excluding Floriculture, Horticulture, Development of seeds, Animal Husbandry, Pisciculture and cultivation of vegetables, mushrooms, etc. under controlled conditions and services related to agro and allied sectors) and Plantations activities (other than Tea Plantations) (c.f. Notification No. FEMA 94/2003-RB dated June 18, 2003).
vii) Housing and Real Estate business (except development of townships, construction of residential/commercial premises, roads or bridges to the extent specified in Notification No. FEMA 136/2005-RB dated July 19, 2005).
viii) Trading in Transferable Development Rights (TDRs).
ix) Manufacture of cigars , cheroots, cigarillos and cigarettes , of tobacco or of tobacco substitutes.

(Please also see the the website of Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India at www.dipp.gov.in for details regarding sectors and investment limits therein allowed ,under FDI)

Q.6. What is the procedure to be followed after investment is made under the Automatic Route or with Government approval?

Ans. A two-stage reporting procedure has to be followed :.

- On receipt of share application money:

Within 30 days of receipt of share application money/amount of consideration from the non-resident investor, the Indian company is required to report to the Foreign Exchange Department, Regional Office concerned of the Reserve Bank of India,under whose jurisdiction its Registered Office is located, the Advance Reporting Form, containing the following details :

· Name and address of the foreign investor/s;
· Date of receipt of funds and the Rupee equivalent;

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- Name and address of the authorised dealer through whom the funds have been received;
- Details of the Government approval, if any; and
- KYC report on the non-resident investor from the overseas bank remitting the amount of consideration.

The Indian company has to ensure that the shares are issued within 180 days from the date of inward remittance which otherwise would result in the contravention / violation of the FEMA regulations.

- Upon issue of shares to non-resident investors:

  Within 30 days from the date of issue of shares, a report in Form FC-GPR- PART A together with the following documents should be filed with the Foreign Exchange Department, Regional Office concerned of the Reserve Bank of India.

- Certificate from the Company Secretary of the company accepting investment from persons resident outside India certifying that:

  The company has complied with the procedure for issue of shares as laid down under the FDI scheme as indicated in the Notification No. FEMA 20/2000-RB dated 3rd May 2000, as amended from time to time.

- The investment is within the sectoral cap / statutory ceiling permissible under the Automatic Route of the Reserve Bank and it fulfills all the conditions laid down for investments under the Automatic Route,

  OR

- Shares have been issued in terms of SIA/FIPB approval No. --------------------- dated -------------------- (enclosing the FIPB approval copy)

- Certificate from Statutory Auditors/ SEBI registered Merchant Banker / Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

Q.7. What are the guidelines for transfer of existing shares from non-residents to residents or residents to non-residents?

Ans. The term 'transfer' is defined under FEMA as including "sale, purchase, acquisition, mortgage, pledge, gift, loan or any other form of transfer of right, possession or lien" {Section 2 (ze) of FEMA, 1999}.

The following share transfers are allowed without the prior approval of the Reserve Bank of India

A. Transfer of shares from a Non Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that :-

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i. The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;

ii. The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations / guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/ substantial acquisition / SEBI SAST, buy back); and

iii. Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations / guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

B. Transfer of shares from Resident to Non Resident:

i) Where the transfer of shares requires the prior approval of the FIPB as per the extant FDI policy provided that :

a) The requisite approval of the FIPB has been obtained; and

b) The transfer of share adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.

ii) Where SEBI (SAST) guidelines are attracted subject to the adherence with the pricing guidelines and documentation requirements as specified by Reserve Bank of India from time to time.

iii) Where the pricing guidelines under the Foreign Exchange Management Act (FEMA), 1999 are not met provided that:-

The resultant FDI is in compliance with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc.; b) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations / guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/ substantial acquisition / SEBI SAST); and

Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations / guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

iv) Where the investee company is in the financial sector provided that :

a) NOCs are obtained from the respective financial sector regulators/ regulators of the investee company as well as transferor and transferee entities and such NOCs are filed along with the form FC-TRS with the AD bank; and

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b). The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc., are complied with.

Where non-residents (including NRIs) make investment in an Indian company in compliance with the provisions of the Companies Act, 1956, by way of subscription to Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

Transfer of shares/ fully and mandatorily convertible debentures by way of Gift:

A person resident outside India can freely transfer shares/ fully and mandatorily convertible debentures by way of gift to a person resident in India as under:

- Any person resident outside India, (not being a NRI or an erstwhile OCB), can transfer by way of gift the shares/ fully and mandatorily convertible debentures to any person resident outside India;
- a NRI may transfer by way of gift, the shares/convertible debentures held by him to another NRI only,
- Any person resident outside India may transfer share/ fully and mandatorily convertible debentures to a person resident in India by way of gift.
-

Q.8. Can a person resident in India transfer security by way of gift to a person resident outside India?

Ans. A person resident in India who proposes to transfer security by way of gift to a person resident outside India [other than an erstwhile OCBs] shall make an application to the Central Office of the Foreign Exchange Department, Reserve Bank of India furnishing the following information, namely:

- Name and address of the transferor and the proposed transferee
- Relationship between the transferor and the proposed transferee
- Reasons for making the gift.
- In case of Government dated securities, treasury bills and bonds, a certificate issued by a Chartered Accountant on the market value of such securities.
- In case of units of domestic mutual funds and units of Money Market Mutual Funds, a certificate from the issuer on the Net Asset Value of such security.
- In case of shares/ fully and mandatorily convertible debentures, a certificate from a Chartered Account on the value of such securities according to the guidelines issued by the Securities & Exchange Board of India or the Discount Free Cash Flow Cash (DCF) method with regard to listed companies and unlisted companies, respectively.
- Certificate from the Indian company concerned certifying that the proposed transfer of shares/convertible debentures, by way of gift, from resident to the non-resident shall not breach the applicable sectoral cap/ FDI limit in the company and that the proposed number of shares/convertible debentures to be

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held by the non-resident transferee shall not exceed 5 per cent of the paid up capital of the company.

The transfer of security by way of gift may be permitted by the Reserve bank provided:

(i) The donee is eligible to hold such security under Schedules 1, 4 and 5 to Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.
(ii) The gift does not exceed 5 per cent of the paid up capital of the Indian company/ each series of debentures/ each mutual fund scheme
(iii) The applicable sectoral cap/ foreign direct investment limit in the Indian company is not breached
(iv) The donor and the donee are relatives as defined in section 6 of the Companies Act, 1956.
(v) The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift in the financial year does not exceed the rupee equivalent of USD 50000.
(vi) Such other conditions as considered necessary in public interest by the Reserve Bank.

Q.9. What if the transfer of shares from resident to non-resident does not fall under the above categories?

Ans. Transfer of Shares by Resident which requires Government approval

The following instances of transfer of shares from residents to non-residents by way of sale or otherwise requires Government approval:

(i) Transfer of shares of companies engaged in sector falling under the Government Route.
(ii) Transfer of shares resulting in foreign investments in the Indian company, breaching the sectoral cap applicable.

Prior permission of the Reserve Bank in certain cases for acquisition / transfer of security

i) Transfer of shares or convertible debentures from residents to non-residents by way of sale requires prior approval of Reserve Bank in case where the non-resident acquirer proposes deferment of payment of the amount of consideration. Further, in case approval is granted for the transaction, the same should be reported in Form FC-TRS to the AD Category – I bank, within 60 days from the date of receipt of the full and final amount of consideration.

(ii) A person resident in India, who intends to transfer any security, by way of gift to a person resident outside India, has to obtain prior approval from the Reserve Bank.

Any other case not covered by by General Permission.

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Q 10. What are the reporting obligations in case of transfer of shares between resident and non-resident ?

Ans. The transaction should be reported by submission of form FC-TRS to the AD Category – I bank, within 60 days from the date of receipt/remittance of the amount of consideration. The onus of submission of the form FC-TRS within the given timeframe would be on the resident in India, the transferor or transferee, as the case may be.

Q.11. What is the method of payment and remittance/credit of sale proceeds in case of transfer of shares between resident and non-resident?

Ans. The sale consideration in respect of the shares purchased by a person resident outside India shall be remitted to India through normal banking channels. In case the buyer is a Foreign Institutional Investor (FII), payment should be made by debit to its Special Non-Resident Rupee Account. In case the buyer is a NRI, the payment may be made by way of debit to his NRE/FCNR (B) accounts. However, if the shares are acquired on non-repatriation basis by NRI, the consideration shall be remitted to India through normal banking channel or paid out of funds held in NRE/FCNR (B)/NRO accounts.

The sale proceeds of shares (net of taxes) sold by a person resident outside India) may be remitted outside India. In case of FII the sale proceeds may be credited to its special Non-Resident Rupee Account. In case of NRI, if the shares sold were held on repatriation basis, the sale proceeds (net of taxes) may be credited to his NRE/FCNR(B) accounts and if the shares sold were held on non repatriation basis, the sale proceeds may be credited to his NRO account subject to payment of taxes. The sale proceeds of shares (net of taxes) sold by an erstwhile OCB may be remitted outside India directly if the shares were held on repatriation basis and if the shares sold were held on non-repatriation basis, the sale proceeds may be credited to its NRO (Current) Account subject to payment of taxes, except in the case of erstwhile OCBs whose accounts have been blocked by Reserve Bank.

Q. 12. Are the investments and profits earned in India repatriable?

Ans. All foreign investments are freely repatriable (net of applicable taxes) except in cases where:

i) the foreign investment is in a sector like Construction and Development Projects and Defence wherein the foreign investment is subject to a lock-in-period; and

ii) NRIs choose to invest specifically under non-repatriable schemes.

Further, dividends (net of applicable taxes) declared on foreign investments can be remitted freely through an Authorised Dealer bank.

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Q.13. What are the guidelines on issue and valuation of shares in case of existing companies?

Ans.

A. The price of shares issued to persons resident outside India under the FDI Scheme shall not be less than :

(i) the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company is listed on any recognised stock exchange in India;

(ii) the fair valuation of shares done by a SEBI registered Category - I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India; and

(iii) the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

B. The price of shares transferred from resident to a non-resident and vice versa should be determined as under:

i) Transfer of shares from a resident to a non-resident:

a) In case of listed shares, at a price which is not less than the price at which a preferential allotment of shares would be made under SEBI guidelines.

b) In case of unlisted shares at a price which is not less than the fair value as per the Discount Free Cash Flow (DCF) Method to be determined by a SEBI registered Category-I- Merchant Banker/Chartered Accountant.

ii) Transfer of shares from a non-resident to a resident - The price should not be more than the minimum price at which the transfer of shares would have been made from a resident to a non-resident.

In any case, the price per share arrived at as per the above method should be certified by a SEBI registered Category-I-Merchant Banker / Chartered Accountant.

Q.14. What are the regulations pertaining to issue of ADRs/ GDRs by Indian companies?

Ans.

- Indian companies can raise foreign currency resources abroad through the issue of ADRs/ GDRs, in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt

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Mechanism) Scheme, 1993 and guidelines issued by the Government of India thereunder from time to time.

