

The Chamber of Tax Consultants

Export and Import – Overview of FEMA regulations and some issues

21st December, 2018

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Legal background

- Export and Import are **Current Account Transactions under FEMA**. Prima facie no restrictions.

However procedures to be complied with.

For most arrangements – **conditions apply**.

- Main Agencies involved – DGFT, SEZ authority, Customs / CBIC, RBI, Banks.
- Certification by CAs for some transactions.

Legal background

- Export and Import trade is regulated by DGFT.
- The Foreign Trade (Development and Regulation) Act, 1992.
- Foreign Trade Policy 2017 (includes Handbook of procedures, Appendices and Aayat Niryat forms, Standard Input Output norms, etc).
- Banks need to follow the prescribed norms, follow KYC and PMLA guidelines.
- Uniform Customs and Practices for Documentary Credits for L/C (issued by ICC).

FEMA Act

- S. 2(l) and Reg. 2(iv) of Notf. 23(R) – Definition of Export.
- 2(p) – Definition of Import.
- S. 3 – Dealing in FX not permitted except through AD.
- S. 5 – Drawal or sale of FX permitted for Current Account transactions.
- S. 7 – Exporter has to make declaration of exports and amount to be realised / expected to be realised.
- S. 8 – Indian resident should realise and repatriate FX due to him.

FEMA regulations

- Current Account Rules – largely for payment; and commission in relation to certain transactions.
- **No specific regulation for imports** – only Master Directions. Banks to follow normal trade practices.
- Export regulations – Notn. 23(R) dt. 12.1.2016.
- Master Direction on Exports.

FEMA regulations

- Manner of receipt and payment regulations – Notn. 14(R) dt. 2.5.2016
- Foreign currency account by Indian resident regulations – Notn. 10(R) dt. 21.1.2016
- Realisation, repatriation and surrender of foreign exchange regulations – Notn. 9(R) dt. 29.12.2015
- Guarantee regulations – Notn. 8 dt. 3.5.2000

FEMA regulations

- FEMA law applies to all goods and services – even though several rules appear to apply only to goods and software services.
- Difficulties in some compliance particularly for services which are not expressly dealt with.
- Regional offices of RBI where exporter / importer has its office has jurisdiction.

- [In this presentation, key issues are covered. It does not cover all procedures in details. Kindly refer to Master Directions.]

Exports

Exports monitoring system

- Rules and the system have been designed to monitor and track the realisation of FX for exports.
- Export Data Processing and Management System (EDPMS) is designed for this purpose. It is accessible to Customs, RBI and Banks.
- Customs enter the details in EDPMS on export.

Exporter has to submit documents to AD within 21 days (non-FDI port). AD updates EDPMS.

AD downloads shipping bill etc. from EDPMS (EDI port). AD monitors. AD updates EDPMS on receipt of funds.

Transaction closed on EDPMS.

Basic responsibility of exporter

- Exporter must not do anything where:
 - Payment is received in any manner other than as specified.
 - Payment is delayed.
 - Proceeds do not represent full value.

Export Declaration

- Declaration to be filed for value of exports for goods (EDF) and software (SOFTEX).
- For other services there is no reporting. However other regulations – write off, delay etc. apply. There is no implementation mechanism...
- At Non-EDI ports, exporter has to submit EDF in 21 days to the bank.
- At EDI ports, shipping bill was to be submitted. However, after 2016, data is linked with EDPMS. No need to submit shipping bill to bank.

