



Acquisition and Transfer of Immovable Property in India and Outside India (including FDI in Real Estate)

Advance FEMA Conference by –
Committee on Economic and
Commercial Laws and Economic
Advisory of ICAI

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SYNOPSIS

- Acquisition and Transfer of Immovable Property in India (FEMA Notification No. 21R)
- Acquisition and Transfer of Immovable Property Outside India (FEMA Notification No. 7R)
- FDI in Real Estate (FEMA Notification No. 20R)

What is Immovable Property under FEMA?

- Immovable Property (IP) is not defined in the Act as well as in Notification 7R and even in 21R.
- Acquisition and Transfer of IP being a Capital Account Transaction, Sec 6(3)(h) and (i) prescribes this capital account transaction as under –
 - 6(3)(h) – transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India
 - 6(3)(i) – acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India

Certain activities relating to IP prohibited

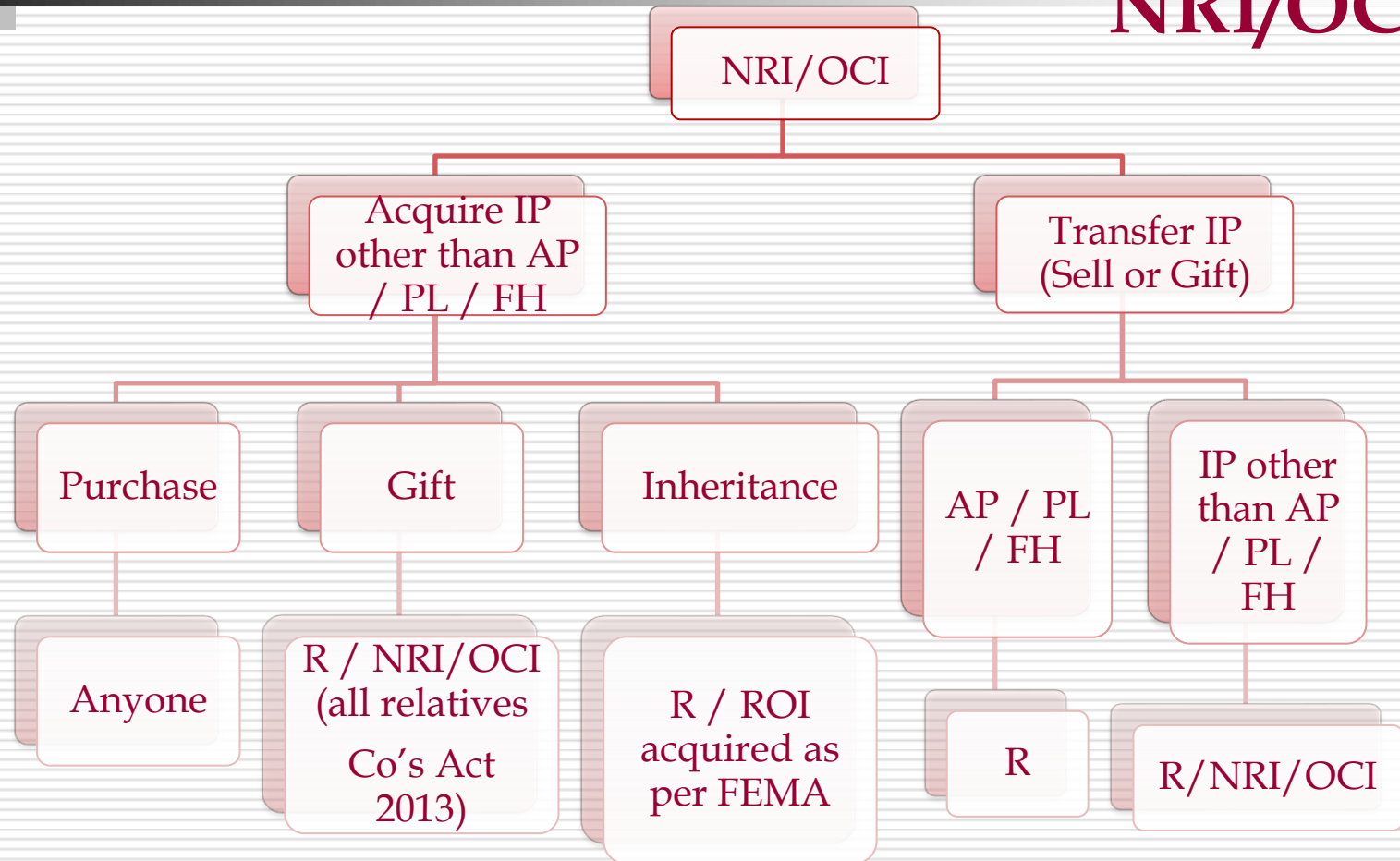
- As per Not. 1 (Permissible Capital Account Transactions) no person resident outside India shall make investment in India in any form, in any company or partnership firm or any entity which is engaged in –
 - Real estate business or construction of farm house; or
 - Engaged in trading in TDRs
- These prohibitions also apply for Domestic Inv by NRIs/OCIs