- A company can issue ADRs / GDRs, if it is eligible to issue shares to persons resident outside India under the FDI Scheme. However, an Indian listed company, which is not eligible to raise funds from the Indian Capital Market including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) will not be eligible to issue ADRs/GDRs.
- Unlisted companies, which have not yet accessed the ADR/GDR route for raising capital in the international market, would require prior or simultaneous listing in the domestic market, while seeking to issue such overseas instruments. Unlisted companies, which have already issued ADRs/GDRs in the international market, have to list in the domestic market on making profit or within three years of such issue of ADRs/GDRs, whichever is earlier.
- After the issue of ADRs/GDRs, the company has to file a return in Form DR as indicated in the RBI Notification No. FEMA.20/ 2000-RB dated May 3, 2000, as amended from time to time. The company is also required to file a quarterly return in Form DR- Quarterly as indicated in the RBI Notification ibid.
- There are no end-use restrictions on GDR/ADR issue proceeds, except for an express ban on investment in real estate and stock markets.
- Erstwhile OCBs which are not eligible to invest in India and entities prohibited to buy, sell or deal in securities by SEBI will not be eligible to subscribe to ADRs / GDRs issued by Indian companies.
- The pricing of ADR / GDR issues including sponsored ADRs / GDRs should be made at a price determined under the provisions of the Scheme of issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Government of India and directions issued by the Reserve Bank, from time to time.

Q.15. What is meant by Sponsored ADR & Two-way fungibility Scheme of ADR/ GDR?

Ans. Sponsored ADR/GDR: An Indian company may sponsor an issue of ADR/ GDR with an overseas depository against shares held by its shareholders at a price to be determined by the Lead Manager. The operative guidelines for the same have been issued vide A.P. (DIR Series) Circular No.52 dated November 23, 2002.

Two-way fungibility Scheme: Under the limited Two-way fungibility Scheme, a registered broker in India can purchase shares of an Indian company on behalf of a person resident outside India for the purpose of converting the shares so purchased into ADRs/ GDRs. The operative guidelines for the same have been issued vide A.P. (DIR Series) Circular No.21 dated February 13, 2002. The Scheme provides for purchase and re-conversion of only as many shares into ADRs/ GDRs which are equal to or less than the number of shares emerging on surrender of ADRs/ GDRs which have been actually sold in the market. Thus, it is only a limited two-way fungibility wherein the headroom available for fresh purchase of shares from domestic market is restricted to the number of converted shares sold in the domestic market by non-resident investors. So long

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the ADRs/ GDRs are quoted at discount to the value of shares in domestic market, an investor will gain by converting the ADRs/ GDRs into underlying shares and selling them in the domestic market. In case of ADRs/ GDRs being quoted at premium, there will be demand for reverse fungibility, i.e. purchase of shares in domestic market for re-conversion into ADRs/ GDRs. The scheme is operationalised through the Custodians of securities and stock brokers under SEBI.

Q.16. Can Indian companies issue Foreign Currency Convertible Bonds (FCCBs)?

Ans. FCCBs can be issued by Indian companies in the overseas market in accordance with the Scheme for Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993.

The FCCB being a debt security, the issue needs to conform to the External Commercial Borrowing guidelines, issued by RBI vide Notification No. FEMA 3/2000-RB dated May 3, 2000, as amended from time to time.

Q.17. Can a foreign investor invest in Preference Shares? What are the regulations applicable in case of such investments?

Ans. Yes. Foreign investment through preference shares is treated as foreign direct investment. However, the preference shares should be fully and mandatorily convertible into equity shares within a specified time to be reckoned as part of share capital under FDI. Investment in other forms of preference shares requires to comply with the ECB norms.

Q.18. Can a company issue debentures as part of FDI?

Ans. Yes. Debentures which are fully and mandatorily convertible into equity within a specified time would be reckoned as part of share capital under the FDI Policy.

Q.19. Can shares be issued against Lumpsum Fee, Royalty, ECB , Import of capital goods/ machineries / equipments (excluding second-hand machine) and Pre-operative/pre-incorporation expenses (including payments of rent)?

Ans. An Indian company eligible to issue shares under the FDI policy and subject to pricing guidelines as specified by the Reserve Bank from time to time, may issue shares to a person resident outside India :

i. being a provider of technology / technical know-how, against Royalty / Lumpsum fees due for payment;

ii. against External Commercial Borrowing (ECB) (other than import dues deemed as ECB or Trade Credit as per RBI Guidelines).

iii. With prior approval from FIPB for against import of capital goods/ machineries / equipments and Pre-operative/pre-incorporation expenses subject to the compliance with the extant FEMA regulations and AP Dir Series 74 dated June 30,2011.

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Provided, that the foreign equity in the company, after such conversion, is within the sectoral cap.

Q.20. What are the other modes of issues of shares for which general permission is available under RBI Notification No. FEMA 20 dated May 3, 2000?

Ans.

- Issue of shares under ESOP by Indian companies to its employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside India directly or through a Trust up to 5% of the paid up capital of the company.
- Issue and acquisition of shares by non-residents after merger or de-merger or amalgamation of Indian companies.
- Issue shares or preference shares or convertible debentures on rights basis by an Indian company to a person resident outside India.

Q.21. Can a foreign investor invest in shares issued by an unlisted company in India?

Ans. Yes. As per the regulations/guidelines issued by the Reserve Bank of India/Government of India, investment can be made in shares issued by an unlisted Indian company.

Q.22. Can a foreigner set up a partnership/ proprietorship concern in India?

Ans. No. Only NRIs/PIOs are allowed to set up partnership/proprietorship concerns in India on non-repatriation basis.

Q.23. Can a foreign investor invest in Rights shares issued by an Indian company at a discount?

Ans. There are no restrictions under FEMA for investment in Rights shares issued at a discount by an Indian company, provided the rights shares so issued are being offered at the same price to residents and non-residents. The offer on right basis to the person's resident outside India shall be:

(a) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company; and

(b) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

Q.24. Can a AD bank allow pledge of shares of an Indian company held by non-resident investor in favor of an Indian bank or an Overseas bank?

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Ans Yes, the same has been allowed vide the instruction and subject to compliance with the terms and conditions as mentioned in the AP Dir Series Circular No 57 dated May 2, 2011.

II. Foreign Technology Collaboration Agreement

Whether the payment in terms of foreign technology collaboration agreement' can be made by an Authorised Dealer (AD) bank?

Ans. Yes, RBI has delegated the powers, to make payments for royalty, lumpsum fee for transfer of technology and payment for use of trademark/brand name in terms of the foreign technology collaboration agreement entered by the Indian company with its foreign partners, to the AD banks subject to compliance with the provisions of Foreign Exchange Management (Current Account Transactions) Rules, 2000. Further, the requirement of registration of the agreement with the Regional Office of Reserve Bank of India has also been done away with.

III. <u>Foreign Portfolio Investment</u>

Q.1. What are the regulations regarding Portfolio Investments by SEBI registered Foreign Institutional Investors (FIIs)?

Ans.

- Investment by SEBI registered FIIs is regulated under SEBI (FII) Regulations, 1995 and Regulation 5(2) of FEMA Notification No.20 dated May 3, 2000, as amended from time to time. FIIs include Asset Management Companies, Pension Funds, Mutual Funds, Investment Trusts as Nominee Companies, Incorporated / Institutional Portfolio Managers or their Power of Attorney holders, University Funds, Endowment Foundations, Charitable Trusts and Charitable Societies.
- SEBI acts as the nodal point in the registration of FIIs. The Reserve Bank of India has granted general permission to SEBI Registered FIIs to invest in India under the Portfolio Investment Scheme (PIS).
- Investment by SEBI registered FIIs and its sub accounts cannot exceed 10per cent of the paid up capital of the Indian company. However, in case of foreign corporates or High Networth Individuals (HNIs) registered as sub accounts of an FII, their investment shall be restricted to 5 per cent of the paid up capital of the Indian company. All FIIs and their sub-accounts taken together cannot acquire more than 24 per cent of the paid up capital of an Indian Company. An Indian company can raise the 24 per cent ceiling to the sectoral cap / statutory ceiling, as applicable, by passing a resolution by its Board of Directors followed by passing a Special Resolution to that effect by their General Body. The Indian company has to intimate the raising of the FII limit to the Reserve Bank to enable the Bank to notify the same on its website for larger public dissemination.
- SEBI registered FIIs/sub-accounts of FIIs can invest in primary issues of Non-Convertible Debentures (NCDs)/ bonds only if listing of such bonds / NCDs is committed to be done within 15 days of such investment. In case the NCDs/bonds issued to the SEBI registered FIIs / sub-accounts of FIIs are not

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listed within 15 days of issuance to the SEBI registered FIIs / sub-accounts of FIIs, for any reason, then the FII/sub-account of FII shall immediately dispose of these bonds/NCDs either by way of sale to a third party or to the issuer and the terms of offer to FIIs / sub-accounts should contain a clause that the issuer of such debt securities shall immediately redeem / buyback the said securities from the FIIs/sub-accounts of FIIs in such an eventuality.

Q.2. What are the regulations regarding Portfolio Investments by NRIs/PIOs?

Ans.

- Non- Resident Indian (NRIs) and Persons of Indian Origin (PIOs) can purchase or sell shares/ fully and mandatorily convertible debentures of Indian companies on the Stock Exchanges under the Portfolio Investment Scheme. For this purpose, the NRI/ PIO has to apply to a designated branch of a bank, which deals in Portfolio Investment. All sale/ purchase transactions are to be routed through the designated branch.
- An NRI or a PIO can purchase shares up to 5 per cent of the paid up capital of an Indian company. All NRIs/PIOs taken together cannot purchase more than 10 per cent of the paid up value of the company. This limit can be increased by the Indian company to 24 per cent by passing a General Body resolution. The Indian company has to intimate the raising of the NR Limit to the Reserve Bank to enable the Bank to notify the same on its website for larger public dissemination.
- The sale proceeds of the repatriable investments can be credited to the NRE/ NRO, etc. accounts of the NRI/ PIO, whereas the sale proceeds of non-repatriable investment can be credited only to NRO accounts.
- The sale of shares will be subject to payment of applicable taxes.

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IV. Investment in other securities :

Q.1. Can a Non-resident Indian (NRI) and SEBI registered Foreign Institutional Investor (FII)invest in Government Securities/ Treasury bills and Corporate debt?

Ans. Under the FEMA Regulations, only NRIs andSEBI registered FIIs are permitted to purchase Government Securities/Treasury bills and Corporate debt. The details are as under :

A. A Non-resident Indian can purchase without limit,

(1) on repatriation basis

i) Dated Government securities (other than bearer securities) or treasury bills or units of domestic mutual funds;

ii) Bonds issued by a public sector undertaking (PSU) in India; and

iii) Shares in Public Sector Enterprises being disinvested by the Government of India.

(2) on non-repatriation basis

i) Dated Government securities (other than bearer securities) or treasury bills or units of domestic mutual funds;

ii) Units of Money Market Mutual Funds in India; and

iii) National Plan/Savings Certificates.

