

# CHANGE IN RESIDENTIAL STATUS

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# Residential Status under FEMA

- Under FEM Act residential status is of two types:
  - Person resident in India
  - Person resident outside India
- The Current Account Rules under FEMA, also refer to '**Person Resident but not permanently resident in India**'
- Under FERA, citizenship was considered as deciding factor
- FEMA lays emphasis on 'residing' which denotes permanency
- The definition of "Resident" is silent regarding the residential status of students going abroad for education.



# Residential Status under FEMA

- PERSON RESIDENT IN INDIA [Sec. 2(v)(i) of FEMA]:

Residing in India for > 182 days during the course of preceding F.Y. but doesn't include

- going out of India or staying outside India

- for taking up employment
- for carrying business or vocation
- for any other purpose in such circumstances as would indicate his intention to stay outside India for uncertain period

- coming to India or staying in India otherwise than

- for taking up employment
- for carrying business or vocation
- for any other purpose in such circumstances as would indicate his intention to stay in India for uncertain period

- PERSON RESIDENT OUTSIDE INDIA [Sec. 2(w) of FEMA]: a person who is not resident in India.



# Analysis of Definition

- Unlike Income tax, wherein residential status of a person is determined only on the basis of physical stay in India, under FEMA, it is the **intention** of 'leaving India' or 'coming to India' determines the residential status
- However, definition does refer to physical stay in India.
- The better view however should be – “**Intention**” prevails over “**Physical Stay**”.



# Reference to FEMA and Government Press Release emphasizing “Intention”

- **Para 7 of Schedule 1 of FEMA Notification No. 5(R) – Deposit regulations**

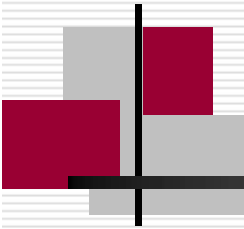
*NRE accounts should be re-designated..... at option of account holder immediately upon return to India for taking up employment or for carrying on business or for any other purpose indicating intention to stay in India.....*

**Above para does give an indication that physical stay is secondary.**

- **Physical condition only relevant for buying of Immovable Property as Resident (specially in case of foreign nationals).**

- **Press Release of Ministry of Finance dated 1<sup>st</sup> February 2009 – Government’s advice on acquiring land by persons resident outside India**

**Travel related documents and nature of Visa can establish intention of a person.**



# Residential Status under FEMA- Person Resident but not permanently resident

- Explanation to Schedule III of Current A/c Rules
- ....., a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed 3 years, is considered to be *a person resident but not permanently resident in India*.
- Purchase and Sale of foreign security by a person resident in India - Regulation 4(c) of Notification 120



# Residential Status under FEMA for Students

- A.P. (Dir Series) Circular no. 45 dated 8/12/2003, states that since the students stay abroad for more than 182 days in the preceding financial year and they intend to stay outside India for an uncertain period, they 'can be' treated as a person resident outside India.
- The student has a choice whether to be a resident or a non-resident under FEMA.



# Definitions of Non Resident Indian (NRI) in different Regulations

- NRI is defined in FEMA Notification No. 3R – Borrowing and Lending Regulations, 5R – Deposit Regulations, 13R – Remittance of Assets, It is same in all the regulations.

'Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India.

- In Notification No. 396 (Debt Instruments Regulations) and Non Debt Instruments Rules –

NRI means an individual resident outside India who is a citizen of India.





# Definitions of Overseas Citizen of India (OCI) in different Regulations

- OCI is defined in FEMA Notification No. 3R – Borrowing and Lending Regulations as –  
'Overseas Citizen of India (OCI) cardholder shall have same meaning assigned to it under Section 7(A) of the Citizenship Act, 1955 means a person resident outside India who is a citizen of India.
- In Notification No. 396 (Debt Instruments Regulations) and Non Debt Instruments Rules –  
OCI means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under section 7A of the Citizenship Act, 1955.



# OCI under Section 7A of Citizenship Act, 1955

- (a) any person of full age and capacity,—
- (i) who is a citizen of another country, but was a citizen of India at the time of, or at any time after the commencement of the Constitution; or
  - (ii) who is a citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution; or
  - (iii) who is a citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947; or
  - (iv) who is a child or a grandchild or a great grandchild of such a citizen; or
- (b) a person, who is a minor child of a person mentioned in clause (a); or
- (c) a person, who is a minor child, and whose both parents are citizens of India or one of the parents is a citizen of India; or



## OCI under Section 7A of Citizenship Act, 1955

(d) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section:

Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India:

Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section.



