

The Chamber of Tax Consultants

Immovable Property in India and outside India – FEMA provisions

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**Naresh Ajwani
Rashmin Sanghvi & Associates
Chartered Accountants**

Immovable Property / Real Estate

- Immovable Property (IP) transactions across borders are Capital Account Transactions.
- Business in immovable property and acquiston of IP are considered separately.
- This presentation deals with :
 - A) Non-resident's transactions for IP in India – Non-debt Instrument Rules, 2019.
 - B) Indian resident's transactions for IP outside India – Notification no. 7(R) and LRS.[Master Direction & FAQs are also issued for guidance.]

A) Immovable Property in India by Non-residents

Regulations deal with:

- Acquisition and transfer of IP by NRI / OCI.
- Repatriation of funds on sale.
- Acquiring property for business in India.
- Purchase and sale of property by Foreign embassy, Diplomats and Consulate General.
- Joint acquisition of property by spouse (Non-NRI/OCI) of NRI / OCI.
- Acquisition by Long Term Visa holder.
- Prohibition on certain citizens.
- Mortgage of IP and loan.

Regulations...

- Erstwhile Notification no. 21 was replaced by new Notification no. 21(R) dated 26.3.2018.
- Notification 21(R) has been replaced by Non-debt instrument Rules, 2019 w.e.f. 17.10.2019
- Notification 21(R) & Non-debt instrument Rules 2019 are at par.
- Largely Master Direction & FAQs are no longer valid – but practically useful.

Regulations...

- In this presentation, erstwhile regulations means Notification No. 21 of 2000.
- Notification 21 had **different regulations for NRI and PIO** which created unintended difficulties. The new notification & rules has **one regulation for NRI and OCI**. Rules are most useful for NRI and OCI.
- PIOs as a category are no longer eligible to acquire IP with effect from 26.3.2018.

Regulations...

- Non-residents are primarily barred from acquiring IP in India.
- **However NRI / OCI can:**
 - Acquire property for holding/self-use.
 - Sell the property & repatriate sale proceeds abroad, most of the times.
 - Let out the property on rent & repatriate funds abroad after payment of taxes.
 - Bequeath the property to anyone.

Acquisition of Immovable Property by NRI and OCI

Meaning of Immovable Property

- “Immovable property” is not defined.

However acquisition, sale or dealing directly in immovable property is considered as “Non-dept instrument”. {R. 2(ai)(vii)}.

Meaning of NRI and OCI

- Rule 2(aj) defines NRI as citizen of India resident outside India.
- Rule 2(ak) defines PIO as person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.

What NRI / OCI cannot do?

- NRI / OCI cannot buy agricultural land, plantation property & farm houses.
- NRI / OCI cannot do Real Estate Trading, or trade in Transferable Development Rights.
(Where is it written? No where. However this is the understanding.)

Acquiring IP

- They can acquire any immovable property – **except** agricultural property/plantation/farm house.
- No approval from RBI is required. No declarations have to be filed.
- **Purchase** - Payment for purchase can be paid from abroad through banking channel, or from Indian account **ONLY**. No other mode.

Acquiring IP

- **Gift** – Only from a “relative” as defined in Companies Act 2013.

Acquisition can be from a resident, NRI or PIO.
(Not from anyone else).

[Under erstwhile regulations (Notification 21), acquisition by way of gift could be from a non-relative also. The donor could be Indian resident, NRI or PIO.]

Transfer of IP

- They can transfer immovable property without any approval except as under:
 - **Non-Agricultural property** can be sold or gifted away to Indian resident, NRI & OCI (Not to foreigners who are non-residents.)
 - **Agricultural Property** can be sold or gifted, only to **Indian residents** (even if they are foreign citizens.)

Repatriation of sale proceeds

- Subject to guidelines, funds can be repatriated abroad without any approval.
- **Repatriable Investment:**
 - If property was purchased in FX, sale proceeds can repatriated.
(Earlier restriction of repatriation upto cost of the property has been removed.)
 - Property should not be agricultural property.
 - Repatriation is restricted to two house properties in case of residential houses.

Repatriation of sale proceeds

- **Non-Repatriable Investment:**

Upto U.S. \$ 1 million can be repatriated. This limit is all-inclusive limit – not specifically for IP.