B. A SEBI registered FII may purchase, on repatriation basis, dated Government securities/ treasury bills, listed non-convertible debentures/ bonds issued by an Indian company and units of domestic mutual funds either directly from the issuer of such securities or through a registered stock broker on a recognised stock exchange in India.

Purchase of debt instruments including Upper Tier II instruments issued by banks in India and denominated in Indian Rupees by FIIs are subject to limits notified by SEBI and the Reserve Bank from time to time. The present limit for investment in Corporate Debt Instruments like non-convertible debentures / bonds by FIIs is USD 45 billion , which constitutes of the:

Out of USD 45 billion, USD 25 billion is earmarked for investment in infrastructure corporate bonds and the remaining USD 20 billion is earmarked for investment in non-infrastructure corporate bonds. Out of the USD 25 billion earmarked for FIIs investment in infrastructure corporate bonds, a uniform lock-in period of one year and residual maturity of fifteen months has been

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prescribed for USD 22 billion investment by FIIs excluding the USD 3 billion limit earmarked for QFIs investment in mutual fund debt oriented schemes.The present limit of investment by SEBI registered FIIs in Government Securities is USD 20 billion which constitutes of :

- USD 10 billion will be without any conditions and the remaining USD 10 billion is with the condition that the residual maturity of the instrument at the time of first purchase by FIIs should be at least three years.

Sovereign Wealth Funds (SWFs), Multilateral agencies, endowment funds, insurance funds, pension funds and foreign Central Banks to be registered with SEBI are also allowed to invest in Government securities within this enhanced limit of USD 20 billion.

Q.2. Can a NRI and SEBI registered FII invest in Tier I and Tier II instruments issued by banks in India?

Ans. SEBI registered FIIs and NRIs have been permitted to subscribe to the Perpetual Debt instruments (eligible for inclusion as Tier I capital) and Debt Capital instruments (eligible for inclusion as upper Tier II capital), issued by banks in India and denominated in Indian Rupees, subject to the following conditions:

a. Investment by all FIIs in Rupee denominated Perpetual Debt instruments (Tier I) should not exceed an aggregate ceiling of 49 per cent of each issue and investment by individual FII should not exceed the limit of 10 per cent of each issue.
b. Investments by all NRIs in Rupee denominated Perpetual Debt instruments (Tier I) should not exceed an aggregate ceiling of 24 per cent of each issue and investments by a single NRI should not exceed 5 percent of each issue.
c. Investment by FIIs in Rupee denominated Debt Capital instruments (Tier II) shall be within the limits stipulated by SEBI for FII investment in corporate debt instruments.
d. Investment by NRIs in Rupee denominated Debt Capital instruments (Tier II) shall be in accordance with the extant policy for investment by NRIs in other debt instruments.
e. Investment by FIIs in Rupee denominated Upper Tier II Instruments raised in Indian Rupees will be within the limit prescribed by the SEBI for investment in corporate debt instruments.
f. The details of the secondary market sales / purchases by FIIs and the NRIs in these instruments on the floor of the stock exchange are to be reported by the custodians and designated Authorised Dealer banks respectively, to the Reserve Bank through the soft copy of the Forms LEC (FII) and LEC (NRI).

Q.3. Can a NRI and SEBI registered FIIinvest in Indian Depository Receipts (IDRs)?

Ans. NRI and SEBI registered FIIs have been permitted to invest, purchase, hold and transfer IDRs of eligible companies resident outside India and issued in the Indian capital market, subject to the following conditions:

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(i) The purchase, hold and transfer of IDRs is in accordance with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 notified vide Notification No. FEMA 20 / 2000-RB dated May 3, 2000, as amended from time to time.

A limited two way fungibility for IDRs (similar to the limited two way fungibility facility available for ADRs/GDRs) subject to the following terms and conditions:

i. The conversion of IDRs into underlying equity shares would be governed by the conditions mentioned in paras 6 and 7 of A.P. (DIR Series) Circular No. 5 dated July 22, 2009.
ii. Fresh IDRs would continue to be issued in terms of the provisions of A.P. (DIR Series) Circular No. 5 dated July 22, 2009.
iii. The re-issuance of IDRs would be allowed only to the extent of IDRs that have been redeemed /converted into underlying shares and sold.
iv. There would be an overall cap of USD 5 billion for raising of capital by issuance of IDRs by eligible foreign companies in Indian markets. This cap would be akin to the caps imposed for FII investment in debt securities and would be monitored by SEBI.
v. IDRs shall not be redeemable into underlying equity shares before the expiry of one year period from the date of issue of the IDRs.
vi. At the time of redemption / conversion of IDRs into the underlying shares, the Indian holders (persons resident in India) of IDRs shall comply with the provisions of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 notified vide Notification No. FEMA 120 / RB-2004 dated July 7 2004, as amended from time to time.

The FEMA provisions shall not apply to the holding of the underlying shares, on redemption of IDRs by the FIIs including SEBI approved sub-accounts of the FIIs and NRIs.The issuance, redemption and fungibility of IDRs would also be subject to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time as well as other relevant guidelines issued in this regard by the Government, the SEBI and the RBI from time to time.

Q.4. Can a person resident in India invests in the Indian Depository Receipts (IDRs)? What is the procedure for redemption of IDRs held by persons resident in India?

Ans. A person resident in India may purchase, hold and transfer IDRs of eligible companies resident outside India and issued in the Indian capital market. The FEMA Regulations shall not be applicable to persons resident in India as defined under section 2(v) of FEMA, 1999, for investing in IDRs and subsequent transfer arising out of a transaction on a recognized Stock Exchange in India. However, at the time of redemption / conversion of IDRs into underlying shares, the Indian holders (persons resident in India) of IDRs shall comply with the provisions of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 notified vide Notification No. FEMA 120 / RB-2004 dated July

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7 2004, as amended from time to time. The following guidelines shall be followed on redemption of IDRs by persons resident in India:

i. Listed Indian companies may either sell or continue to hold the underlying shares subject to the terms and conditions as per Regulations 6B and 7 of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time.

ii. Indian Mutual Funds, registered with SEBI may either sell or continue to hold the underlying shares subject to the terms and conditions as per Regulation 6C of Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time.

iii. Other persons resident in India including resident individuals are allowed to hold the underlying shares only for the purpose of sale within a period of 30 days from the date of conversion of the IDRs into underlying shares.

V. Foreign Venture Capital Investment

What are the regulations for Foreign Venture Capital Investment?

Ans.

- A SEBI registered Foreign Venture Capital Investor has general permission from the Reserve Bank of India to invest in a Venture Capital Fund (VCF) or an Indian Venture Capital Undertaking (IVCU), in the manner and subject to the terms and conditions specified in Schedule 6 of RBI Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time. These investments by SEBI registered FVCI, would be subject to the SEBI regulation and sector specific caps of FDI.
- FVCIs can purchase equity / equity linked instruments / debt / debt instruments, debentures of an IVCU or of a VCF through initial public offer or private placement in units of schemes / funds set up by a VCF. At the time of granting approval, the Reserve Bank permits the FVCI to open a Foreign Currency Account and/ or a Rupee Account with a designated branch of an AD Category – I bank.
- FVCIs allowed to invest in the eligible securities (equity, equity linked instruments, debt, debt instruments, debentures of an IVCU or VCF, units of schemes / funds set up by a VCF) by way of private arrangement / purchase from a third party also. FVCIs are also allowed to invest in securities on a recognized stock exchange.
- The purchase / sale of shares, debentures and units can be at a price that is mutually acceptable to the buyer and the seller.
- AD Category – I banks can offer forward cover to FVCIs to the extent of total inward remittance. In case the FVCI has made any remittance by liquidating some investments, original cost of the investments has to be deducted from the eligible

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VI. Branch/ Project/ Liaison Office of a foreign company in India

Q.1. How can foreign companies open Liaison /Branch office in India?

Ans.

A. With effect from February 1, 2010, foreign companies/entities desirous of setting up of Liaison Office / Branch Office (LO/BO) are required to submit their application in Form FNC along with the documents mentioned therein to Foreign Investment Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai through an Authorised Dealer bank. This form is available at www.rbi.org.in

B. The applications from such entities in Form FNC will be considered by the Reserve Bank under two routes:

- Reserve Bank Route - Where principal business of the foreign entity falls under sectors where 100 per cent Foreign Direct Investment (FDI) is permissible under the automatic route.

- Government Route - Where principal business of the foreign entity falls under the sectors where 100 per cent FDI is not permissible under the automatic route. Applications from entities falling under this category and those from Non - Government Organisations / Non - Profit Organisations / Government Bodies / Departments are considered by the Reserve Bank in consultation with the Ministry of Finance, Government of India.

C. The following additional criteria are also considered by the Reserve Bank while sanctioning Liaison/Branch Offices of foreign entities:

- Track Record

  - For Branch Office — a profit making track record during the immediately preceding five financial years in the home country.
  - For Liaison Office — a profit making track record during the immediately preceding three financial years in the home country.

  - Net Worth [total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name].
  - For Branch Office — not less than USD 100,000 or its equivalent.
  - For Liaison Office — not less than USD 50,000 or its equivalent.

D. Permission to set up such offices is initially granted for a period of 3 years and this may be extended from time to time by the Authorised Dealer in whose jurisdiction the office is set up. The Branch / Liaison offices established with the Reserve Bank's approval will be allotted a Unique Identification Number (UIN) (www.rbi.org.in/scripts/Fema.aspx). The BOs / LOs shall also obtain Permanent

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Account Number (PAN) from the Income Tax Authorities on setting up the offices in India.

E. Liaison/Branch offices have to file an Annual Activity Certificate (AACs) from the Auditors, as at end of March 31, along with the audited Balance Sheet on or before September 30 of that year, stating that the Liaison Office has undertaken only those activities permitted by Reserve Bank of India. In case the annual accounts of the LO/ BO are finalized with reference to a date other than March 31, the AAC along with the audited Balance Sheet may be submitted within six months from the due date of the Balance Sheet.

Q.2. What are the permitted activities of Liaison Office/ Representative Office?

Ans. A Liaison Office (also known as Representative Office) can undertake only liaison activities, i.e. it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India. The role of such offices is, therefore, limited to collecting information about possible market opportunities and providing information about the company and its products to the prospective Indian customers. A Liaison Office can undertake the following activities in India:

i. Representing in India the parent company / group companies.

ii. Promoting export / import from / to India.

iii Promoting technical/financial collaborations between parent/group companies and companies in India.

iv. Acting as a communication channel between the parent company and Indian companies.

Q.3. Can Foreign Insurance Companies / Banks set up Liaison Office in India?

Ans. Foreign Insurance companies can establish Liaison Offices in India only after obtaining approval from the Insurance Regulatory and Development Authority (IRDA). Similarly, foreign banks can establish Liaison Offices in India only after obtaining approval from the Department of Banking Operations and Development (DBOD), Reserve Bank of India.

