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Tax Consultants**
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INTENSIVE STUDY COURSE ON FEMA

BRAIN TRUST SESSION

SATURDAY, 21ST DECEMBER 2019

Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate, Mumbai – 400 020

Chairman: CA Dilip J. Thakkar

Brain Trustees: CA Rashmin Sanghvi and Mr. Himanshu Mohanty-

Executive Director, Regulatory- PWC India

RESIDENTIAL STATUS

1. Mr. A, Indian citizen, leaves India on 1st December 2018 for taking up employment outside India for the first time. What will be his residential status? Can he acquire agricultural land in India before 30th April, 2019?

DT -----

2. Mr. B, Foreign citizen, staying in Dubai for past several years came to India on 1st May 2018 for medical treatment. He has not visited India during F.Y. 2017-2018. He is planning to return to Dubai after medical treatment. Doctors have advised him to stay in India up to 31st October 2019. What will be his residential status under FEMA for the financial years 2018- 2019 & 2019-2020?

RS -----

3. Mr. C, a foreign citizen of non-Indian origin comes to India for the first time and takes up employment in India on 1st September 2018. What will be his residential status for the financial year 2018-2019? Can he acquire Immovable property in India during Financial year 2019-2020?

DT -----

4. Mr. A, a UAE-based OCI has business operation overseas and no employment in India. His family also resides abroad. He was extradited to India and was required to stay in India till the court proceedings were over and dues were settled. The same took 4 years from 2013-14 to 2017-18. In all the four years he was in India throughout the year. He left India on 10th December, 2018, the very day on which he obtained the Court permission. Would he be treated as a resident for 2013-14 till 2017-18?

RS -----

5. Mr. A citizen of USA has joined Indian Company as an employee. He will be rendering services partly from India and partly from USA. His stay in India will not exceed 182 days. The Indian entity is contemplating of remitting the salary (net of tax) to his overseas bank account. Whether Indian company is permitted to do so as a permissible current account transaction?

DT -----

6. The condition that a person should be in India for more than 182 days for being a FEMA resident. The condition that the person should be in India for more than 182 days in the preceding financial year becomes irrelevant when a person leaves the country for employment etc. But in a reverse case it is not clear when the person who has gone out of India for many years and returns to India for good .

Whether he can become resident only in the next financial year after he completes 182 days in India in the first financial year of his coming back to India?

RS -----

7. Mr. L had a HSBC Bank Account in Geneva which was not disclosed. The Income-tax Department conducted a search and Mr. L has paid the complete amount of Income-tax and the matter was referred to the ED for non-disclosure of Bank Account. What could be the repercussions on Mr. L and what remedies are available to him.

DT -----

TRUSTS

8. Today many families have relatives in India and abroad. Assets are owned in India and abroad. There are several permutations of situations. For example, some heirs may be residents and some may be non-residents. Some assets may be in India. Some assets may be outside India. Some assets are held directly, while some may be held through an SPV / company. For smooth succession planning, a trust is

considered as one of the important arrangements. Today, there is no clarity on trusts. While there are several issues, we have put down some questions as illustrations.

- a) Can an Indian resident settle his Indian property in an Indian trust, where non-resident relatives are beneficiaries?
- b) Can an Indian resident settle his foreign property in a trust outside India, where resident relatives are beneficiaries? Will such resident beneficiaries be permitted to keep the funds outside India?
- c) Can non-residents settle his Indian property in a trust in India, where his resident and non-resident relatives are beneficiaries?
- d) What are the implications of a revocable Trust under FEMA 1999?
- e) Can non-resident settle his foreign property in a trust outside India, where his resident and non-resident relatives are beneficiaries?
- f) Can trust make distribution to the NRO accounts of NRI beneficiaries? If Yes, is there any limit?