PIO

- PIO can continue to hold the IP if it was acquired as per the law prevailing at the time of acquisition.
- Such PIO is eligible for repatriation of sale proceeds like an NRI / OCI. (Para 8.2 of MD.)
- PIO is also eligible for repatriation of funds upto US\$ 1 mn.

Loan for IP

- NRI / OCI can take a loan from Indian banks / FIs and employers. (However conditions not yet prescribed.) [R. 7B(i) of Notification 3(R)]
- Repayment of loan can be made from NRE A/c / foreign funds / NRO A/c.
- On sale, funds eligible for repatriation if loan repaid from NRE A/c / from abroad.
- Repayment of loan by relatives now NOT permitted. Earlier it was permitted.
- **PIO also eligible** for the above facility if loan was obtained as per erstwhile Rupee loan notification (No. 4).

Renting of IP

- NRI / OCI can rent their property.
- Rent can be repatriated abroad after payment of taxes. It is a current account transaction.
- PIO is also eligible for the above.

**Acquisition of Immovable Property by persons
OTHER THAN NRI and OCI**

Foreign Citizens resident in India

- FEMA applies only to non-residents.
- Indian residents can buy immovable property, without any approval.
- Foreigners buy property in India – cause for concern to RBI. People have invested under FDI for guest houses and resorts.
- Restriction on citizens of 11 countries (if they are residents) on acquisition of property is ultra-vires. (Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan and North Korea)

Foreign Citizens resident in India

- **Transfer or property:**

As long as they are Indian residents, no approval is required.

If they become non-residents later, no approval is required for transfer to Indian resident. [R.30(2)]. The resident is otherwise eligible to purchase (i.e. he should not be a citizen of 11 countries).

Transaction should be through banking channel.

Foreign Citizens resident in India

- **Repatriation of funds:**

As long as they are Indian residents, they can remit funds as per LRS.

If they become non-residents later, they can sell the IP as per S. 6(5). However approval is required for repatriation of funds. [R. 29(1)].

Non-NRI/OCI spouse

- Non-resident (Non-NRI/OCI) who is a spouse of NRI / OCI can acquire one property in India (**Spouse of Indian resident is not eligible**).
- Property to be jointly held with NRI/OCI spouse.
- Payment should be in FX through banking channels or a permitted account held in India.
- Marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.
- The person is otherwise eligible (i.e. he should not be a citizen of 11 countries).

Non-NRI/OCI spouse

- No approval is required for transfer to Indian resident. [R.30(2)]. The resident is otherwise eligible to purchase (i.e. he should not be a citizen of 11 countries).
- Transaction should be through banking channel.
- Repatriation of funds will require an approval.

Long Term Visa Holder

- Eligible person - Citizen of Afghanistan, Bangladesh or Pakistan; belonging to minority communities in those countries - Hindus, Sikhs, Buddhists, Jains, Parsis and Christians; who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government.
- Property - Only one residential IP for self-occupation; and Only one IP for carrying out self-employment.

Long Term Visa Holder

- IP should not be located in and around restricted/protected areas so notified by the Central Government and cantonment areas;
- Person submits a declaration to the Revenue Authority of the district where the property is located, specifying the source of funds and that he/she is residing in India on LTV;
- Registration documents of the property should mention the nationality and the fact that such person is on LTV;

Long Term Visa Holder

- Property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities;
- Copy of the documents of the purchased property shall be submitted 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);

Long Term Visa Holder

- Person shall be eligible to sell the property only after acquiring Indian citizenship. However, transfer of the property before acquiring Indian citizenship shall require prior approval of DCP/FRO/FRRO concerned.

IP for Business

- Non-residents who set up branch or a place of business in India, can buy immovable property, which is necessary & incidental to carrying out the activities.
- However, entities of 11 countries referred to earlier require prior approval.
- Liaison office cannot buy immovable property.

IP for Business

Contd...

- A declaration has to be filed within 90 days in form IPI.
- Mortgage of property can be done for taking a loan from a bank in India.
- For sale, RBI approval is required.

IP for business

- NRI / OCI card holders are permitted to invest under Schedule 4 of FEMA Notification no. 20(R) to invest on non-repatriable basis.
- Investment can be for earning lease income.