Q. 4. What is the procedure for setting up Branch office?

Ans. Permission for setting up branch offices is granted by the Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai. Reserve Bank of India considers the track record of the applicant company, existing trade

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relations with India, the activity of the company proposing to set up office in India as well as the financial position of the company while scrutinising the application. The application in Form FNC should be submitted to the Reserve Bank through the Authorised Dealer bank.

Q.5. What are the permitted activities of Branch Office?

Ans. Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the Reserve Bank. Such Branch Offices are permitted to represent the parent / group companies and undertake the following activities in India:

i. Export / Import of goods.[1]
ii. Rendering professional or consultancy services.
iii. Carrying out research work, in areas in which the parent company is engaged.
iv. Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
v. Representing the parent company in India and acting as buying / selling agent in India.
vi. Rendering services in information technology and development of software in India.
vii. Rendering technical support to the products supplied by parent/group companies.
viii. Foreign airline / shipping company.

Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.

Note:

a. Retail trading activities of any nature is not allowed for a Branch Office in India.
b. A Branch Office is not allowed to carry out manufacturing or processing activities in India, directly or indirectly.
c. Profits earned by the Branch Offices are freely remittable from India, subject to payment of applicable taxes.

Q.6. Whether Branch Offices are permitted to remit profit outside India?

Ans. Branch Offices are permitted to remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the Authorised Dealer through whom the remittance is effected :

a. A Certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year;

b. A Chartered Accountant's certificate certifying -

i. the manner of arriving at the remittable profit

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ii. that the entire remittable profit has been earned by undertaking the permitted activities
iii. that the profit does not include any profit on revaluation of the assets of the branch.

Q.7 What are the documents to be submitted to the AD bank at the time of closure of the Liaison/ Branch Office?

Ans. At the time of winding up of Branch/Liaison offices, the company has to approach the designated AD Category - I bank with the following documents:

a) Copy of the Reserve Bank's permission/ approval from the sectoral regulator(s) for establishing the BO / LO.

b) Auditor's certificate - i) indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;

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

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

c) No-objection / Tax Clearance Certificate from Income-Tax authority for the remittance/s.

d) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending and there is no legal impediment to the remittance.

e) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 1956, in case of winding up of the Office in India.

f) Any other document/s, specified by the Reserve Bank while granting approval.

Q.8. What is the procedure for setting up Project Office?

Ans. The Reserve Bank has granted general permission to foreign companies to establish Project Offices in India, provided they have secured a contract from an Indian company to execute a project in India, and

i. the project is funded directly by inward remittance from abroad; or
ii. the project is funded by a bilateral or multilateral International Financing Agency; or
iii. the project has been cleared by an appropriate authority; or

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iv. a company or entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the project.

However, if the above criteria are not met or if the parent entity is established in Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China, such applications have to be forwarded to the Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai for approval.

Q.9. What are the bank accounts permitted to a Project Office?

Ans. AD Category – I banks can open non-interest bearing Foreign Currency Account for Project Offices in India subject to the following:

i. The Project Office has been established in India, with the general / specific permission of Reserve Bank, having the requisite approval from the concerned Project Sanctioning Authority concerned.
ii. The contract, under which the project has been sanctioned, specifically provides for payment in foreign currency.
iii. Each Project Office can open two Foreign Currency Accounts, usually one denominated in USD and other in home currency, provided both are maintained with the same AD category–I bank.
iv. The permissible debits to the account shall be payment of project related expenditure and credits shall be foreign currency receipts from the Project Sanctioning Authority, and remittances from parent/ group company abroad or bilateral / multilateral international financing agency.
v. The responsibility of ensuring that only the approved debits and credits are allowed in the Foreign Currency Account shall rest solely with the branch concerned of the AD. Further, the Accounts shall be subject to 100 per cent scrutiny by the Concurrent Auditor of the respective AD banks.
vi. The Foreign Currency accounts have to be closed at the completion of the Project.

Q.10. What are the general conditions applicable to Liaison / Branch / Project Office of foreign entities in India?

Ans. The general conditions applicable to Liaison/Branch/Project Office of foreign entities in India are as under;

(i) Without prior permission of the Reserve Bank, no person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China can establish in India, a Branch or a Liaison Office or a Project Office or any other place of business.

(ii) Partnership / Proprietary concerns set up abroad are not allowed to establish Branch /Liaison/Project Offices in India.

(iii) Entities from Nepal are allowed to establish only Liaison Offices in India.

(iv) Branch/Project Offices of a foreign entity, excluding a Liaison Office are permitted to acquire property for their own use and to carry out permitted/incidental activities but not for leasing or renting out the property. However, entities from Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran, Bhutan or China are not allowed to acquire immovable property in India even for a Branch Office. These entities are allowed to lease such property for a period not exceeding five years.

(v) Branch / Liaison / Project Offices are allowed to open non-interest bearing INR current accounts in India.

(vi) Transfer of assets of Liaison / Branch Office to subsidiaries or other LO / BO or any other entity is permitted only with the specific approval of the Central Office of the Foreign Exchange Department, Reserve Bank of India.

(viii) Authorised Dealers can allow term deposit account for a period not exceeding 6 months in favor of a branch/office of a person resident outside India provided the bank is satisfied that the term deposit is out of temporary surplus funds and the branch / office furnishes an undertaking that the maturity proceeds of the term deposit will be utilised for their business in India within 3 months of maturity. However, such facility may not be extended to shipping/airline companies.

(ix) Permission to establish offices, in India by foreign Non-Government Organisations/Non-Profit Organisations/Foreign Government Bodies/Departments, by whatever name called, are under the Government Route as specified in A. P. (DIR Series) Circular No. 23 dated December 30, 2009. Such entities are required to apply to the Reserve Bank for prior permission to establish an office in India, whether Project Office or otherwise.

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I. Investment by QFIs

Q 1. What are QFIs ?

Ans : QFIs mean a person who fulfils the following criteria :

(a) Resident in a country that is a member of Financial Action task Force (FATF) or a member of a group which is a member of FATF; and

(b) Resident in a country that is a signatory to IOSCO's MMoU (Appendix A Signatories) or a signatory of a bilateral MoU with SEBI

PROVIDED that the person is not resident in a country listed in the public statements issued by FATF from time to time on jurisdictions having a strategic AML/CFT deficiencies to which counter measures apply or that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies;

Further such person is not resident in India and is not registered with SEBI as a Foreign Institutional Investor (FII) or Sub-Account of an FII or Foreign Venture Capital Investor (FVCI).

Explanation:

1. "bilateral MoU with SEBI" shall mean a bilateral MoU between SEBI and the overseas regulator that, inter alia, provides for information sharing arrangements.
2. Member of FATF shall not mean an associate member of FATF.

Q2. What are the investments QFIs can undertake and what are the applicable caps for such investment?

Ans. Rupee denominated units of equity schemes of domestic MFs

The QFIs may invest in rupee denominated units of equity schemes of domestic MFs directly issued by the SEBI registered domestic MFs under the two routes, namely the Direct Route – SEBI registered Depository Participant (DP) route and the Indirect Route - Unit Confirmation Receipt (UCR) route (no secondary market purchases are allowed)

Investments by the QFIs will have a ceiling of USD 10 billion under both the routes. Units and UCRs issued under this scheme to QFIs, are non-tradable and non-transferable.

Domestic MF debt schemes which invest in infrastructure debt

QFIs are also allowed to invest (under both the routes – Direct and Indirect), up to an additional amount of USD 3 billion in units of domestic MF debt schemes which invest in infrastructure ("Infrastructure" as defined under the extant ECB guidelines) debt of minimum residual maturity of 5 years, within the existing ceiling of USD 25 billion for FII investment in corporate bonds issued by infrastructure companies.

Equity shares

QFIs are also permitted to invest through SEBI registered Depository Participants in equity shares of listed Indian companies through recognized brokers on recognized stock exchanges in India as well as in equity shares of Indian companies which are offered to public in India in terms of the relevant SEBI guidelines/regulations.

The individual and aggregate investment limits for the QFIs are 5% and 10% respectively of the paid up capital of an Indian company. These limits are over and above the FII and NRI investment ceilings prescribed under the Portfolio Investment Scheme for foreign investment in India. Further, wherever there are composite sectoral caps under the extant FDI policy, these limits for QFI investment in equity shares shall also be within such overall FDI sectoral caps.

QFIs are also permitted to acquire equity shares by way of rights shares, bonus shares or equity shares on account of stock split / consolidation or equity shares on account of amalgamation, demerger or such corporate actions subject to the investment limits prescribed below. QFIs are also allowed to sell the equity shares so acquired by way of sale

Debt securities

Qualified Foreign Investors (QFIs) have been permitted to purchase, on repatriation basis, debt securities through SEBI registered Qualified Depository Participants (QDPs) in eligible corporate debt instruments, viz. listed Non-Convertible Debentures(NCDs), listed bonds of Indian companies, listed units of Mutual Fund debt Schemes and “to be listed” corporate bonds directly from the issuer or through a registered stock broker on a recognized stock exchange in India. The provisions relating to FIIs in case of non-listing of “to be listed” corporate bonds, within 15 days as per A.P. (DIR Series) Circular No. 89 dated March 1, 2012, are applicable to QFIs.

QFIs are permitted to invest in corporate debt securities (without any lock-in or residual maturity clause) and Mutual Fund debt schemes subject to a total overall ceiling of USD 1 billion. This limit shall be over and above USD 20 billion for FII investment in corporate debt.

QFIs are also be permitted to sell ‘eligible debt securities’ so acquired by way of sale through registered stock broker on a recognized stock exchange in India or by way of buyback or redemption by the issuer.

Mode of payment / repatriation

A QFI may open a single non-interest bearing Rupee Account with an AD Category- I bank in India, for routing the receipt and payment for transactions relating to purchase and sale of units of domestic mutual funds, equity shares of listed Indian companies and eligible debt securities

Demat accounts - QFIs would be allowed to open a single demat account with a QDP in India for investment in all eligible debt securities under the QFI scheme.

Permissible currencies - QFIs will remit foreign inward remittance through normal banking channel in any permitted currency (freely convertible) directly into the single non-interest bearing Rupee account of the QFI maintained with an AD Category-I bank.

Pricing – The pricing of all eligible transactions and investment in all eligible securities by QFIs under this scheme shall be in accordance with the relevant and applicable guidelines issued from time to time.

Hedging – QFIs would be permitted to hedge their currency risk on account of their permissible investments (in equity and debt instruments) in terms of the guidelines issued by the Reserve Bank from time to time, similar to the facilities made available to the FIIs in the matter.

Reporting – In addition to the reporting to SEBI as may be prescribed by them, QDPs and AD Category-I banks (maintaining QFI accounts) are required to ensure reporting to the Reserve Bank of India in a manner and format as prescribed by the Reserve Bank of India from time to time.