RS -----

ECB

9. ABC Ltd., an Indian Company is a WOS of XYZ Ltd., a Japanese Company. ABC Ltd has taken an ECB from its holding company of USD 4 million. The end use is general corporate purposes. ABC Ltd wants to take further ECB of USD 2 million from its associate concern viz. POR Pte. Ltd. a Singapore Company. ABC Ltd. and PQR Pte. Ltd. are held by the same parent i.e. XYZ. Ltd. After taking further ECB of USD 2 million, ECB liability: Equity Ratio of ABC Ltd. will be 8:1. Further, POR Pte Ltd has asked for a personal guarantee of the Directors of ABC Ltd and a charge on the financial assets of the ABC Ltd.

Question:

Whether ABC Ltd. can take ECB from PQR Pte. Ltd. under automatic route?
Whether the personal guarantee can be given and the charge on the financial assets can be made?

DT -----

- 10. ECB taken from Foreign Equity Holder can be utilised for Working Capital purposes and General Corporate purposes.

Question:

What is the meaning of General Corporate purposes and Working Capital purposes?

RS -----

- 11. An Indian party made import of capital goods from unrelated overseas supplier. The outstanding amount of FA was eventually paid by Foreign Shareholder of Indian Company (through a Tri-party agreement) and the same now stands in the name of foreign shareholder.

Can this outstanding amount towards import of capital goods be converted to ECB or equity capital? Will that require prior approval of RBI?

DT -----

12. In case of import of capital goods, the credit period of Trade Credit shall be up to three years for import of capital goods. For non-capital goods, this period shall be up to one year or the operating cycle whichever is less.

In case where payment is outstanding or overdue for more than 3 years for capital goods by Indian Party will that be treated as "Deemed ECB" and will the matter go to the RBI for compounding?

RS -----

ROUND TRIPPING

13. Mr. A, a person resident in India, settled a Trust in the UK for the benefit of his Family Members, by making a remittance of GBP 1,000. The Trust was settled in 2010. The Trust made various investments in Companies in the UK. One such Company has been listed on the London Stock Exchange. As a part of the business of the Company, a subsidiary has been incorporated in India in 2019. Would this be considered as round-tripping of funds in the following scenarios:

The Trust holds 5% stake in U Co;

The Trust holds 51% stake in U Co

Does the percentage holding in U Co by the Trust have relevance to determine whether there is round tripping of funds?

DT -----

14. F Co has investments in many countries including India. I Co wishes to purchase 20% stake in F Co for exposure to global business. If investment has already been made in India, when I Co purchases shares of F Co, will it be considered as round tripping of funds?

RS -----

15. If an Indian Co. has pre-existing FDI and then the company makes ODI in the company from whom it received FDI earlier, will this transaction be considered as round-tripping transaction if such investment is made out of company's own funds and not FDI funds?

DT -----

DEPOSITS

16. Mr. A takes up employment in Malaysia. He currently operates the following Bank Accounts / Deposits jointly held with his spouse who is resident of India under FEMA.

Nature of Deposit	Type of Holding	Amount
Fixed Deposit	First Name	Rs. 10,00,000
Current Account	First Name	Rs. 20,00,000
Resident Foreign Currency Account - RFC(D)	First Name	US \$ 50,000
Savings Account	Second Name	Rs. 35,00,000

Question:

Mr. A needs expert advice of the Brains Trustees for action required by him upon change in his residential status

RS -----

FDI - FOREIGN DIRECT INVESTMENT

17. A Indian LLP, an existing LLP with two resident partners who were sharing profit / losses equally invited Mr. A, a Non-Resident, to join LLP as 1/3rd partner. The fair value of the LLP was determined to be Rs. 7 Cr as per the internationally accepted pricing methodology resulting into premium of Rs. 6 Cr.

DT -----

Questions:

The LLP wants expert advice on following FEMA issues

(i) Whether 33.33% share offered to a non-resident partner will amount to transfer of shares by resident partners to a non-resident?

(ii) Mr. A remitted Rs. 2.50 Cr. which included premium of Rs. 2 Cr. Where will the premium of Rs. 2 Cr. received from Mr. A be credited?

18. I Co. is a wholly owned subsidiary of FCo. FCo. enters into an arrangement with a Foreign bank (or foreign branch of an Indian bank) to issue SBLC in favour of the Indian bank of ICo, which in turn discounts the same to extend a loan to ICo.