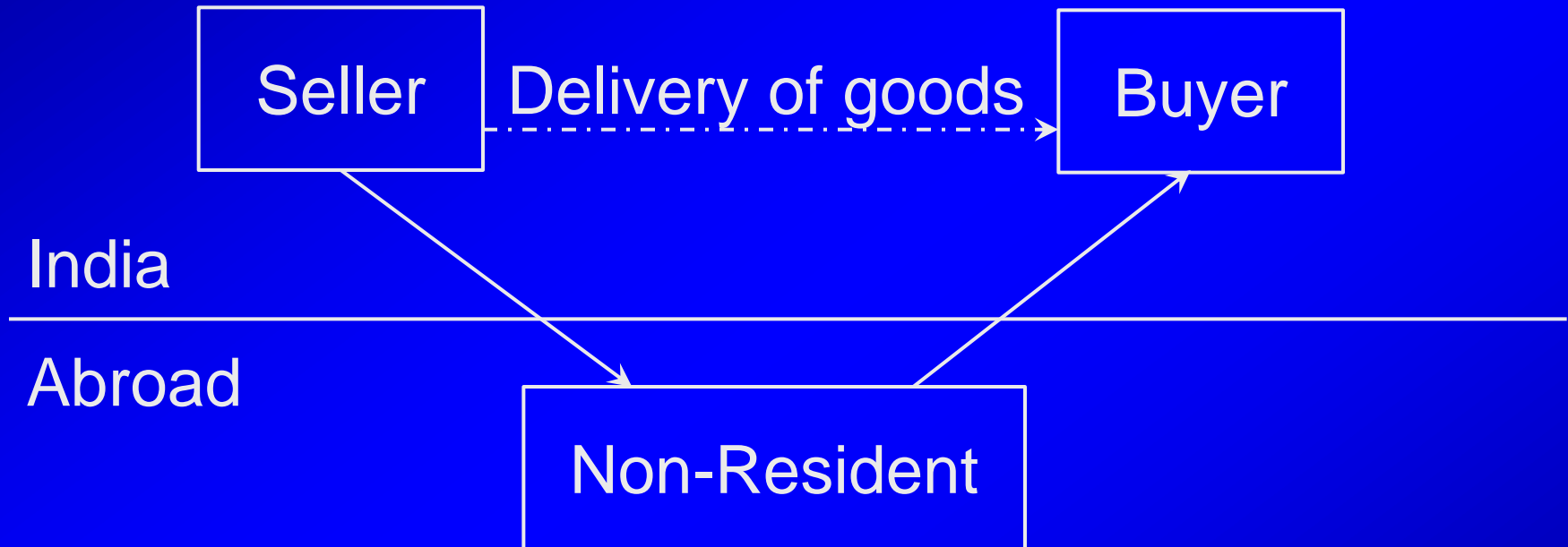
Export Declaration

- Softex form should be filed with STPI/SEZ – single or in bulk.
- Delay in submitting form – AD may handle. SPTI normally does not accept even one day delay.
- Land, road, river transport – EDF should be given at customs. Separate procedures prescribed.
- Mid-sea transshipment of catch – Master of vessel can certify the value on EDF. Separate procedures prescribed.

Export Declaration

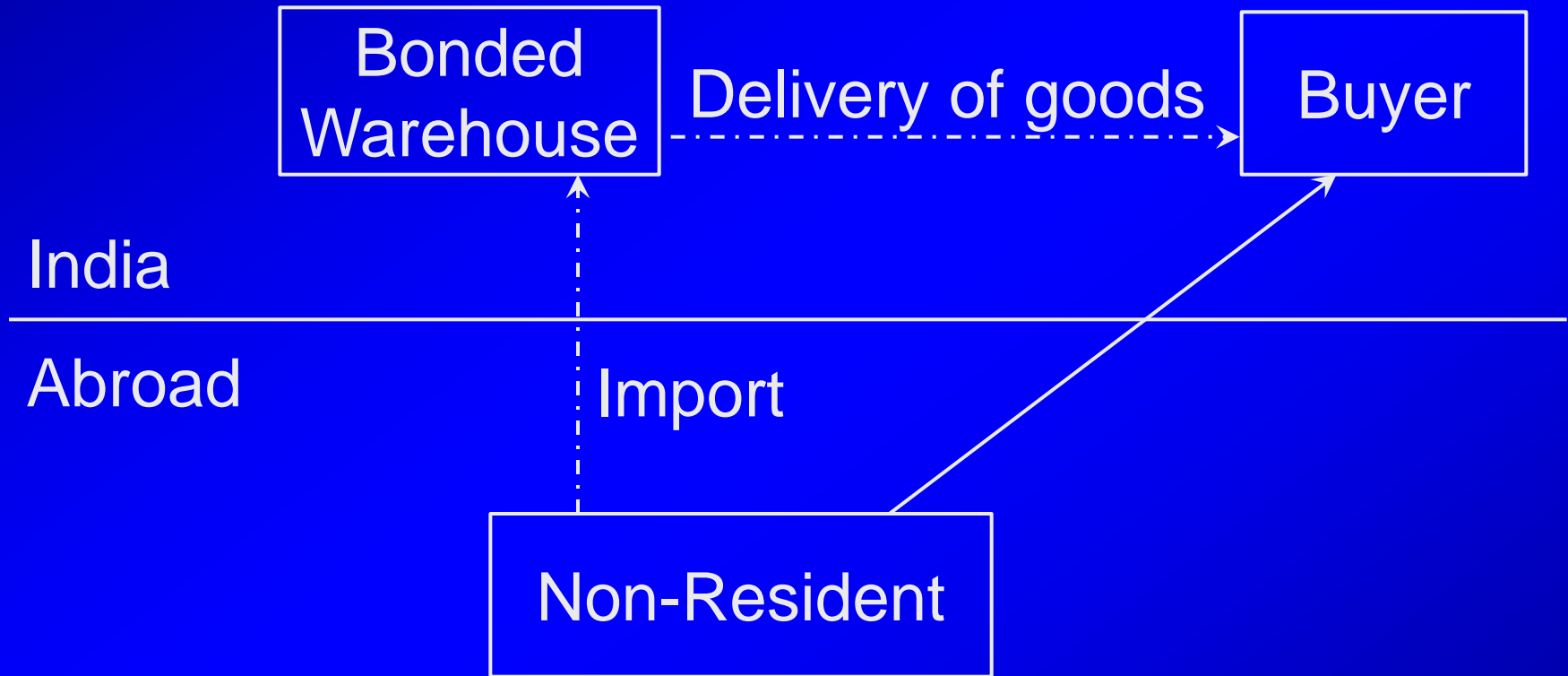
- No need to file declaration for some transactions – E.g. samples, ship stores, free of cost goods for export promotion upto Rs. 1 cr. or 2% of average annual export realisation in last 3 years (8% for Export by pharma companies for life saving drugs to UN etc.); or where RBI gives approval