Foreign Investments in Infrastructure Debt Funds

Investment on repatriation basis by eligible non-resident investors viz. Sovereign Wealth Funds, Multilateral Agencies, Pension Funds, Insurance Funds and Endowment Funds which are registered with SEBI as eligible non- resident investors in IDFs is allowed in Rupee and Foreign currency denominated bonds issued by the Infrastructure Debt Funds (IDFs) set up as an Indian company and registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank of India and in (ii) Rupee denominated units issued by IDFs set up as SEBI registered domestic Mutual Funds(MFs), in accordance with the terms and conditions stipulated by the SEBI and the Reserve Bank of India from time to time.

The original / initial maturity of all aforementioned securities at the time of first investment by a non resident investor is five years and subject to a lock in period of 3 years.

All non-resident investment in IDFs (other than NRIs) (in both Rupee and Foreign Currency denominated securities) are within an overall cap / limit of USD 10 billion. This cap / limit of USD 10 billion would be within the overall cap of USD 25 billion for FII investment in bonds / non convertible debentures issued by Indian companies in the infrastructure sector (where infrastructure is as defined under the extant ECB guidelines) or by Infrastructure Finance Companies (IFCs registered as NBFCs with the Reserve Bank).

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The facility of foreign exchange hedging would be available to the eligible non-resident IDF investors, IDFs as well as the infrastructure project companies exposed to the foreign exchange/ currency risk

Q.3: What are the reporting requirements for acquisition/transfer of shares by non-residents under respective schedules to FEMA 20 ?:

Ans : Following are the reporting requirements

(A) Reporting of FDI for fresh issuance of shares

(i) Reporting of inflow

(a) The actual inflows on account of such issuance of shares shall be reported by the AD branch in the R-returns in the normal course.

(b) An Indian company receiving investment from outside India for issuing shares / convertible debentures / preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank through it's AD Category I bank, not later than 30 days from the date of receipt in the Advance Reporting Form enclosed in Annex - 6. Noncompliance with the above provision would be reckoned as a contravention under

FEMA, 1999 and could attract penal provisions.

The Form can also be downloaded from the Reserve Bank's website http://www.rbi.org.in/Scripts/BS_ViewFemaForms.aspx.

(c) Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares / convertible debentures, through an AD Category - I bank, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

(ii) Time frame within which shares have to be issued

The equity instruments should be issued within 180 days from the date of receipt of the inward remittance or by debit to the NRE/FCNR (B) /Escrow account of the non-resident investor. In case, the equity instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded immediately to the non-resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR (B)/Escrow account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and could attract

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penal provisions. In exceptional cases, refund / allotment of shares for the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the Reserve Bank, on the merits of the case.

(iii) Reporting of issue of shares

(a) After issue of shares (including bonus and shares issued on rights basis and shares issued on conversion of stock option under ESOP scheme)/ convertible debentures / convertible preference shares, the Indian company has to file Form FC-GPR, through it's AD Category I bank, not later than 30 days from the date of issue of shares. The Form can also be downloaded from the Reserve Bank's website http://www.rbi.org.in/Scripts/BS_ViewFemaForms.aspx.

Non-compliance with the above provision would be reckoned as a contravention under FEMA and could attract penal provisions.

(b) Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorised Dealer of the company, who will forward it to the concerned Regional Office of the Reserve Bank. The following documents have to be submitted along with Form FC-GPR:

(i) A certificate from the Company Secretary of the company certifying that :

a) all the requirements of the Companies Act, 1956 have been complied with;

b) terms and conditions of the Government's approval, if any, have been complied with;

c) the company is eligible to issue shares under these Regulations; and

d) the company has all original certificates issued by AD banks in India evidencing receipt of amount of consideration.

(ii) A certificate from SEBI registered Merchant Banker or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

(c) The report of receipt of consideration as well as Form FC-GPR have to be submitted by the AD bank to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

(d) Issue of bonus/rights shares or shares on conversion of stock options issued under ESOP to persons resident outside India directly or on amalgamation / merger with an existing Indian company, as well as issue of shares on conversion of ECB / royalty / lumpsum technical know-how fee / import of capital goods by units in SEZs has to be reported in Form FC-GPR.

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B. Reporting of FDI for Transfer of shares route

(i) The actual inflows and outflows on account of such transfer of shares shall be reported by the AD branch in the R-returns in the normal course.

(ii) Reporting of transfer of shares between residents and non-residents and vice-versa is to be made in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category – I bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor / transferee, resident in India.

(iii) The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a KYC check (Annex 9-ii) by the remittance receiving AD Category – I bank at the time of receipt of funds. In case, the remittance receiving AD Category – I bank is different from the AD Category - I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category – I bank carrying out the transaction along with the Form FC-TRS.

(iv) The AD bank should scrutinise the transactions and on being satisfied about the transactions should certify the form FC-TRS as being in order.

(v) The AD bank branch should submit two copies of the Form FC-TRS received from their constituents/customers together with the statement of inflows/outflows on account of remittances received/made in connection with transfer of shares, by way of sale, to IBD/FED/or the nodal office designated for the purpose by the bank in the proforma (which is to be prepared in MS-Excel format). The IBD/FED or the nodal office of the bank will consolidate reporting in respect of all the transactions reported by their branches into two statements inflow and outflow statement. These statements (inflow and outflow) should be forwarded on a monthly basis to Foreign Exchange Department, Reserve Bank, Foreign Investment Division, Central Office, Mumbai in soft copy (in MS- Excel) by e-mail. The bank should maintain the FC-TRS forms with it and should not forward the same to the Reserve Bank of India.

(vi) The transferee/his duly appointed agent should approach the investee company to record the transfer in their books along with the certificate in the Form FC-TRS from the AD branch that the remittances have been received by the transferor/payment has been made by the transferee. On receipt of the certificate from the AD, the company may record the transfer in its books.

(vi) On receipt of statements from the AD bank , the Reserve Bank may call for such additional details or give such directions as required from the transferor/transferee or their agents, if need be.

C. Reporting of conversion of ECB into equity

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Details of issue of shares against conversion of ECB have to be reported to the Regional Office concerned of the Reserve Bank, as indicated below:

a. In case of full conversion of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051, within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

b. In case of partial conversion of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

c. The SEZ unit issuing equity as mentioned in para (iii) above, should report the particulars of the shares issued in the Form FC-GPR.

D. Reporting of ESOPs for allotment of equity shares

The issuing company is required to report the details of issuance of ESOPs to its employees to the Regional Office concerned of the Reserve Bank, in plain paper reporting, within 30 days from the date of issue of ESOPs. Further, at the time of conversion of options into shares the Indian company has to ensure reporting to the Regional Office concerned of the Reserve Bank in form FC-GPR, within 30 days of allotment of such shares. However, provision with regard to advance reporting would not be applicable for such issuances.

E. Reporting of ADR/GDR Issues

The Indian company issuing ADRs / GDRs has to furnish to the Reserve Bank, full details of such issue in the Form enclosed in Annex -10, within 30 days from the date of closing of the issue. The company should also furnish a quarterly return in the prescribed Form, to the Reserve Bank within 15 days of the close of the calendar quarter. The quarterly return has to be submitted till the entire amount raised through ADR/GDR mechanism is either repatriated to India or utilized abroad as per the extant Reserve Bank guidelines.

F. Reporting of FII investments under PIS scheme

(i) FII reporting: The AD Category – I banks have to ensure that the FIIs registered with SEBI who are purchasing various securities (except derivative and IDRs) by debit to the Special Non-Resident Rupee Account should report all such transactions details (except derivative and IDRs) in the Form LEC (FII) to Foreign Exchange Department, Reserve Bank of India, Central Office by uploading the same to the ORFS web site

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(https://secweb.rbi.org.in/ORFSMainWeb/Login.jsp). It would be the banks responsibility to ensure that the data submitted to RBI is reconciled by periodically taking a FII holding report for their bank.

(iii) The Indian company which has issued shares to FIIs under the FDI Scheme (for which the payment has been received directly into company's account) and the Portfolio Investment Scheme (for which the payment has been received from FIIs' account maintained with an AD Category – I bank in India) should report these figures separately under item no. 5 of Form FC-GPR (Annex - 8) (Post-issue pattern of shareholding) so that the details could be suitably reconciled for statistical / monitoring purposes.

G. Reporting of NRI investments under PIS scheme

The link office of the designated branch of an AD Category – I bank shall furnish to the Reserve Bank18, a report on a daily basis on PIS transactions undertaken by it, on behalf of NRIs. This report can be furnished on a floppy to the Reserve Bank and also uploaded directly on the OFRS web site (https://secweb.rbi.org.in/ORFSMainWeb/Login.jsp). It would be the banks responsibility to ensure that the data submitted to RBI is reconciled by periodically taking a NRI holding report for their bank.

H. Reporting of foreign investment by way of issue / transfer of 'participating interest/right' in oil fields

Foreign investment by way of issue / transfer of 'participating interest/right' in oil fields by Indian companies to a non resident would be treated as an FDI transaction under the extant FDI policy and the FEMA regulations. Accordingly, transfer of 'participating interest/ rights' will be reported as 'other' category under Para 7 of revised Form FC-TRS and issuance of 'participating interest/ rights' will be reported as 'other' category of instruments under Para 4 of Form FCGPR.

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FAQ"S RELATED TO Liberalised Remittance Scheme To Resident Indian :

Reserve Bank of India had announced a Liberalised Remittance Scheme (the Scheme) in February 2004 as a step towards further simplification and liberalization of the foreign exchange facilities available to resident individuals. As per the Scheme, resident individuals may remit up to USD 200,000 per financial year for any permitted capital and current account transactions or a combination of both. The Scheme was operationalised vide A.P. (DIR Series) Circular No. 64 dated February 4, 2004.

PART A :

Q.1. What is the Liberalised Remittance Scheme of USD 200,000?

Ans. Under the Liberalised Remittance Scheme, all resident individuals, including minors, are allowed to freely remit up to USD 200,000 per **financial** year (April – March) for any permissible current or capital account transaction or a combination of both.

Q.2. Please provide an illustrative list of capital account transactions permitted under the scheme.

Ans. Under the Scheme, resident individuals can acquire and hold immovable property or shares or debt instruments or any other assets outside India, without prior approval of the Reserve Bank. Individuals can also open, maintain and hold foreign currency accounts with banks outside India for carrying out transactions permitted under the Scheme.

Q. 3. What are the prohibited items under the Scheme?

Ans. The remittance facility under the Scheme is not available for the following:

i) Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000;

ii) Remittance from India for margins or margin calls to overseas exchanges / overseas counterparty;

iii) Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market;

iv) Remittance for trading in foreign exchange abroad;

v) Remittance by a resident individual for setting up a company abroad;

vi) Remittances directly or indirectly to Bhutan, Nepal, Mauritius and Pakistan;

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vii) Remittances directly or indirectly to countries identified by the Financial Action Task Force (FATF) as "non co-operative countries and territories", from time to time; and

viii) Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

Q.4. Whether LRS facility is in addition to existing facilities detailed in Schedule III under remittances?

Ans. Yes, The facility under the Scheme is **in addition** to those already available for private travel, business travel, studies, medical treatment, etc., as described in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. The Scheme can also be used for these purposes.