# Definition of Person of Indian Origin (PIO) in different Regulations

- PIO is defined in FEMA Notification No. 5R – Deposit Regulations and 13R – Remittance of Assets as –

‘Person of Indian Origin (PIO)’ means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

- Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
- Who belonged to a territory that became part of India after the 15th day of August, 1947; or
- Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c)

Explanation: for the purpose of this sub-regulation, the expression ‘Person of Indian Origin’ includes an ‘Overseas Citizen of India’ cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955



## PIO vs. OCI

- Relevance of PIO is only limited to Deposits Regulations.
- For all other purposes OCI is relevant.
- Difference in definition under certain situations

Mr. A an Indian citizen is staying in Indian Citizen is staying in Singapore on work visa. He marries a Singaporean woman. His wife wants to invest in NRE FDs in India and also invest in house property in India.

- Upon Marriage, she qualifies as PIO and can open NRE FD on an immediate basis.
- However, unless she obtains OCI cardholder (minimum 2 years), she does not qualify as OCI and cannot invest in house property in India either jointly or singly.



# EMIGRATING INDIANS

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## SECTION 6(5) of FEMA - STATUS OF ASSETS IN INDIA

- A person resident outside India may **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 resident in India or inherited from a person who was resident in India.
- Assets (Share / Securities, Immovable Property and Indian Currency) which were acquired at time when a person was resident in India can be continued to be held even after he turns out non - resident.
- The same can even be transferred or invested.
- Further, NR can inherit the same from a resident u/s 6(5) of FEMA.



## SECTION 6(5) of FEMA - STATUS OF OTHER ASSETS IN INDIA

- Whether other assets like Jewellery, Paintings, Silver Articles etc., interest in LLP or Partnership Firm can also be in terms of Section 6(5)?
- **Jewellery, Paintings, Silver Articles etc. -**
  - ❖ 6(5) only refers to specific assets viz. currency, securities and immovable property.
  - ❖ However intention is to permit NRI to own all assets which he was owning prior to turning NRI.
  - ❖ Thus, all assets can be continued.





## SECTION 6(5) of FEMA - STATUS OF OTHER ASSETS IN INDIA

### ■ Interest in Indian LLP -

- ❖ Intention of 6(5) is to permit NRI to own all assets which he was owning prior to turning NRI.
- ❖ NRI can continue even as partner of Indian LLP even after becoming NRI.
- ❖ Fresh investment in LLP towards capital may be made through NRO to make it distinctively clear that fresh investment is also on non-repatriation basis.
- ❖ Fresh investment in form of loan cannot be made to LLP.
- ❖ Existing Loan to LLP may be continued. However repayment of loan by LLP or firm shall be made to NRO account.



## SECTION 6(5) of FEMA - STATUS OF OTHER ASSETS IN INDIA

### ■ Interest in Indian Partnership Firm -

- ❖ Intention of 6(5) is to permit NRI to own all assets which he was owning prior to turning NRI.
- ❖ Unlike LLP, NRI can even continue to be as partner of Indian Partnership Firm even after becoming NRI.
- ❖ Fresh investment as capital in firm to be made compulsorily through NRO.
- ❖ Fresh Loan cannot be given.
- ❖ Indian Partnership Act permits firm having all NRIs/OCIs partners. No need of having resident partner.



## Impact on transactions done at time when person was resident in India

### Bank Accounts:

- Existing resident account should be re-designated to NRO account if person leaves India for uncertain period (for employment or business or vocation outside India).
- Balances in EEFC and RFC(D) can be credited to NRE/FCNR(B) accounts

### Demat Accounts:

- Sec 6(5) permits NRI to continue to own securities which were acquired while person was resident of India.
- Securities in Demat account can be continued to be held by NRI.
- NRI needs to Intimate Depository about change in his residential status.



## Impact on transactions done at time when person was resident in India

### Demat Accounts:

- Schedule 3 and 4 of Non Debt Instrument Rules permits NRI to make portfolio on repatriation and non-repatriation basis.
- The investment in securities (Demat Account) existing on date of becoming NRI will be characterized as non-repatriable investment.
- For making fresh investment on repatriation basis, new Demat account needs to be opened.