Trade by Non-Residents



Obtains waiver from RBI for waiver of EDF & BOE

Goods stored in Bonded warehouse



Is this permitted?

Time limit for export realisation

- Exports proceeds should be realised and repatriated within 9 months from export (date of shipment – when goods are shipped on the vessel). For Software date of export is usually date of invoice.
- Export to warehouse outside India – proceeds to be realised with 15 months. (Warehouse can be permitted by the AD – para MD-C.13.)
 - Export outstanding should not be more than 5% of preceding year's export.
 - Minimum exports of US \$ 1,00,000

Manner of receipt of funds

- FEMA Notn. 14(R) regulates receipts. Funds have to come through banking system.
- Receipt in freely convertible currency, or rupees from Vostro account of foreign bank. Some exceptions.
- Currency should be appropriate to place of final destination and not of the buyer's residence.

Manner of receipt of funds

- Some other methods – Exporter can receive by:
 - bank draft, cheque, pay order, foreign currency notes/ travelers cheque from a buyer during his visit to India. Exporter should surrender the same to AD within 7 days.
 - debit to NRE / FCNR account.
 - credit card (where bank receives FX).
 - rupee account in the name of Exchange house upto Rs. 50 lakhs per export.
 - precious metals in export of jewellery units in SEZ and EOUs – conditions apply.

Online Payment Gateway

- Banks can have arrangements with Gateway service providers so that exporters can receive payments through them.
- Upto US\$ 10,000 is permitted per export for goods & services.
- Amount should be repatriated to India within maximum of 7 days.
- Other conditions given in MD-para A.3(iii).

Online Payment Gateway

- Start-up can realise receivables of its overseas subsidiary also through gateways.
- Start up can open foreign currency account & receive export proceeds for itself and sales of its JV/WOS abroad.
- OPGSP can also be availed to repatriate funds to its subsidiary upto US \$ 10,000.
- Start up should repatriate its own funds within 9 months.

Payment by third party

- Normally payment should come from the person to whom the exports are made.
- Payment from third party is permitted if the same is stated in an agreement, invoice etc.
- Receipt only through banking channel is permitted. (Eg. Online payment gateway is not permitted.)
- Export declaration should state the third party.

Shipping Documents

- Banks should send Shipping Documents to their branches / correspondents abroad.
- Banks may send documents to consignees if:
 - Full advance payment is received.
 - There is an irrevocable L/C.
 - Bank is satisfied about bonafides of his client and client has made arrangement for export proceeds.

Shipping Documents

- Bank can permit Status holder exporters and SEZ units to send documents to consignees subject to conditions.
- Banks can regularise sending of documents by exporter directly to consignee subject to conditions – if the amount is upto US\$ 1 mn. per consignment.