However, remittances for gift and donation can not be made separately and have to be made under the Scheme only. Accordingly, resident individuals can remit towards gifts and donations up to USD 200,000 per financial year under the Scheme.

Further, a resident individual can give rupee gifts to his visiting NRI/PIO close relatives [means relative as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque/electronic transfer within the overall limit of USD 200,000 per financial year for the resident individual and the gifted amount should be credited to the beneficiary's NRO account. An individual resident can lend money by way of crossed cheque /electronic transfer to a Non resident Indian (NRI)/ Person of Indian Origin (PIO) close relative [means relative as defined in Section 6 of the Companies Act, 1956] within the overall limit of USD 200,000 per financial year under the Liberalised Remittance Scheme, to meet the borrower's personal or business requirements in India, subject to conditions. The loan should be interest free and have a maturity of minimum one year and cannot be remitted outside India.

Q. 5. Are resident individuals under this Scheme required to repatriate the accrued interest/dividend on deposits/investments abroad, over and above the principal amount?

Ans. The resident individual investors can retain and re-invest the income earned on investments made under the Scheme. The residents are not required to repatriate the funds or income generated out of investments made under the Scheme.

Q.6. Are remittances under the Scheme on gross basis or net basis (net of repatriation from abroad)?

Ans. Remittance under this scheme is on a gross basis.

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Q. 7. Can remittances under the facility be consolidated in respect of family members?

Ans. Remittances under the facility can be consolidated in respect of family members subject to the individual family members complying with the terms and conditions of the Scheme.

Q. 8. Can one use the Scheme for purchase of objects of art (paintings, etc.) either directly or through auction house?

Ans. Remittances under the Scheme can be used for purchasing objects of art subject to compliance with the extant Foreign Trade Policy of the Government of India and other applicable laws.

Q.9. Is the AD required to check permissibility of remittances based on nature of transaction or allow the same based on remitters declaration?

Ans. AD will be guided by the nature of transaction as declared by the remitter and will certify that the remittance is in conformity with the instructions issued by the Reserve Bank, in this regard from time to time.

Q.10. Can remittance be made under this Scheme for acquisition of ESOPs?

Ans. The Scheme can also be used for remittance of funds for acquisition of ESOPs.

Q.11. Is this scheme in addition to acquisition of ESOPs linked to ADR/GDR (i.e USD 50,000/- for a block of 5 calendar years)?

Ans. The remittance under the Scheme is in addition to acquisition of ESOPs linked to ADR/GDR.

Q.12. Is this Scheme is in addition to acquisition of qualification shares (i.e. USD 20,000 or 1% of paid up capital of overseas company, whichever is lower)?

Ans. The remittance under the Scheme is in addition to acquisition of qualification shares.

Q.13. Can a resident individual invest in units of Mutual Funds, Venture Funds, unrated debt securities, promissory notes, etc., under this scheme?

Ans. A resident individual can invest in units of Mutual Funds, Venture Funds, unrated debt securities, promissory notes, etc. under this Scheme. Further, the resident can invest in such securities through the bank account opened abroad for the purpose under the Scheme.

Q.14. Can an individual, who has availed of a loan abroad while as a non-resident Indian can repay the same on return to India, under this Scheme as a resident?

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Ans. This is permissible.

Q. 15. Is it mandatory for resident individuals to have PAN number for sending outward remittances under the Scheme?

Ans. It is mandatory to have PAN number to make remittances under the Scheme.

Q.16. In case a resident individual requests for an outward remittance by way of issuance of a demand draft (either in his own name or in the name of the beneficiary with whom he intends to putting through the permissible transactions) at the time of his private visit abroad, whether the remitter can effect such an outward remittance against self-declaration?

Ans. Such outward remittance in the form of a DD can be effected against the declaration by the resident individual in the format prescribed under the Scheme.

Q. 17. Are there any restrictions on the frequency of the remittance?

Ans. There is no restriction on the frequency. However, the total amount of foreign exchange purchased from or remitted through, all sources in India during a financial year should be within the cumulative limit of USD 200,000.

Q.18. What are the requirements to be complied with by the remitter?

Ans. The individual will have to designate a branch of an AD through which all the remittances under the Scheme will be made. The applicants should have maintained the bank account with the bank for a minimum period of one year prior to the remittance. If the applicant seeking to make the remittance is a new customer of the bank, Authorised Dealers should carry out due diligence on the opening, operation and maintenance of the account. Further, the AD should obtain bank statement for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by the applicant may be obtained. He has to furnish an application-cum-declaration in the specified format (Annex) regarding the purpose of the remittance and declare that the funds belong to him and will not be used for the purposes prohibited or regulated under the Scheme.

Q. 19. Can an individual, who has repatriated the amount remitted during the financial year, avail of the facility once again?

Ans. Once a remittance is made for an amount up to USD 200,000 during the **financial year**, he would not be eligible to make any further remittances under this scheme, even if the proceeds of the investments have been brought back into the country.

Q.20. Can remittances be made only in US Dollars?

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Ans. The remittances can be made in any freely convertible foreign currency equivalent to USD 200,000 in a **financial year.**

Q.21. In the past resident individuals could invest in overseas companies listed on a recognised stock exchange abroad and which has the shareholding of at least 10 per cent in an Indian company listed on a recognised stock exchange in India. Does this condition still exist?

Ans. Investment by resident individual in overseas companies is subsumed under the Scheme of USD 200,000. The requirement of 10 per cent reciprocal shareholding in the listed Indian companies by such overseas companies has since been dispensed with.

PART – B :

Guidelines for Financial Intermediaries

Q. 22. Are intermediaries expected to seek specific approval for making overseas investments available to clients?

Ans. Banks including those not having operational presence in India are required to obtain prior approval from the Department of Banking Operations and Development, Central Office, Reserve Bank of India, Central Office Building, Shahid Bhagat Singh Marg, Mumbai, for soliciting deposits for their foreign/overseas branches or for acting as agents for overseas mutual funds or any other foreign financial services company.

Q.23. Are there any restrictions on the kind/quality of debt or equity instruments an individual can invest in?

Ans. No ratings or guidelines have been prescribed under the Liberalised Remittance Scheme. However, the individual investor is expected to exercise due diligence while taking a decision regarding the investments under the Scheme.

Q. 24. Whether credit facilities in Indian Rupees or foreign currency would be permissible against security of such deposits?

Ans. No. The Scheme does not envisage extension of credit facility against the security of the deposits. Further, the banks should not extend any kind of credit facilities to resident individuals to facilitate outward remittances under the Scheme.

Q. 25. Can bankers open foreign currency accounts in India for residents under the Scheme?

Ans. No. Banks in India cannot open foreign currency accounts in India for residents under the Scheme.

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Q. 26. Can an Offshore Banking Unit (OBU) in India be treated on par with a branch of the bank outside India for the purpose of opening of foreign currency accounts by residents under the Scheme?

Ans. No. For the purpose of the Scheme, an OBU in India is not treated as an overseas branch of a bank in India.

General Information

For further details/guidance, please approach any bank authorised to deal in foreign exchange or contact Regional Offices of the Foreign Exchange Department of the Reserve Bank.

Annex

Application cum Declaration for purchase of foreign exchange under the Liberalised Remittance Scheme of USD 200,000 for Resident individuals

(To be completed by the applicant)

I. Details of the applicant

a. Name …………………………..

b. Address……………………….

c. Account No……………………..

d. PAN No…………………………

II. Details of the foreign exchange required

1. Amount (Specify currency)……………………………..

2. Purpose …………………………………………………

III. Source of funds: …………………………………………

IV. Nature of instrument

Draft………………………..

Direct remittance………..

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V. Details of the remittance made under the Scheme in the financial year (April-March) 20.. – 20..

Date :.................

Amount :............

VI. Details of the Beneficiary

1. Name ....

2. Address ....

3. Country ....

4*. Name and address of the bank..........................

5*. Account No...

(* Required only when the remittance is to be directly credited to the bank account of the beneficiary)**This is to authorize you to debit my account and effect the foreign exchange remittance/ issue a draft as detailed above. (strike out whichever is not applicable).**

Declaration

I, ……………… ………..(Name), hereby declare that the total amount of foreign exchange purchased from or remitted through, all sources in India during the financial year as per item No. V of the Application, including loan extended or gift made in rupees credited to NRO account of non-resident close relative(s), is within the limit of USD 200,000/- (US Dollar Two lakh only), which is the limit prescribed by the Reserve Bank for the purpose and certify that the source of funds for making the said remittance belongs to me and will not be used for prohibited purposes.

Signature of the applicant

(Name)

Certificate by the Authorised Dealer

This is to certify that the remittance is not being made by/ to ineligible entities and that the remittance is in conformity with the instructions issued by the Reserve Bank from time to time under the Scheme.

Name and designation of the authorised official:

Place:

Signature:

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FAQ Related to Account Opened by Foreign Nationals and Foreign Tourists :

Q.1. **Can foreign tourists open a bank account in India during their short visit?**

A. Yes. Foreign tourists during their short visit to India can open a Non-Resident (Ordinary) Rupee (NRO) account (Current / Savings) with any Authorised Dealer bank dealing in foreign exchange. Such account can be opened up to a maximum period of 6 months.

Q.**2** **What are the documents required for opening such accounts**?

A. Passports and other valid identification proofs are required for opening the accounts. Authorised Dealer banks are also required to follow the Know Your Customer norms while opening of the accounts.

Q.3. What credits can be made to such accounts?

A. Funds remitted from outside India through banking channel or those obtained by sale of foreign exchange brought by the tourists to India can be credited to the NRO account.

Q4. Can the NRO account be used for making local payments?

A. Yes. Tourists can freely make local payments through the NRO account. All payments to residents exceeding INR 50,000 can be made only by means of cheques / pay orders / demand drafts.

Q.5. Can foreign tourists repatriate the balance held in their NRO account at the time of departure from India?

A. Authorised Dealer banks have been allowed to convert the balance in the account for payment to the account holder at the time of departure from India into foreign currency, provided the account has been maintained for a period not exceeding six months and the account has not been credited with any local funds, other than interest accrued thereon.

Q.**6. What can be done to repatriate the proceeds of an account that has been maintained for more than six months?**

A. In such cases, applications for repatriation of balance may be made on plain paper to the Foreign Exchange Department of the Regional Office concerned of the Reserve Bank through the Authorised Dealer bank maintaining the account.

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Q.7. Can foreign nationals resident in India open resident account?

A. Yes. Foreign nationals resident in India can open and maintain a resident Rupee account in India in terms of Notification No.5/2000-RB dated May 3, 2000 viz., Foreign Exchange Management (Deposit) Regulations, 2000, as amended from time to time.

Q.8. Can AD Category-I banks remit proceeds of such accounts on closure?