Foreign Embassy

- Foreign embassy/ Diplomat/ Consulate General can **purchase or sell** IP (other than agriculture property) if –
 - They obtain clearance from MEA.
 - Payment for purchase is made from abroad through banking channels.

[Not stated – but sale also should be through banking channels.]

Lease of Property

- Acquiring property by non-residents by way of lease upto 5 years, is permitted. (Liaison office of a foreign company can acquire property only through this route.)
- It is not a capital account transaction.

Immovable Property – Other issues

Inheritance / Bequests

- An NRI can acquire property through inheritance from:
 - from non-resident if he had acquired IP as per then prevailing law, or
 - from Indian resident.
- An NRI can bequeath property in his will to another non-resident or an Indian resident.
- An Indian resident can also bequeath property to non-resident.

Inheritance / Bequests

Contd...

- Even agricultural property can be bequeathed/inherited.

However restrictions can be put on use / repatriation.

Bequeath IP to NR Heir

- IP in India can be bequeathed to NR heir.

Can it be distributed before death?

- Indian resident relative can gift the IP to NRI / OCI. LRS limit does not apply.
- Indian resident should not buy & gift to NRI / OCI. One should not do things indirectly which cannot be done directly.

Inheritance by Non-NRIs

- Non-NRIs (foreign citizens who are non-residents) require approval to inherit IP and hold the same.
- Sale - No approval is required for transfer to Indian resident. [R.30(2)]. The resident is otherwise eligible to purchase (i.e. he should not be a citizen of 11 countries).

Inheritance by Non-NRIs

- A person can repatriate upto US \$ 1 mn. per annum without approval on account of legacy, bequest or inheritance to a foreign national resident outside India. [Notn. 13(R), 7(1)(i)(a).]
[However this is for liquid assets.]
- For IP, an approval is required for repatriation.
- However if inheritance is from resident u/s. 6(5), upto US\$ 1 mn. can be repatriated. [Notn. 13(R), Reg. 4(1)(iii).]

Change of Residential Status / Citizenship

- Resident who becomes NR – can continue to hold property in India. Agricultural activities cannot be conducted in case of agricultural properties. [S. 6(5)]
- People who acquire foreign citizenship – can continue to hold property in India.
They should acquire OCI card – although R. 33 is helpful.

Change of Residential Status / Citizenship

Contd...

- Non-resident who becomes Indian resident – can continue to hold property. Repatriability is lost.
- Foreign citizens who become Indian citizens – can continue to hold property.

Charge on IP - ECB

- ECB by Indian residents can create a charge on IP in India.
- On invocation of charge, the foreign lender can sell IP only to Indian resident & sale proceeds can be repatriated to liquidate the ECB. (Any other loan cannot be recovered by sale of the hypothecated IP.)

B) Immovable property outside India by Indian Residents

IP Abroad – by Residents

- Acquiring IP abroad is a Capital Account Transaction. Notification No. 7(R) regulates it.
- Normally IP abroad is prohibited.
- IP abroad can be acquired as under:
 - Purchase under LRS.
 - Gift / Inheritance under certain circumstances.
 - From RFC account.
- Foreign nationals are exempt from regulations.
- IP acquired on or before 8.7.1947 and continued to be held with RBI approval are exempt from regulations.

Purchase of IP Abroad by Residents

- Purchase is permitted under LRS.
- Lease of IP is permitted.
- Sale is permitted.
- Retaining of funds abroad from rent & sale is permitted.
- Re-investment of those funds is permitted.
- Joint holder can be a non-resident who is a relative provided there is outflow of funds from India.

Relative means – husband, wife, brother, sister, lineal ascendant or descendent.