RS -----

Questions:

(i) Is the above arrangement permissible under the FEMA regulations?

(ii) What would be the implications when FCo makes a payment against the SBLC to its bank?

(iii) Will there be any change in the answer if FCo holds 10% or 15% of the shares in I Co rather than 100%?

(iv) Would the implications be different if F Co is a group company of I Co and not a direct shareholder?

19. I Co is required to reimburse guarantee fees is to the parent company and the same is outstanding for more than 3 years. Is it deemed to be in violation of FEMA regulations? Is an approval required from the RBI?

DT -----

20. F Co wishes to incorporate a subsidiary in India. The subsidiary will use technology to guide customers for micro savings. There will be no human intervention. Can the business of the subsidiary be considered as Information Technology or will it be considered as financial consultancy services.

If considered as financial consultancy services, these services are unregulated by any Financial Sector Regulator. As per Press Release of 16 April 2018, for non-fund based activities, the minimum FDI capital is USD 2 million under approval route. Considering that the limit has been provided by a Press Release which is not incorporated in the Law, what is the validity of the Press Release?

RS -----

ODI- OVERSEAS DIRECT INVESTMENT

21. I Co is an Indian company, engaged in the business of hospitality and makes investment in shares of group companies and earning income therefrom as well as providing management / advisory services.

B Co UK, a wholly owned subsidiary of I Co, is a holding cum operating entity of the I group engaged in the hospitality sector and is in the process of setting-up its greenfield operations in Australia through its Melbourne branch. B UK also has operating assets in Amsterdam and Germany which it had acquired from third parties. Additionally, B UK also provides consulting services to the group companies interalia asset management services, back office accounting support etc.

B UK along with a JV partner is contemplating to acquire the entire business operations of C Hotels by acquiring 100% stake in B Investments S.a.r.l (Luxembourg). Further, there is no intention of the Purchasers to lease any hotel asset of the group to third parties and / or sell out any asset individually without the business operations.

The IP of C Hotels group is held by B Investments. Post acquisition B Investments will charge a royalty for use of IP.

B Investments has obtained a debt from third party banks, which has been pushed down into the group companies. It charges interest from the group entities, which is used to pay interest due to the banks (cash pooling). Currently, B Investments is not charging any fee for cash pooling services, but shall charge for the same post acquisition.

C Hotels BV (Netherlands) does not have any operations / income. C Hotels BV along with C GP1 Limited (UK) holds 100% shareholding of C Hotels Property LP (UK) which in turn owns the UK real estate. UK operations are housed under C Hotels Limited (UK), which pays the lease rentals.

C Hotels SAS (France) holds the real estate hotel in France and has leased out the same to Hotel Cayre SAS which operates the hotel and pays lease rentals to C Hotels SAS.

DT -----

Questions:

(i) Whether the proposed acquisition in the existing structure on as is basis is permissible under automatic route from ODI perspective?

(ii) The structure has group companies which are Property Cos earning lease rentals, Op Cos managing business operations and SPVs. Whether this overall structure is fine from ODI perspective or that each entity in the structure would need to comply with the extant ODI guidelines?

(iii) As per Master Directions on ODI, it is possible to make the investments through "A" SPV (i.e. a non-operating holding company) where the Target is an operating Company. In view thereof, can there be more than one SPV in the group structure (horizontally) from ODI standpoint?

(iv) Whether D Investments could be said to be engaged in financing activity from ODI standpoint?

(v) While submitting the ODI filing for the proposed acquisition of C through B UK, which sector should be selected from the drop down menu in the Form ODI? Also is a single ODI form required to be filed, reporting all the entities acquired under the structure, with details of each entities to be provided separately?