A. Yes. But AD Category-I banks should ensure that the funds to be repatriated outside India were either received from abroad or they are repatriable in nature or permissible in terms of RBI notification No. FEMA 13/2000 dated 3rd May 2000, as amended from time to time. The foreign nationals employed in India holding valid visas are eligible to maintain resident accounts with an Authorised Dealer Category - I (AD Category-I) bank in India. In order to facilitate such foreign nationals to collect their pending dues in India , AD Category-I banks may, permit foreign nationals to re-designate their resident account maintained in India as NRO account on leaving the country after their employment to enable them to receive their pending bonafide dues, subject to conditions

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FAQ"S Related to Acquisition and Transfer of Immovable Property in India by a person resident outside India

Introduction

Acquisition of immovable property in India by persons resident outside India (foreign national) is regulated in terms of section 6 (3) (i) of the Foreign Exchange Management Act (FEMA), 1999 as well as by the regulations contained in the Notification No. FEMA 21/2000-RB dated May 3, 2000, as amended from time to time. Section 2 (v) and Section 2 (w) of FEMA, 1999 defines `person resident in India' and a `person resident outside India', respectively. Person resident outside India is categorized as Non-Resident Indian (NRI) or a foreign national of Indian Origin (PIO) or a foreign national of non-Indian origin. The Reserve Bank does not determine the residential status. Under FEMA, residential status is determined by operation of law. The onus is on an individual to prove his / her residential status, if questioned by any authority.

A person resident in India who is not a citizen of India is also covered by the relevant Notifications.

2. In terms of the provisions of Section 6(5) of FEMA 1999, a person resident outside India can 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 a resident in India or inherited from a person who was a resident in India.

3. The regulations under Notification No. FEMA 21/2000-RB dated May 3, 2000, as amended from time to time, permit a NRI or a PIO to acquire immovable property in India, other than agricultural land or, plantation property or farm house. Further, foreign companies who have been permitted to open a Branch or Project Office in India are also allowed to acquire any immovable property in India, which is necessary for or incidental to carrying on such activity. Such dispensation is however not available to entities which are permitted to open liaison offices in India.

4. The restrictions on acquiring immovable property in India by a person resident outside India would not apply where the immovable property is proposed to be acquired by way of a lease for a period not exceeding 5 years or where a person is deemed to be resident in India.

   In order to be deemed to be a person resident in India, from FEMA angle, the person would need to comply with the provisions of Section 2(v) of FEMA 1999. The Press Release dated February 1, 2009 issued by Government of India in this regard is enclosed as Annex.

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Note: Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan cannot acquire or transfer immovable property in India, (other than on lease not exceeding five years) without the prior permission of the Reserve Bank.

5. NRIs/ PIOs are allowed to repatriate an amount up to USD one million, per financial year (April-March), out of the balances held in the Non-Resident (Ordinary) Rupee (NRO) account, subject to compliance with applicable tax requirements. This amount includes sale proceeds of assets acquired by way of inheritance or settlement.

6. The FAQs cover the following topics :

A. Acquisition of Immovable Property in India by a person resident outside India, i.e., by a NRI / PIO / foreign national of non-Indian origin by way of purchase / gift / inheritance.

B. Transfer of immovable property in India by a person resident outside India by way of

i) sale
ii) gift
iii) mortgage

C. Mode of payment for purchase of immovable property in India.

D. Repatriation of sale proceeds of residential / commercial property, in India, outside India acquired by NRI / PIO by way of

i) purchased
ii) gift
iii) inheritance

E. Provisions for Foreign Embassies / Diplomats / Consulates General

F. Other Aspects.

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A. *Acquisition of Immovable Property in India through purchase / gift/ inheritance*

Q.1. Who can purchase immovable property in India ?

Ans. Under the general permission available, the following categories can purchase immovable property in India:

i) Non-Resident Indian (NRI)1[1][1][1]

ii) Person of Indian Origin (PIO)2[2][2]

The general permission, however, covers only purchase of residential and commercial property and is not available for purchase of agricultural land / plantation property / farm house in India.

Q.2. Can NRI/PIO acquire agricultural land/ plantation property / farm house in India?

Ans. No.

Q.3. Are any documents required to be filed with the Reserve Bank after the purchase?

Ans. No. An NRI / PIO who has purchased residential / commercial property under general permission, is not required to file any documents/reports with the Reserve Bank.

Q.4. How many residential / commercial properties can NRI / PIO purchase under the general permission?

Ans. There are no restrictions on the number of residential / commercial properties that can be purchased.

Q.5. Can a foreign national of non-Indian origin be a second holder to immovable property purchased by NRI / PIO?

Ans. No.

Q.6. Can a foreign national of non-Indian origin resident outside India purchase immovable property in India?

Ans. No. A foreign national of non-Indian origin, resident outside India cannot purchase any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India. However, he / she can acquire or transfer immovable property in India, on lease, not exceeding five years. In such cases, there is no requirement of taking any permission of /or reporting to the Reserve Bank.

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Q.7. Can a foreign national who is a person resident in India purchase immovable property in India?

Ans. Yes, a foreign national who is a 'person resident in India' within the meaning of Section 2(v) of FEMA, 1999 can purchase immovable property in India, but the person concerned would have to obtain the approvals and fulfil the requirements, if any, prescribed by other authorities, such as, the State Government concerned, etc. The onus to prove his/her residential status is on the individual as per the extant FEMA provisions, if required by any authority. However, a foreign national resident in India who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan would require prior approval of the Reserve Bank.

Q.8. Can the branch / liaison office of a foreign company purchase immovable property in India?

Ans. A foreign company which has established a Branch Office or other place of business in India, in accordance with the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000, can acquire any immovable property in India, which is necessary for or incidental to carrying on such activity. The payment for acquiring such a property should be made by way of foreign inward remittance through the proper banking channels. A declaration in form IPI should be filed with the Reserve Bank within ninety days from the date of acquiring the property. Such a property can also be mortgaged with an Authorised Dealer as a security for the purpose of borrowings. On winding up of the business, the sale proceeds of such property can be repatriated only with the prior approval of the Reserve Bank. Further, acquisition of immovable property by entities incorporated in Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan and who have set up Branch Offices in India and would require prior approval of the Reserve Bank.

However, if the foreign company has established a Liaison Office in India, it cannot acquire immovable property. In such cases, Liaison Offices can acquire property by way of lease not exceeding 5 years.

Q.9. Can a NRI/PIO acquire immovable property in India by way of gift? Cana foreign national acquire immovable property in India by way of gift?

Ans.

(a) Yes, NRIs and PIOs can freely acquire immovable property by way of gift either from

- i) a person resident in India; or
- ii) an NRI; or
- iii) a PIO.

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However, the property can only be commercial or residential in nature. Agricultural land / plantation property / farm house in India cannot be acquired by way of gift.

(b) A foreign national of non-Indian origin resident outside India cannot acquire any immovable property in India by way of gift.

Q.10. Can a non-resident inherit immovable property in India?

Ans. Yes, a person resident outside India i.e. i) an NRI; ii) a PIO; and iii) a foreign national of non-Indian origin can inherit and hold immovable property in India from a person who was resident in India.

Q.11. From whom can a non-resident person inherit immovable property?

Ans. A person resident outside India (i.e. NRI or PIO or foreign national of non-Indian origin) can inherit immovable property from

(a) a person resident in India
(b) a person resident outside India

However, the person from whom the property is inherited should have acquired the same in accordance with the foreign exchange law in force or FEMA regulations, applicable at the time of acquisition of the property.

B. <u>Transfer of immovable property in India</u>

(i) Transfer by way of sale

Q.12. Can an NRI/ PIO/foreign national sell his residential / commercial property?

Ans.

(a) NRI can sell property in India to

i) a person resident in India; or
ii) an NRI; or
iii) a PIO.

(b) PIO can sell property in India to

i) a person resident in India; or
ii) an NRI; or
iii) a PIO – with the prior approval of the Reserve Bank

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(c) Foreign national of non-Indian origin including a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan can sell property in India with prior approval of the Reserve Bank to

i) a person resident in India
ii) an NRI
iii) a PIO

Q.13. Can a non-resident owning / holding an agricultural land / a plantation property / a farm house in India sell the said property?

Ans.

(a) NRI / PIO may sell agricultural land /plantation property/farm house to a person resident in India who is a citizen of India.

(b) Foreign national of non-Indian origin resident outside India would need prior approval of the Reserve Bank to sell agricultural land/plantation property/ farm house in India.

(ii) Transfer by way of gift

Q.14. Can a non-resident gift his residential / commercial property?

Ans. Yes.

(a) NRI / PIO may gift residential / commercial property to –

(i) person resident in India or
(ii) an NRI or
(iii) PIO.

(b) A foreign national of non-Indian origin requires the prior approval of the Reserve Bank for gifting the residential / commercial property.

Q.15. Can an NRI / PIO / foreign national holding an agricultural land / a plantation property / a farm house in India, gift the same?

Ans.

(a) NRI / PIO can gift an agricultural land / a plantation property / a farm house in India only to a person resident in India who is a citizen of India.

(b) A foreign national of non-Indian origin would require the prior approval of the Reserve Bank to gift an agricultural land / a plantation property / a farm house in India.

(iii) Transfer through mortgage

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Q.16. Can residential / commercial property be mortgaged by NRI/ PIO?

Ans.

i) NRI / PIO can mortgage a residential / commercial property to:

(a) an Authorised Dealer / the housing finance institution in India without the approval of Reserve Bank

(b) a bank abroad, with the prior approval of the Reserve Bank.

ii) A foreign national of non-Indian origin can mortgage a residential / commercial property only with prior approval of the Reserve Bank.

iii) A foreign company which has established a Branch Office or other place of business in accordance with FERA/FEMA regulations has general permission to mortgage the property with an Authorised Dealer in India.

C. Mode of payment for purchase **of immovable property in India.**

Q.17. How can an NRI / PIO make payment for purchase of residential / commercial property in India?

Ans. Payment can be made by NRI / PIO out of:

(a) funds remitted to India through normal banking channels or

(b) funds held in NRE / FCNR (B) / NRO account maintained in India

No payment can be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned above.

Q.18 Is repatriation of application money for booking of flat / payment made to the builder by NRI/ PIO allowed when the flat or plot is not allotted or the booking / contract is cancelled?

Ans. The Authorised Dealers can allow NRIs / PIOs to credit refund of application/ earnest money/ purchase consideration made by the house building agencies/ seller on account of non-allotment of flat/ plot/ cancellation of bookings/ deals for purchase of residential, commercial property, together with interest, if any, net of income tax payable thereon, to NRE/FCNR account, provided, the original payment was made out of NRE/FCNR account of the account holder or remittance from outside India through normal banking channels and the Authorised Dealer is satisfied about the genuineness of the transaction.

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Q.19. Can NRI / PIO avail of loan from an authorised dealer for acquiring flat / house in India for his own residential use against the security of funds held in his NRE Fixed Deposit account / FCNR (B) account? How the loan can be repaid?

Ans. Yes, such loans are permitted subject to the terms and conditions laid down in Schedules 1 and 2 to the Notification No. FEMA 5/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Deposit) Regulations, 2000, as amended from time to time. Banks cannot grant fresh loans or renew existing loans in excess of Rs. 100 lakhs against NRE and FCNR (B) deposits, either to the depositors or to third parties. The banks should also not undertake artificial slicing of the loan amount to circumvent the ceiling of Rs. 100 lakh.