High Value IP

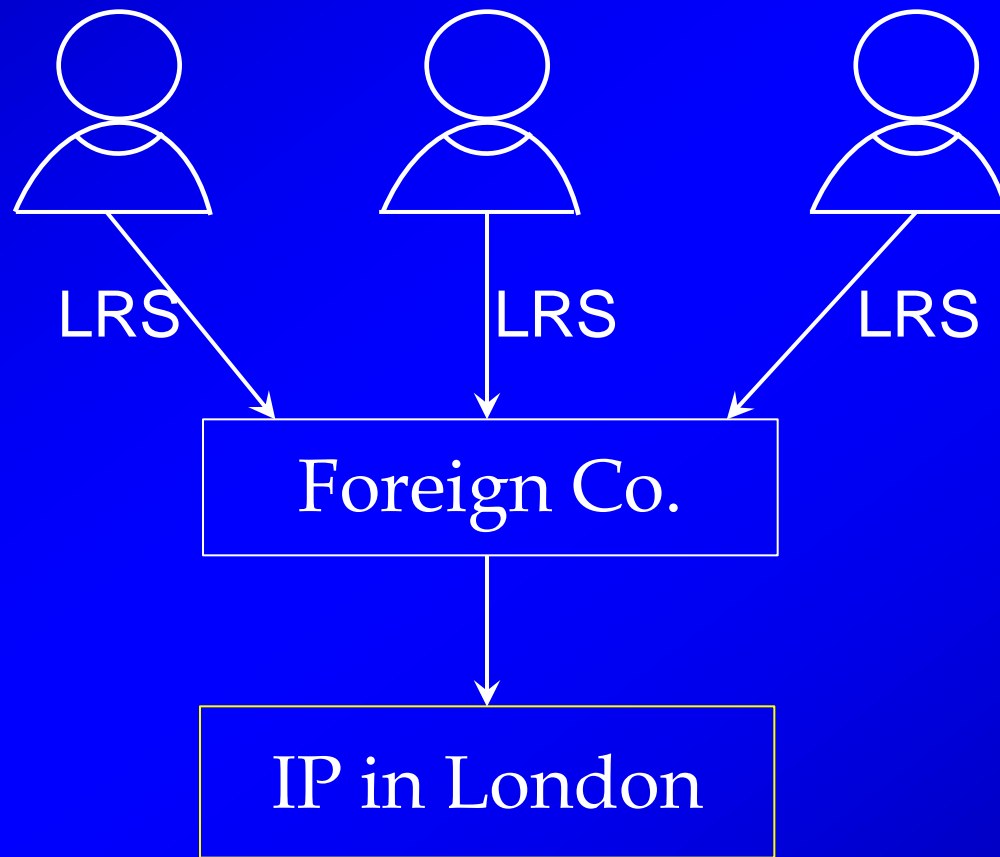
- An individual can remit money under LRS in foreign bank account and buy IP when sufficient funds are available.
- Family members can remit the funds & buy it jointly – **with all members as joint holders.**

Loan for IP

- One cannot take a loan – in India or abroad – to buy IP.
- Booking of flat and Installments – technically not all right as the person is taking up a commitment to pay to NR. Legally, LRS can be withdrawn in future by RBI.

[AP circular 32 dated 4.9.2013 states that if there is a contract for payment in instalments, payment may be made within LRS. This was because in 2013, LRS was barred for immovable property.]

Corporate Structure - LRS



Corporate Structure - LRS

- Investment after 5.8.2013 is not permitted in a company which does not have operating business.
- Investment before that was permitted.
- However, RBI has taken an adverse view. See next slide ...
- Even prior to 5.8.2013, loan in foreign co. was not permitted.

Corporate Structure - LRS

- RBI advises –
 - Wind up, bring back proceeds + Compounding. This is because even today, holding IP through a foreign entity is not permitted.
 - If investment was before 8.5.2007, RBI may permit to hold ??

Business Investment - Branch

- A branch of Indian company can buy IP for business or staff residence. Notn. 7(R), Reg. 5(3).
- Sale requires RBI approval.