Note: Real Estate Business **shall not include** development of townships, construction of residential commercial premises and REITs registered with SEBI.



Acquisition and Transfer of Immovable Property in India

Acquisition / Transfer of Immovable Property in India by an NRI/OCI



NRI - Non Resident Indian
 OCI - Overseas Citizen of India
 R - Resident
 ROI - Resident outside India



Joint Acquisition

Regulation 6 of FEMA 21(R) –

- A person resident outside India not being NRI or OCI who is spouse of NRI or OCI can acquire **one IP** (other than AP, PL or FH) jointly with his/her NRI / OCI spouse.
- Consideration for acquiring property shall be made out of funds received in India through normal banking channels by way of inward remittance or out of funds held in any non-resident account.
- No payment shall be made by traveler's cheque or by foreign currency notes.
- The marriage is registered and has been subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.
- Non-resident spouse otherwise should not be prohibited from acquiring the property.



Acquisition of property by Foreign Nationals

➤ **Foreign Nationals of 11 countries -**

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong and Democratic Republic of Korea -

- ✓ Irrespective of their residential status cannot acquire or transfer any IP in India without prior RBI approval.
- ✓ However, this is not applicable to an OCI and who is citizen of above 11 countries. (Proviso to Reg 9)

➤ **Foreign Nationals of other countries -**

Resident in India -

- ✓ Can acquire IP in India

Resident outside India -

- ✓ Cannot acquire IP in India except for lease not exceeding 5 years.



Foreign Nationals as Resident under FEMA

- Requirements:
- Residing in India for >182 days in P.F.Y. For taking up employment, business or uncertain period
- So, period of stay, purpose of stay & the nature of Visa should clearly & unambiguously establish intention to stay for an uncertain period in India.
- Tourist and other visa for certain period are not valid visa for the purpose of acquiring IP



Acquisition by Long Term Visa (LTV) Holders

- Citizen of Afghanistan, Bangladesh and Pakistan belonging to minority communities mainly Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and have been granted LTV by Central Government can purchase –
 - ✓ One residential property for self occupation and
 - ✓ One immovable property for carrying out self employment

Conditions:

- ✓ The property should not be located in and around restricted/ protected areas.
- ✓ Submission of declaration to the Revenue Authority of the district
- ✓ The registration documents of the property should mention the nationality and the fact that such person is on a LTV.



Acquisition by Long Term Visa (LTV) Holders

- ✓ Attachment/ confiscation in the case of anti-India activities.
- ✓ Submission of property documents to the Deputy Commissioner of Police (DCP)/ Foreigners Registration Office (FRO)/ Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division).
- ✓ Sale only after obtaining Indian citizenship. Prior Sale will require approval of DCP/ FRO/ FRRO concerned.



Acquisition of IP by Branch Office (BO) or any other place of business in India

- Person resident outside India having BO or other place of business for carrying any activity in India, excluding a Liaison Office may –
 - ✓ Acquire IP necessary for or incidental in carrying on business activity.
 - i. All laws, rules, regulations to be complied.
 - ii. Such person has to file Form IPI with RBI within 90 days from date of such acquisition.
 - ✓ Transfer IP acquired by way of mortgage to an AD as security for any borrowing.
 - ✓ Restriction of 11 nations would continue to apply here too



Repatriation of Sale Proceeds

Repatriation of sales proceeds:

Regulation 8(a) of FEMA 21R – Specific or General Permission of RBI is required to be obtained to repatriate sale proceeds of immovable property outside India by persons referred to in Section 6(5) or his successor who had acquired such property when he was resident in India or inherited from a person resident in India.