Foreign currency account in India

- **EEFC A/c.** – Export proceeds and other permitted transactions can be received in the account.
 - Funds to be converted in rupees before the end of subsequent month except – funds utilised for approved purpose and forward commitments.
 - No interest can be earned.
- [Purpose is to save on exchange costs and not to build FX balance. This purpose was stated after several years. Backtracking...]

Foreign currency account in India

- **RFC(Domestic) A/c.** – Individuals can open this account for export earnings, services rendered abroad and some other purposes.
 - Restrictions on conversion into rupees & interest – similar to EEFC A/c.
- **Diamond Dollar Account (DDA)** – only for sale of diamonds & diamond studded jewellery.
[Plain gold jewellery businessmen can also open DDA A/c. – but only for diamonds.]
 - Cannot have another foreign currency A/c.
 - Only firm & companies are permitted.
- **SEZ unit** can hold account in India.

Foreign currency account abroad

- Participants in **international exhibition** abroad can open account abroad. Exporters can deposit FX from sale in exhibition.

[Export declaration – MD – Para C.3. Goods can be sold at discount.]

- Exporters can open a bank account abroad with approval from RBI, New Delhi.
- Branch abroad of Indian Co / firm / LLP can open a bank account abroad.
No loans by branch.

Advance against exports

- Export should be made within one year of advance.
- Interest cannot exceed LIBOR+1%.
- Documents should be routed through the bank where advance is received.
- Non-supply of goods becomes a loan. Condonation required.
- Refund if any beyond one year will require RBI approval.

Advance against exports

- Exporters with 3 year track record can receive advance against confirmed order for goods upto 10 years. Para MD-C.2(2).
 - No double financing. i.e. No working capital loan.
 - Strict monitoring.
 - BG/SBLC upto 2 years at a time.
- - No pending investigation or caution listing.

Advance against exports

- Advance for export beyond one year can be permitted by bank subject to conditions. Para MD-C.2(3) prescribe more conditions than normal export advance.
 - No instance of refund above 10% of advance in last 3 years.
 - No interest on untitled portion of advance without RBI approval.

Delay in realisation of proceeds

- Bank can permit extension upto 6 months at a time subject to conditions:
 - no pending investigations.
 - bank is satisfied about reasons.
 - for extension beyond one year, outstanding should not exceed US\$ 1 mn. or 10% of average export realisations of preceding 3 years, whichever is higher.
 - if suits are filed, extension may be granted irrespective of amount involved.
- Realisation not insisted under Export Promotion scheme. Write off under AD route. Para MD-C.25

Reduction in invoice value

- Cash discount on prepayment – upto interest rate stipulated in export contract, or upto prime rate / LIBOR of the currency of invoice where interest is not stipulated.
- Upto 25% of invoice value:
 - no floor price stipulated for the commodity exported.
 - exporter not on caution list.
 - export incentives should be surrendered.

Reduction in invoice value

- For exporters in business for more than 3 years, no ceiling on reduction – subject to regular conditions.
 - export outstanding do not exceed 5% of average annual export realisation in preceding 3 years.
 - outstandings from countries having externalisation problems may be ignored if the buyer has made payment in local currency.
- Reduction on change of buyer upto 25% of value.

Write off of unrealised exports

- Write off of **outstanding amounts of more than one year** is permitted up following **percentage in a year** of export proceeds realised during previous calendar year.
 - Exporter itself – 5%
 - Status Holder exporter itself – 10%
 - Through AD – 10%

[CA certificate required for self write off with full details.]
- Write off can exceed 10% if claims are settled by ECGC / pvt. Insurance companies. Claim in rupees will not be FX realisation. (Para MD-C.24)

Write off of unrealised exports

- Eligible Cases - MD-para C.23(iii) Examples:-
 - buyer not traceable / insolvent, goods auctioned by foreign authorities, amount settled through Indian embassy / foreign chamber of commerce, cost of legal action is more than write off involved.
 - export incentives are surrendered.
- Following cases not eligible:
 - countries with externalisation problem buy buyer has deposited local currency with its central bank.
 - EDF under investigation.

RBI approval

- If cases of reduction / write off do not fall within automatic route, apply to RBI.
- All details required. Justification required.
- Apply through the AD which has dealt with the transaction.
- Old cases where evidence of compliance is insufficient, is time-consuming.

Refund of exports

- Bank can permit refund of exports due to poor quality.
- Bank to verify track record, bonafides etc.
- Goods should be reimported within 3 months of refund.