Such loans can be repaid in the following manner:

(a) by way of inward remittance through normal banking channel or

(b) by debit to the NRE / FCNR (B) / NRO account of the NRI/ PIO or

(c) out of rental income from such property

(d) by the borrower's close relatives, as defined in section 6 of the Companies Act,

1956, through their account in India by crediting the borrower's loan account.

Q.20. Can NRI / PIO, avail of housing loan in Rupees from an Authorised Dealer or a Housing Finance Institution in India approved by the National Housing Bank for purchase of residential accommodation or for the purpose of repairs / renovation / improvement of residential accommodation ? How can such loan be repaid?

Ans. Yes, NRI/PIO can avail of housing loan in Rupees from an Authorised Dealer or a Housing Finance Institution subject to certain terms and conditions laid down in Regulation 8 of Notification No. FEMA 4/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Borrowing and lending in rupees) Regulations, 2000, as amended from time to time. Authorised Dealers/ Housing Finance Institutions can also lend to the NRIs/ PIOs for the purpose of repairs/renovation/ improvement of residential accommodation owned by them in India. Such a loan can be repaid (a) by way of inward remittance through normal banking channel or (b) by debit to the NRE / FCNR (B) / NRO account of the NRI / PIO or (c) out of rental income from such property; or (d) by the borrower's close relatives, as defined in section 6 of the Companies Act, 1956, through their account in India by crediting the borrower's loan account.

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Q.21. Can NRI/PIO avail of housing loan in Rupees from his employer in India?

Ans. Yes, subject to certain terms and conditions given in Regulation 8A of Notification No. FEMA 4/2000-RB dated May 3, 2000 and A.P. (DIR Series) Circular No.27 dated October 10, 2003, i.e.,

(i) The loan shall be granted only for personal purposes including purchase of housing property in India;

(ii) The loan shall be granted in accordance with the lender's Staff Welfare Scheme/Staff Housing Loan Scheme and subject to other terms and conditions applicable to its staff resident in India;

(iii) The lender shall ensure that the loan amount is not used for the purposes specified in sub-clauses (i) to (iv) of clause (1) and in clause (2) of Regulation 6 of Notification No.FEMA.4/2000-RB dated May 3, 2000.

(iv) The lender shall credit the loan amount to the borrower's NRO account in India or shall ensure credit to such account by specific indication on the payment instrument;

(v) The loan agreement shall specify that the repayment of loan shall be by way of remittance from outside India or by debit to NRE/NRO/FCNR Account of the borrower and the lender shall not accept repayment by any other means.

D. Repatriation of sale proceeds of residential / commercial property purchased by NRI / PIO

Q.22. Can NRI / PIO repatriate outside India the sale proceeds of immovable property held in India?

Ans.

(a) In the event of sale of immovable property other than agricultural land / farm house / plantation property in India by a NRI / PIO, 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:

- the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels, or

- the amount paid out of funds held in Foreign Currency Non-Resident Account, or

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· 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; and

(iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

For this purpose, repatriation outside India means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency.

(b) In case the property is acquired out of Rupee resources and/or the loan is repaid by close relatives in India (as defined in Section 6 of the Companies Act, 1956), the amount can be credited to the NRO account of the NRI/PIO. The amount of capital gains, if any, arising out of sale of the property can also be credited to the NRO account.

NRI/PIO are also allowed by the Authorised Dealers to repatriate an amount up to USD 1 million per financial year out of the balance in the NRO account / sale proceeds of assets by way of purchase / the assets in India acquired by him by way of inheritance / legacy. This is subject to production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter, and a tax clearance / no objection certificate from the Income Tax Authority for the remittance. Remittances exceeding US $ 1,000,000 (US Dollar One million only) in any financial year requires prior permission of the Reserve Bank.

(c) A person referred to in sub-section (5) of Section 6 of the Foreign Exchange Management Act 3[3][3], or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

Q.23. Can an NRI/PIO repatriate the proceeds in case the sale proceeds were deposited in the NRO account?

Ans. Please refer to the answer at Q.22 above. NRI/PIO may repatriate up to USD one million per financial year (April-March) from their NRO account which would also include the sale proceeds of immovable property. There is no lock in period for sale of immovable property and repatriation of sale proceeds outside India.

Q.24. If a Rupee loan was taken by the NRI/ PIO from an Authorised Dealer or a Housing Finance Institution for purchase of residential property can the NRI / PIO repatriate the sale proceeds of such property?

Ans. Yes, Authorised Dealers have been authorised to allow repatriation of sale proceeds of residential accommodation purchased by NRIs/ PIOs out of funds raised by them by way of loans from the authorised dealers/ housing finance

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institutions to the extent such loan/s repaid by them are out of the foreign inward remittances received through normal banking channel or by debit to their NRE/FCNR accounts. The balance amount, if any, can be credited to their NRO account and the NRI/PIO may repatriate up to USD one million per financial year (April-March) subject to payment of applicable taxes from their NRO account balances which would also include the sale proceeds of the immovable property.

Q.25. If the immovable property was acquired by way of gift by the NRI/PIO, can he repatriate abroad the funds from sale of such property?

Ans. The sale proceeds of immovable property acquired by way of gift should be credited to NRO account only. From the balance in the NRO account, NRI/PIO may remit up to USD one million, per financial year, subject to the satisfaction of Authorised Dealer and payment of applicable taxes.

Q.26. If the immovable property was received as inheritance by the NRI/PIO can he repatriate the sale proceeds?

Ans. Yes, general permission is available to the NRIs/PIO to repatriate the sale proceeds of the immovable property inherited from a person resident in India subject to the following conditions:

(i) The amount should not exceed USD one million, per financial year (ii) This is subject to production of documentary evidence in support of acquisition / inheritance of assets and an undertaking by the remitter and certificate by a Chartered Accountant in the formats prescribed by the Central Board of Direct Taxes vide their Circular No.4/2009 dated June 29, 2009 (iii) In cases of deed of settlement made by either of his parents or a close relative (as defined in section 6 of the Companies Act, 1956) and the settlement taking effect on the death of the settler (iv) the original deed of settlement and a tax clearance / No Objection Certificate from the Income-Tax Authority should be produced for the remittance (v) Where the remittance as above is made in more than one installment, the remittance of all such installments shall be made through the same Authorised Dealer (vi) In case of a foreign national, sale proceeds can be repatriated if the property is inherited from a person resident outside India with the prior approval of the Reserve Bank. The foreign national has to approach the Reserve Bank with documentary evidence in support of inheritance of the immovable property and the undertaking and the C.A. Certificate mentioned above.

The general permission for repatriation of sale proceeds of immovable property is not available to a citizen of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan and Iran and he has to seek specific approval of the Reserve Bank.

As FEMA, 1999 specifically permits transactions only in Indian Rupees with citizens of Nepal and Bhutan. Therefore, the question of repatriation of the sale proceeds in foreign exchange to Nepal and Bhutan would not arise.

E. Provisions for Foreign Embassies / Diplomats / Consulates General

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Q.27. Can Foreign Embassies / Diplomats / Consulates General purchase / sell immovable property in India?

Ans. In terms of Regulation 5A of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations 2000, Foreign Embassies/ Diplomats/ Consulates General, may purchase/ sell immovable property (other than agricultural land/ plantation property/ farm house) in India provided –

(i) Clearance from the Government of India, Ministry of External Affairs has been obtained for such purchase/sale; and

(ii) The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through the normal banking channels.

F. Other Aspects

Q.28. Can NRI / PIO rent out the residential / commercial property purchased out of foreign exchange / rupee funds?

Ans. Yes, NRI/PIO can rent out the property without the approval of the Reserve Bank. The rent received can be credited to NRO / NRE account or remitted abroad. Powers have been delegated to the Authorised Dealers to allow repatriation of current income like rent, dividend, pension, interest, etc. of NRIs/PIO who do not maintain an NRO account in India based on an appropriate certification by a Chartered Accountant, certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for.

Q.29. Can a person who had bought immovable property, when he was a resident, continue to hold such property even after becoming an NRI/PIO? In which account can the sale proceeds of such immovable property be credited?

Ans. Yes, a person who had bought the residential / commercial property / agricultural land/ plantation property / farm house in India when he was a resident, continue to hold the immovable property without the approval of the Reserve Bank even after becoming an NRI/PIO. The sale proceeds may be credited to NRO account of the NRI /PIO.

Q.30. Can the sale proceeds of the immovable property referred to in Q.No. 29 be remitted abroad ?

Ans. Yes, From the balance in the NRO account, NRI/PIO may remit up to USD one million, per financial year, subject to the satisfaction of Authorised Dealer and payment of applicable taxes.

Q.31. Can foreign nationals of non-Indian origin resident in India or outside India who had earlier acquired immovable property under FERA with specific

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approval of the Reserve Bank continue to hold the same? Can they transfer such property?

Ans. Yes, they may continue to hold the immovable property under holding license obtained from the Reserve Bank. However, they can transfer the property only with the prior approval of the Reserve Bank.

Q.32. Is a resident in India governed by the provisions of the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000?

Ans. A person resident in India who is a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan is governed by the provisions of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000, as amended from time to time, i.e. she/he would require prior approval of the Reserve Bank for acquisition and transfer of immovable property in India even though she/he is resident in India. Such requests are considered by the Reserve Bank in consultation with the Government in India.

The citizens of countries other than those listed above can be PIOs who are covered under the general permission (please refer to Q.No.1). The provisions relating to foreign national of non-Indian origin are covered in detail in Q Nos. 6 and 7.

Note:

The relevant regulations covering the transactions in immovable property have been notified vide RBI Notification No. FEMA 21/2000-RB dated May 3, 2000 and this basic notification has been subsequently amended by the notifications detailed below:

i) Notification No.FEMA 64/2002-RB dated June 29, 2002;
ii) Notification No.FEMA 65/2002-RB dated June 29, 2002;
iii) Notification No.FEMA 93/2003-RB dated June 9, 2003;
iv) Notification No. FEMA 146/2006-RB dated February 10, 2006 read with A.P.(DIR Series) Circular No. 5 dated 16.8.2006; and
v) Notification No. FEMA 200/2009-RB dated October 5, 2009

All the above notifications and A.P. (DIR Series) Circulars are available on the RBI website: www.fema.rbi.org.in. The Master Circular on Acquisition and Transfer of Immovable Property in India by NRIs/PIOs/Foreign Nationals of Non-Indian Origin is also available on the website under the link “www.rbi.org.in ® Sitemap ® Master Circulars”.

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[1] [1][1] Non-Resident Indian (NRI) is a citizen of India resident outside India.

[2] [2][2] A 'Person of Indian Origin' means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who

i. at any time, held an Indian Passport or
ii. who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

[3] [3][3] A person resident outside India may hold, own, transfer or invest in Indian currency, security or **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.

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