- Section 6(5) refers to person resident outside India and includes NRI or PIO also but by sub regulation (b) of Reg 8
- NRIs and OCIs can avail remittance can repatriate subject to following conditions



Repatriation of Sales Proceeds

Repatriation by NRIs/OCIs:

- The immovable property was acquired in accordance with FEMA provisions
- Amount of acquisition was paid in foreign exchange received through banking channels or out of funds held in foreign currency non-resident account or NRE account.
- In case of residential property, repatriation is restricted to not more than 2 properties.

Repatriation under 1 Mn Scheme (Not 13) is in addition to above

- For repatriation of proceeds of properties exceeding two, the same can be credited to the NRO account and can be remitted out of NRO account upto USD 1 million per financial year {Except for Section 6(5)}



Refund in case of non-allotment of flat/plot/cancellation of bookings

Refund in case of non-allotment of flat / plot / cancellation of bookings / contracts

From the old Master Circular-

- Refund together with interest (net of income tax) can be credited to NRE / FCNR (B) account provided:
 - ❑ the original payment was made out of NRE/FCNR (B) account or remittance from outside India through normal banking channels; and
 - ❑ the authorised dealer is satisfied about the genuineness of the transaction.
 - ❑ Transaction should be in the nature of flat booking and not in the nature of loan



Creation of Charge on Immovable Property for securing Loan

For availing ECB-

- AD Bank may permit a person resident in India to create a charge on his IP in India in favor overseas lender or security trustee for ECB.

For availment of loan by overseas company -

- AD Bank in India may create a mortgage on IP in India owned by NRI or OCI, being director of a company outside India for a loan to be availed by the company from overseas lender.
 - Funds shall be used for core business purposes overseas.
 - In case of invocation of charge, Indian bank may sell the IP and pay to overseas lender.



Availing loan against security of immovable property

- Rupee loan against security of IP (other than AP, PL & FH) subject to following conditions: (Reg 7(B) of Not 4)
 - ❑ Shall be utilized for borrower's personal requirements or for business purposes
 - ❑ Shall not be utilized for activities in which investment by NRI is prohibited (chit fund, nidhi company and AP, PL, FH or real estate business and trading in TDR)
 - ❑ Shall not be credited to NRE / FCNR / NRNR account of the borrower
 - ❑ Shall not be remitted outside India
 - ❑ Repayment out of foreign remittance or NRO / NRSR / NRNR / NRE / FCNR account or sale of shares or securities or immovable property



Availing loan for purchase of immovable property

- Housing loan to NRI or PIO/ROI for acquisition of a residential accommodation in India subject to following conditions:
 - ❑ Quantum of loans, margin money and repayment period shall be same as for housing loans to Resident.
 - ❑ Shall not be credit to NRE / FCNR / NRNR account
 - ❑ Fully secured by equitable mortgage of property proposed to be acquired and if required, by lien on the borrower's other asset in India
 - ❑ EMI and other charges to be paid by way of remittance or out of funds in NRE / FCNR / NRNR / NRO / NRSR account in India or rental income or by any 'relative' (as defined under sec. 6 of the Companies Act) in India by crediting the borrower's loan account through the bank account of such relative.
 - ❑ Rate of interest shall conform to RBI or NHB directives.



Transfer of IP by Person Resident Outside India

- Person resident outside India may transfer IP -[Reg 10(4)]
 - ❑ If IP was acquired as per extant FEMA laws.
 - ❑ To person resident in India provided the transaction takes place through banking channels in India.
 - ❑ Resident is not otherwise prohibited from such acquisition.




Govt's advice on acquiring IP by PROI

- State Govt to be extra vigilant and to check eligibility under FEMA for both acquisition & transfer
- Verification of relevant travel docs & nature of Visa before registering sale/pur



Acquisition and Transfer of Immovable Property outside India



How can IP be acquired outside India?