- E.g. Indian service providers charging cost plus mark-up. After finalisation of accounts, if there is an excess charge, can it be refunded?

Caution list of Exporters

- Caution / de-caution is automated under EDPMS.
- Shipping bill outstanding for more than 2 years will make the exporter automatically cautioned.
- Cautioning can happen before 2 years based on any advice by bank, ED, etc.

Caution list – Implications

- Before bill discounting etc.,
 - exporter should have received advance or have irrevocable L/C for full amount.
 - Usance bill should be covered by L/C and also permit drawings.
- AD cannot issue guarantees (for exports) without RBI approval.

Caution list – Other transactions affected

- Overseas investment possible under approval route.
- ECB for FX earners.
- Receiving long term advance against exports.
- Reduction in export invoice value.
- Payment of export claims.
- Diamond Dollar Account in India cannot be opened by bank.

Set-off export and import amounts

- If import payment for goods is still outstanding, export receivable for goods can be set off against the import payable.
- Set off should be for transactions with same party.
[No set off of transactions within the group is also permitted.]

Relevant documents should have been submitted.

Consent of foreign party required.

- Transactions with ACU countries cannot be set off.
- Units in SEZ can set off on the balance sheet date.
- Set off of services? Bank is not authorised.

Agency commission

- Commission to foreign agents is permitted by payment or reduction from export proceeds.
- It should be declared in forms.
- Bank may permit commission even if not declared - satisfactory reasons and written agreement.
- **Shipment has been made.**
- Counter trade – commission only by payment.
- No commission for equity participation in JV / WOS abroad.
- No commission on rupee credit route. Commission upto 10% permitted on tea and tobacco.

Other business arrangements

- **Counter trade arrangement** between Indian and foreign party can be undertaken by opening an escrow account in India. RBI approval required.
- **Forfaiting** (selling receivables) to EXIM or Indian bank is permitted. Charges as permitted by EXIM / Bank is permitted.
- **Factoring** on non-recourse (financing receivables) basis is permitted by the bank.
- **Project exports** and export of engineering goods on deferred basis – approval of bank / EXIM.

Follow Project Exports Memorandum of 2014.

Other business arrangements

- **Counter trade with Romania** – RBI approval required. Imports should be completed within 6 months.
- **Export on lease / hire** – RBI approval required.
- **Export on elongated credit terms** – RBI approval required.
- **Consignment sale** – Bank can send documents with certain precautions.
- **Job work** abroad by SEZ units.

Imports

Imports monitoring system

- Rules and the system have been designed to monitor and track the import for remittance made.
- Import Data Processing and Management System (IDPMS) is used for this purpose. It is accessible to Customs/CBIC, RBI and Banks. (Export and Import is under one system – edpms.rbi.org.in.)
- Customs enter the details in IDPMS on import.
Importer has to submit proof of import. With IDPMS, proof is automatically available for goods. For services, importer has to submit evidence.
AD updates IPDMS on payment - ORM/BOE.
Transaction closed on IDPMS.

Key responsibilities of Importer

- Import should be as per Foreign Trade policy. If license is required, import should be as per license.
- FX should be used for the purpose for which it is obtained – S.10 (6).
- For remittances, goods/ services should come in the country. Evidence should be provided to Bank.

Time for payment

- Normally payment should be within 6 months from date of shipment. Amounts held towards performance guarantee is all right. Interest if any is permitted as per Trade Credit Rules upto 3 years.
- No time limit for import of books. Interest permitted as per Trade credit rules upto 3 years.
- Delay due to disputes, financial difficulties are acceptable. Interest if any cannot be for more than 3 years.
- Deferred payment upto 5 years are **Trade credits**. Separate rules for Trade Credit.

Time for payment

- Diamonds, precious stones, gold jewellery – time limit 90 days.
- For clean credit by supplier of diamonds, precious and semi-precious stones, time period is 180 days. Bank can extend it to further 180 days. Para MD-C.12.1.

Manner of payment of funds

- FEMA Notn. 14(R) regulates payments. Funds have to be remitted through banking system.
- Payment in freely convertible currency, or rupees from Nostro account of foreign bank. Some exceptions.
- Currency should be appropriate to country of shipment.
- Payment can be made by International Credit Card also.

Online Payment Gateway

- Banks can have arrangements with Gateway service providers so that importers can make payments through them.
- Upto US\$ 2,000 is permitted per export.
- Amount should be remitted to seller within maximum of 2 days.
- Other conditions given in MD-para C.15.