22. Mr. A formed a 100% owned FZC in UAE in March 2016 and as per Articles & Memorandum of the FZC he has subscribed to shares worth UAE DHS 1,00,000. Since there was no need of money, he has so far not contributed any capital to the FZC. The FZC has earned following income during last 4 years -

2016	DHS	52.500
2017	DHS	1,62.500
2018	DHS	12,15.500
2019	DHS	22,15,500

Question:

Mr. A is of the view that since he has not contributed any capital, he was not required to obtain UIN from the RBI and also file APR for the past four years. Since one of his friends has warned him about the possible consequences under FEMA, he is seeking expert opinion of the Brain Trustees to confirm his understanding.

RS -----

23. In case of ODI by LLP, will balance of partner's current capital be treated as a part of paid-up capital?

DT -----

24. If shares in a foreign company are gifted by Person Resident outside India to Person Resident in India, is it covered under general permission under Part III of FEMA 120? If it is a direct investment, would it require approval under Part I?

RS -----

25. An Indian Company is contemplating of incorporating JV/WOS outside India which will be engaged which is engaged in the business of purchase of immovable property outside India and leasing it (may be on Airbnb or otherwise). The definition of real estate business under FEMA 120/2004 does not cover leasing activity. Whether the investment in Overseas JV/WOS engaged in the business of leasing of immovable property is permitted under automatic route?

DT -----

26. I Co has advanced a loan to its WOS in Singapore. When the WOS repays the loan, what are the compliances by I Co? Is it considered as disinvestment?

RS -----

27. I Co has a WOS in Singapore which further has a step-down subsidiary in Malaysia. S Co and M Co are being amalgamated and M Co will continue the business. What are the regulations to be complied with?

DT -----

I Co has given a loan to a JV in Mauritius M Co. M Co is incurring losses and is not able to repay loan. WOS proposes to convert this loan into Optionally Convertible Preference Shares. Is there any regulation of FEMA prohibiting / permitting such transaction? Also is valuation of these preference shares necessary? If yes, then by whom?

28. As per Regulation 6 of FEMA Notification 120/RB-2004 dated July 7, 2004 as amended from time to time, an Indian Party, without prior approval of the Reserve Bank, may transfer by way of sale to another Indian Party which complies with the provisions of Regulation 6 or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to the conditions. One of the criteria being that the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to Reserve Bank.

- If the above mentioned criteria is not satisfied, whether the company has to apply to Reserve Bank for permission to transfer or sale or disinvest from the WOS outside India?
- If the Indian Parties making ODI, disinvested through liquidation/ winding-up before period of one year due to economic factors beyond its control, whether such disinvestment shall attract compounding? Or whether this shall require prior approval?

RS -----

29. Under the ODI regulations, an Indian party can disinvest by way of sale its overseas JV / WOS with a write-off where the overseas investment (or financial commitment) in the overseas JV/ WOS does not exceed USD 10 million. Is this limit qua each Overseas JV or WOS of the Indian Party? Therefore, if there are two Overseas JVs or two Overseas WOS then can the total write-off be upto USD 20 million?

DT -----

30. Indian Entity operating in financial sector and intending to make overseas investment has made ODI in JV outside India through approval route. Such JV had further made investment in two companies overseas (SDS 1 & SDS 2). Subsequently, due to restructuring in foreign group companies, the JV was dissolved and SDS 2 ultimately became JV entity (due to share swap). The restructure and the status has not been intimated to AD/RBI till date.

- Whether such restructuring and changes in JV and SDS status will require Prior RBI approval (as initial ODI was under Approval route)?
- Also this change in JV & SDS did not involve any inflow or outflow of funds. Whether Form ODI - I for SDS new investment is to be filed first or Form ODI Part IV is to be filed for disinvestment in JV?
- Due to delay in reporting of above to RBI whether this will amount to compounding?

RS -----

31. Indian Entity has made overseas investment in the UAE based company. The said investment comprises of 0.015% of the total holding. Due to continuous losses in the overseas entity, the Indian Company intends to devalue the investment value in its books of accounts. The underlying transaction is covered by FED Master Direction No. 15/2015-16, section B-12 i.e. for restructuring of the balance sheet of the overseas entity involving write-off of capital and receivables. However, this is subject to condition of having atleast 51% stake in overseas entity.