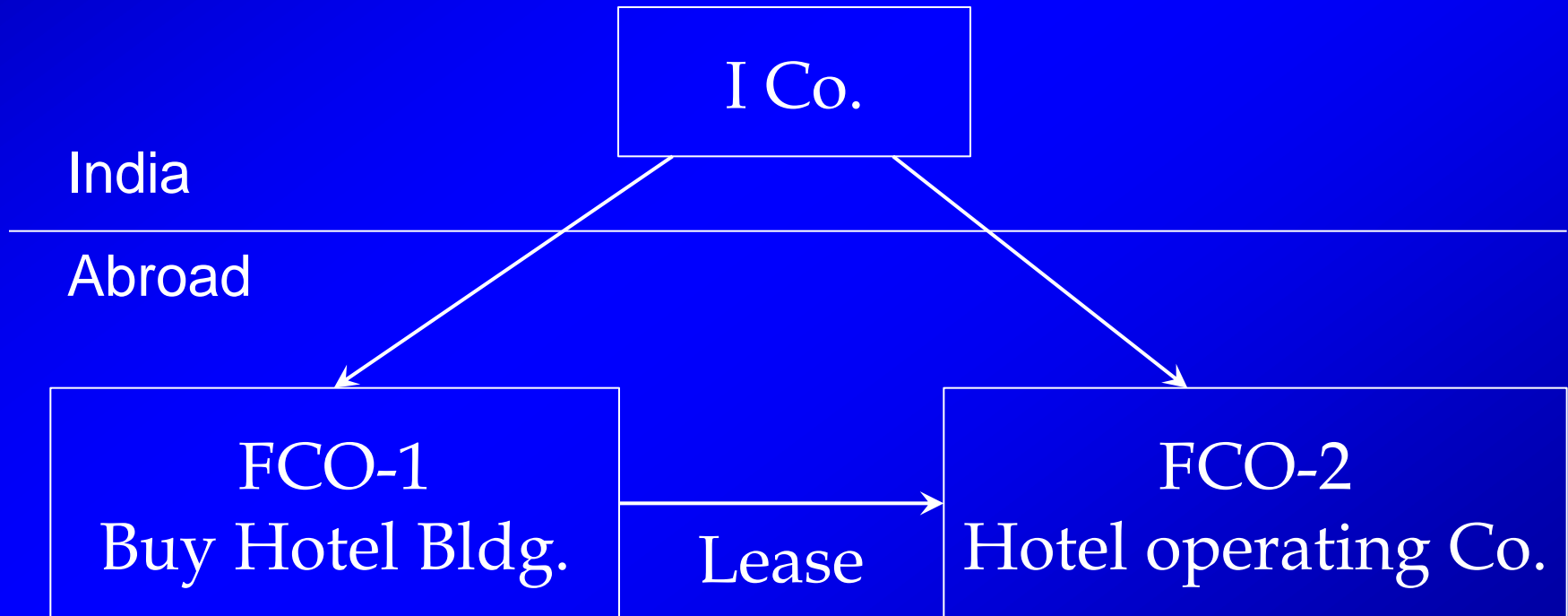
Business Investment - Corporate

- Under FEMA Notification 120, if foreign company buys IP for its own use, it is permitted.

[IP should be commensurate with business.]

Business Investment - Corporate

- JV / WOS abroad can construct & lease the IP.
- Is the following structure permitted ?



Business Investment - Corporate

Contd ...

- Typically for some sectors like hotel & pharma, investors would like to keep IP and business separate. They would like to buy & lease the property to operating co.
- The structure is not permitted – unless the IP is constructed by FCO-1 itself.

IP under LRS

- Can he **gift** it to another Indian resident? Can the donee retain the IP abroad?

Can Indian resident **inheritor** retain the IP abroad if deceased is an Indian resident?

Yes. The donee / inheritor can retain the property abroad. Notn. 7(R), Reg. 5(2).