Payment by third party

- Normally payment should be made to the person from whom imports are made.
- Payment from third party is permitted if the same is stated in an agreement, invoice etc.
- Import document should state the third party.

Advance for imports

- Goods - Permitted upto US\$ 2,00,000.
- Above US\$ 2,00,000 – Irrevocable L/C, or guarantee from foreign bank of international repute; or guarantee from Indian bank with counter guarantee from foreign bank of international repute.
- If bank is satisfied, advance of upto US\$ 5 mn. can be permitted by bank (other than for PSU or Govt. department).
- PSU / Govt. dept. which cannot obtain guarantee require MOF approval for advance above US\$ 1,00,000

Advance for imports

- Services - Permitted upto US\$ 5,00,000.
 - Above US\$ 5,00,000 – guarantee from foreign bank of international repute; or guarantee from Indian bank with counter guarantee from foreign bank of international repute.
 - PSU / Govt. dept. require MOF approval for advance above US\$ 1,00,000 without guarantee.

Advance for imports

- Advance to mining companies approved by GJEPC for rough diamonds permitted without limit. Conditions apply – Para MD-C.1.2. PSUs/ Government department require MOF approval for advance above US \$ 1,00,000 without guarantee.
- For aircrafts, helicopters – Para MD-C.1.4.

Import Documents

- Banks should receive Import Documents from the bank of supplier. [Otherwise Bank cannot make payment without RBI approval]
- Importer may receive documents directly from supplier if:
 - Bill does not exceed US\$ 3,00,000.
 - Indian company receives documents from its 100% foreign holding company.
 - Importer is a status holder exporter.
 - Importer is a company.

Import Documents

- Other situations where documents can be received directly by importer are:
 - Rough diamonds, rough precious and semi-precious stones subject to conditions - upto US 3,00,000.
- Other Causes - where bank is satisfied about financial standing of importer.

Credit report from credit agencies should be obtained for all suppliers. If bank is satisfied, credit report need not be obtained for amount upto US \$ 3,00,000.

Evidence of Import

- Importer should submit BOE no., etc. as evidence of import – irrespective of amount involved. (Physical copies of BOE not required for EDI ports. For non-EDI ports physical BOE required.)
- Customs / postal appraisal form for import by post/courier.
- For amount less than US\$ 1 mn. certificate of CEO / auditor instead of BOE is acceptable. Relevant where physical copy of BOE is processed.

Applicable to listed companies with net worth of Rs. 100 cr. or more; or PSU or Government Department; or scientific bodies, etc. which are audited by CAG.

Evidence of Import

- Software or data – CA certificate for proof of import required.
- Banks are required to follow up if evidence is not submitted for import.

Extension of time for payment

- Bank can permit extension upto 6 months at a time (maximum 3 years).
 - No pending investigation for the invoices.
 - For extension beyond one year, total outstanding should not exceed lower of - US\$ 1 mn or 10% of average imports of 2 preceding years.
- Interest is permitted on delayed payments upto 3 years as per Trade credit rules. (Apply for extension before this can be permitted.)

Write off

- Write off upto 5% is permitted for operational reasons – quality issues, short shipment, destruction of goods by foreign authorities.
- There should be no civil suit pending.
- No adverse notice by investigation authorities.
- If situation changes, the importer should remit/receive funds – as the case may be.

Merchanting trade

- Para MD-C.14 deals with it.
- Merchanting trade means goods should not enter DTA and there is no change in the nature of goods.
- There will be no export and import documents. Everything else will apply.
- Transaction should be completed within 9 months. FX outlay should not exceed 4 months.
- Genuine traders should do this. It should not become a financial arrangement.
- Defaulting traders whose outstanding reach 5% of annual export earning will be caution listed.

Import on unfixed price

- Import of silver and platinum can be on **unfixed price**. i.e. Price will be paid depending on sale to user.
- Is it permitted for other commodities? (Typically for commodities like petro products, chemicals).
- Customs duty issues...

Other business arrangements

- **BPO companies** can import equipment to be installed at their overseas sites for their International Call Centres. Para MD-C.5
- **Import of precious metals** – Para MD-C.12.1. Limit on trade credit of 90 days only. Clean credit can be upto 180 days. No pending investigation.
- **Import factoring** – Para MD-C.13.
- **Remittances for replacement imports** – Para MD-C.3

Questions and suggestions are welcome

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