- In case the Indian company is holding only 0.015% in overseas entity, can the Indian company opt for devaluation?
- Will it require RBI prior approval? Can the company write off more than 25% of the investment value at one go?

DT -----

LRS-ODI

32. As per the FAQs on LRS, there is no distinction between individual and proprietorship. So, in case of ODI by a proprietorship concern, will the LRS limit of USD 2,50,000 apply?

RS -----

33. Whether overseas bank account opened under LRS can be used for making remittances for ODI?

DT -----

34. A resident individual satisfying the criteria as per Schedule V of Notification 120, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India.

As per regulation 20A of Schedule V, the JV or WOS, to be acquired / set up by a resident individual under this Schedule, has to be an operating entity only and no step down subsidiary is allowed to be acquired or set up by the JV or WOS.

- In case JV has further investment only to the extent of 10% in SDS (due to technical collaboration with overseas party), whether JV has to disinvest and dilute the shareholding from such SDS? If yes, whether the funds after disinvestment should be held in JV or repatriated to India by Resident Individual?
- Also what if the JV set up by Resident individual ceases to be an operating entity after 3-4 years of investment?

RS -----

OTHERS

35. An Indian holding company appoints Indian consultant to incorporate subsidiary outside India. For its services, Indian holding company makes advance payment to Indian consultant, which would then be reimbursed by the subsidiary after its incorporation. Is the payment of advance for services, a violation of Sec. 3 (b)?

DT -----

36. Company, I Co (India) is a 100% subsidiary of ABC GmbH & Co. KG, Germany.

Principal business activities of the Indian company comprise of marketing services in respect of Textile Machineries, providing erection & commissioning, field services etc. to 3rd party Indian customers as well as to other customers of our parent company, trading of spares and assembly of control panels. The company has a team of about 35 engineers who provide above mentioned services. The parent company (Germany) has a customer by the name PQR in Turkey. 2 engineers of I Co were deputed to carry out technical services to PQR for & on behalf of ABC. The said 2 engineers were required to sign a fixed term employment contract with PQR. In addition to the employment contract, the 2 engineers were asked to open bank account in Turkey. This was with the view that out of the monthly deposits made by PQR in the engineer's account (salary), certain amount would be withdrawn by PQR towards discharge of legal social security / other statutory obligations.

QUERIES :

Is the above arrangement valid / legal, considering that the engineers were ade to open bank account only with the primary objective of discharge of social security obligation by PQR?

RS -----

37. Is a branch office (B.O) permitted to operate anywhere in India or is the activity of the B.O limited to the state where it is opened? Do we need to inform RBI for operating from different site offices of B.O across India?

DT -----

38. A foreign shareholder supplies machine to its WOS I Co. in India. To pay the same it is also ready to give ECB to its WOS. I. Co will import the machine and receive ECB (after applying to RBI). Payment towards machine will be made from ECB proceeds and then ECB will be repaid as per MAM through internal accruals.

Is above transaction acceptable as per FEMA guidelines? (Import and ECB from same party?)

RS -----

39. Returning Indian – Section 6(4):
Nitin and his parents were UK residents. They had acquired assets including residential houses, investments, bank funds, shares in business company, etc. In 2019, Nitin and his mother has decided to come to India (and become Indian residents) to look after the Indian assets. Nitin’s father has stayed in UK. As a part of inheritance issues, they took advice from a CA. He advised them that if he receives any assets from his father, he will be able to retain the same in UK. However his mother’s assets will have to be brought back to India.

As property is large, the family decided to take a second opinion from another CA. That CA advised exactly the opposite. He advised that assets which he will inherit from his mother, can be retained abroad. However his father's assets will have to be brought into India.

Queries:

The family is confused and seeks the CTC delegates' collective advice. What is the correct view? Should the family go for RBI approval? If yes, when?

DT -----

- 40. FVCI investment in Holding company: An FVCI has invested in an Indian SPV (Holding company). The SPV has invested in a downstream operating company which is in the business of software.

Queries:

Is FVCI investment permitted in an SPV under FEMA Notification no. 20(R) or Non-debt instruments rules?

RS -----