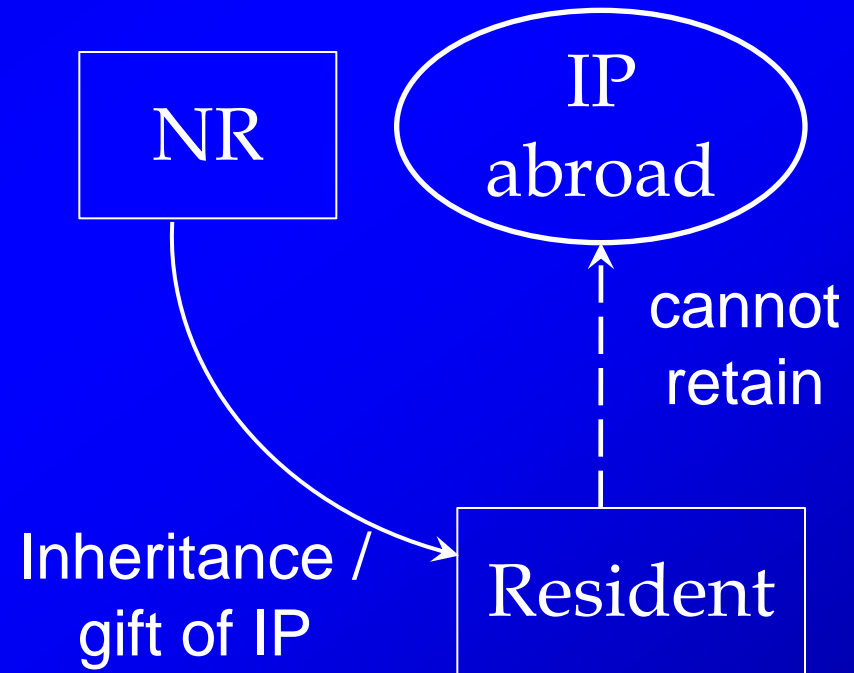
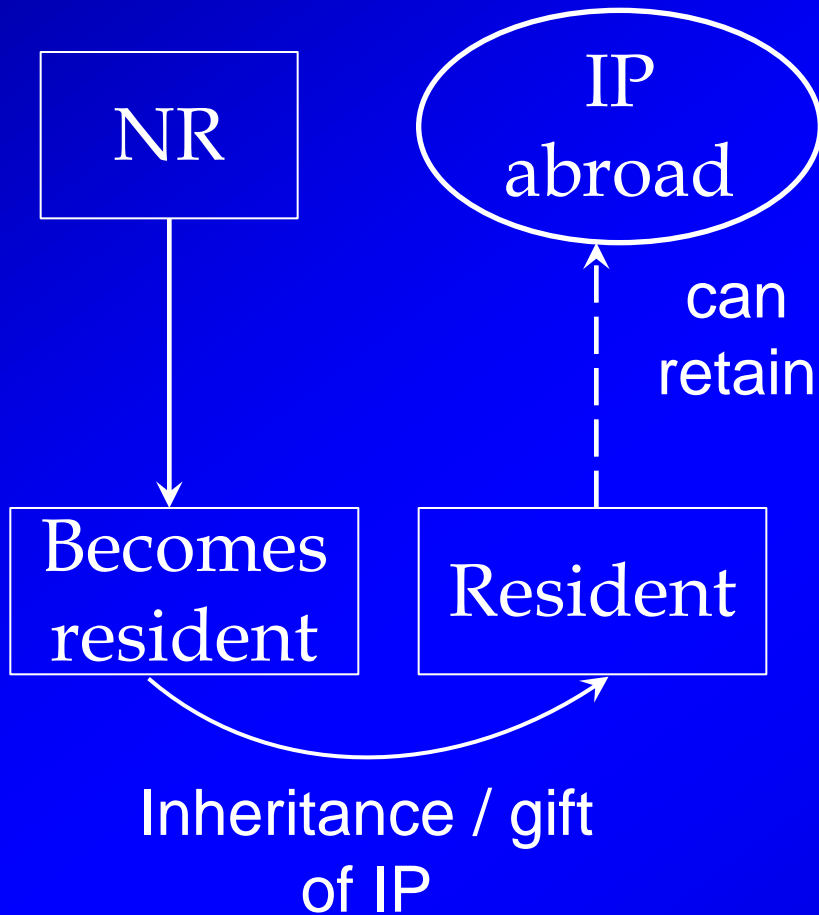
- As long as the Indian resident has acquired the IP as permitted under FEMA, the donee / inheritor can acquire the property from such person.

[Permitted from 21.1.2016.]

Returning Indian – S.6(4)

- Returning Indian can keep IP abroad which was acquired as a NR.
- If a Indian resident (say A) inherits IP from another resident (say B) who had acquired IP while he (i.e. B) was NR, then A can retain the property.
- But if B is a non-resident on death, A cannot retain the IP !

Inheritance of IP - S. 6(4)



IP as remuneration

- Indian resident cannot acquire IP as remuneration for services rendered. A prior approval from RBI is required.

Thank you.
Questions and comments are welcome.

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Naresh Ajwani
Chartered Accountant
Rashmin Sanghvi and Associates
naresh@rashminsanghvi.com