### Insurance Policies:

- Life /General Insurance Policy taken in India can be continued.
- No permission required for payment of premium.



## Impact on transactions done at time when person was resident in India

### PPF Account:

- As per F. No. 01/10/2016-NS dated 23rd February, 2018 an NRI can continue to operate PPF account and continue to invest further till the time it matures (after 15/5 years)
- After maturity account cannot be renewed.

### Foreign Currency Investment made outside India under LRS and ODI:

- All foreign currency investment made under LRS can be continued.
- In case of ODI transactions, upon turning NRI it will no longer remain ODI. Intimation to RBI is required to be given and Form ODI Part III will be required to be filed for cancellation of UIN.



## Impact on transactions done at time when person was resident in India

### Investment in Immovable Property outside India:

- Property bought jointly by Father and Son in 2018 under LRS.
  - ❖ Son intends to go for studies abroad in 2020.
  - ❖ Son intends to go for employment in 2020.
- Implications of Gift of property by Son to father?



## Gift of Overseas Property NRI/OCI to Resident

- ❖ Gift of immovable property situated outside India from NRI/OCI to resident is under approval route.
- ❖ Ref – FEMA Notification No. 7(R).
- ❖ Inheritance to Resident Indian is however under Automatic Route.



## Advantages of becoming NRI/OCI

- The income earned abroad need not be repatriated to India. He can make investments out of these earnings. He can retain foreign assets / security even after his return to India.
- NRI can remit up to USD 1 million out of sale proceeds/balances in their account maintained with an AD in India
- NRI can open a NRE / NRO Account.





## Caution Points upon becoming NRI

- ✓ The NRI may continue to subscribe to the PPF till maturity. However, they are not eligible to renew/ continue the PPF Account after maturity period of 15 years.
- ✓ The NRI cannot invest in agricultural land and plantations. They may continue to own existing Agricultural land acquired before attaining NRI status.
- ✓ The NRI cannot continue to be a partner in a partnership firm which is involved in agricultural/plantation activity or real estate business, i.e. dealing in land and immovable property
- ✓ Taking Life Insurance Policy of Indian Insurer while staying overseas can be cumbersome process and many private life insurance companies wants presence of Insured in India.
- ✓ NRI cannot receive loan in INR from non-relative in India.
- ✓ Existing loans under erstwhile regulation can be continued as permitted up to due date of repayment.



## Loan by NRI/OCI to its relative in India

### Regulation 4(B)(v) of FEMA Notification 3R:

- NRIs/OCIs can give loan to relative resident in India.
- Amount of loan may not exceed USD 2,50,000 or its equivalent.
- The limits is qua borrower.
- This loan will be subject to terms and conditions of RBI (which are not yet prescribed).
- In absence of any guidelines, the transaction may require prior RBI approval.



# Investment on Non-Repatriation Basis in India by NRIs/OCIs

## Schedule IV of Non-Debt Instruments Rules, 2019:

- NRIs/OCIs may purchase or contribute on non-repatriation basis in following:
  - Equity instruments of company on stock exchange or outside it.
  - Units of investment vehicle, on stock exchange or outside it
  - Capital of LLP
  - Convertible notes of startup company
- Investment shall be deemed to be domestic investment. Treated at par with investment made by residents.



# Investment on Non-Repatriation Basis in India by NRIs/OCIs

## Schedule IV of Non-Debt Instruments Rules, 2019:

- NRIs/OCIs may purchase or sell units of domestic mutual funds on non-repatriation basis which investment more than 50% in equity.
- **Prohibition:** Investment shall not be made in
  - Nidhi company, or
  - Company engaged in agricultural activity or plantation activity or
  - Real estate business or construction of farm houses or
  - Dealing in Transferable Development Rights.