- **Immovable property can be acquired outside India –**
 - Under Sec 6(4) of FEMA.
 - As gift or inheritance from –
 - i. Person referred in 6(4); or
 - ii. Person who has acquired prior 8th July 1947; or
 - iii. Person who has acquired property in accordance with FEMA provisions.
 - Purchased from balance held in RFC account.
 - Purchased with remittances made under LRS.
 - Jointly with relative who is non-resident provided there is no outflow of funds from India.
 - By an Indian company having overseas office, for its business purposes or for residence of staff.



Restrictions on Transfer of IP outside India

- Prohibition of resident acquiring property outside India is not applicable if –
 - Resident is a foreign national; or
 - Property was acquired prior July 8, 1947 and continued to be held after obtaining permission; or
 - If it is acquired on lease not exceeding five years



Acquisition of IP outside India under LRS

- Resident can send remittances under LRS to acquire IP outside India.
- If family members pool their remittances to acquire IP, it should be in name of all members who make the remittances.

Gift Transactions

■ Gift and inheritance of Immovable Property Situated outside India:

Donor	Donee	Remarks
NR	R	Not covered by general permission
R	R	Regulation 5(1)(a) for Sec 6(4) cases and 5(2) of Not. 7(R)
R	NR	Not covered by general permission



Foreign Direct Investment (FDI) in Real Estate



FDI - Prohibited Activities

- Person resident outside India cannot make investment in activities of :
 - Lottery Business including Government/private lottery, online lotteries etc.
 - Gambling and Betting including casinos etc.
 - Chit funds
 - Nidhi company
 - *Real estate business or construction of farm houses*
 - Trading of Transferable Development Rights (TDRs)
 - Activities / sectors not open to private sector investment [e.g. atomic energy, railway operations (other than permitted activities)]



FDI - Construction Development Sector

- 100% FDI permitted under Automatic route for Construction Development Projects which include:
 - Development of Townships
 - Construction of residential/commercial premises.
 - Roads or bridges.
 - Hotels, resorts, hospitals, educational institutions, recreational facilities
 - City and regional level infrastructure, townships
 - Development of plots involving creation of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage



FDI - Construction Development Sector (Contd...)

■ Conditions to be satisfied:

- Each phase would constitute separate project
- Minimum area requirements have been done away with
- Exit permitted on -
 - i. Completion of project; or
 - ii. After development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage.
- Exit permitted before completion of project under automatic route provided lock in period of three years, calculated with reference to each tranche has been completed.



FDI - Construction Development Sector (Contd...)

- NR to NR transfer will not be subject to lock in nor under any government approval.
- Only Sale of Developed Plots will be permitted. Developed Plots means where trunk infrastructure has been made available.
- Conditions of lock in will not apply to Hotels and Tourist Resorts, Hospitals, Special Economic Zones, Educational Institutions, Old Age Homes and investment by NRIs/OCIs.
- 100% FDI is permitted in completed projects for operating and managing townships, malls/shopping complexes and business centres.



FDI - Construction Development Sector (Contd...)

- *“Real Estate Business” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships.*
- Following excluded from definition of Real Estate Business –
 - i. Real Estate Broking Services
 - ii. Investment in units of REITS registered with SEBI
 - iii. Earning of rent income on lease of property not amounting to transfer.



FDI - Construction Development Sector (Contd...)

- **Transfer in relation to Real Estate Business includes,**
 - i. The sale, exchange or relinquishment of the asset; or
 - ii. The extinguishment of any rights therein; or
 - iii. The compulsory acquisition thereof under any law; or
 - iv. Any transaction involving the allowing of possession of any IP to be taken or retained in part performance of a contract of nature referred to in Section 53 of Transfer of Property Act, 1882; or
 - v. Any transaction, by acquiring capital instruments in a company or by way of agreement or any arrangement or in any manner whatsoever, which has the effect of transferring or enabling the enjoyment of any immovable property.



ECB for Construction Development

- Companies engaged in Construction Development (except infra activities) are not falling in the coverage of 'Eligible Borrower'.
- The companies which are other wise eligible (such as Manufacturing / Shipping Companies etc.) they also cannot use ECB for purchase of land.
- The ECB Proceeds can be used for purchase of land or real estate only by companies –
 - Engaged in affordable housing;
 - Construction and development of SEZs and Industrial Parks and Integrated Townships



THANK YOU

FIRST DESERVE

AND

THEN DESIRE!!