# Acquisition of Immovable Property (IP) in India by Foreign Nationals

- **Foreign Nationals of other countries (except 11 countries viz. Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong and Democratic Republic of Korea) if resident of India can acquire IP in India.**
- **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



## Repatriation of Sales Proceeds on Selling of property upon return back to home country

- Foreign National while he was resident in India had acquired IP.
- After some years, he returned to his home country and left India permanently.
- He wishes to sell IP in India.
- Whether prior approval of RBI will be required to be obtained by foreign national for repatriation of Sales Proceeds of IP in India which was acquired by him when he was resident in India?
- Refer - **Rule 29 of Non Debt Instruments Rules:**



## Repatriation of Sales Proceeds on Selling of property upon return back to home country

- As per Rule 29(1), a person referred to in Sec 6(5) or his successor cannot repatriate sales proceeds of IP without general or specific permission of RBI.
- Section 6(5) refers to persons resident outside India and includes NRIs and PIOs.
- However, NRIs and PIOs can repatriate up to USD 1 million per financial year of sales proceeds of IP in terms of FEMA Notification No. 13(R).
- Thus restriction in Rule 29(1) applies to persons resident outside India except NRIs and PIOs.



## Sec 204 of Income Tax Act, 1961 - Person Responsible for paying Tax

- Sec 204(iia) – Person responsible for paying tax in case of sum payable to NRI is defined.
- It refers only foreign exchange asset which is Long Term Capital Asset.
- In such cases, it is Authorized Person is who is responsible for remitting such sum to non-resident and not broker.
- Such Authorized Person is responsible for paying tax.



# Snapshot of Investment Opportunities by NR under FEMA

Investment opportunities	NRI/OCI	Non Resident	Repatriation	Non Repatriation
Interest Free Loans to Close "Relatives" under USD 2,50,000 scheme [Reg 6(B)(iv) of FEMA 3(R) (In absence of prescribed conditions, same will require prior RBI approval)	√		√	
Lending in foreign currency in form of ECB to India corporate [Schedule 1 of FEMA 3(R)]	√	√	√	
Loans to persons other than companies	√			√
Deposit with partnership & proprietorship	√			√
Investment in Partnership Firm or Proprietorship Concern [Schedule 4 of Non Debt Instruments Rules)	√			√

# Snapshot of Investment Opportunities by NR under FEMA

Investment opportunities	NRI/OCI	Non Resident	Repatriation	Non Repatriation
Deposits under FCNR/NRE/NRO Account	√		√	√
Investment in Immovable Property (excluding agricultural land/farm house)	√			√*
Investment in Portfolio Scheme	√	√ RFPI	√	√
Investment under FDI Scheme (Schedule 1 of Non Debt Instrument Rules)	√	√	√	√
Domestic Investment under Schedule 4 of Non Debt Instrument Rules	√		√	√

\* - Repatriation of two residential properties is allowed to the extent of cost of immovable property.

# Snapshot of Investment Opportunities by NR under FEMA

Investment opportunities	NRI/OCI	Non Resident	Repatriation	Non Repatriation
Investment in NCDs (Schedule 1 of Debt Instrument Regulations)	√	√	√	√
Investment in Government Securities, Treasury Bills, Units of MF (Schedule 1 of Debt Instrument Regulations)	√	√	√	√
Investment in National Plan / Savings Certificates, National Pension Scheme (Schedule 1 of Debt Instrument Regulations)	√			√
Investment in Limited Liability Partnership (Schedule 6 of Non Debt Instrument Rules)	√	√	√	



# RETURNING INDIANS

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## SECTION 6(4) of FEMA - STATUS OF ASSETS OUTSIDE INDIA

- A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.
- Assets (Share / Securities, Immovable Property and Foreign Currency) which were acquired at time when a person was resident outside India can be continued to be held even after he turns resident.
- The same can even be transferred or invested.
- Further, R can inherit the same from a non resident u/s 6(4) of FEMA.



## SECTION 6(4) of FEMA - A.P. (DIR Series) Circular No. 90 dated 09/01/2014

Following transactions shall be covered in 6(4):

- **Foreign currency accounts** opened and maintained by such a person outside India when he was resident outside India;
- **Income earned through employment or business or vocation outside India** taken up or commenced while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
- **Foreign exchange including any income** arising there from, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.



## SECTION 6(4) of FEMA - COVERS FOLLOWING TRANSACTIONS

- A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefore are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.



## SECTION 6(5) of FEMA - STATUS OF OTHER ASSETS OUTSIDE INDIA

- Whether other Movable Assets like Jewellery, Paintings, Silver Articles etc., or Other Assets like interest in LLP or Partnership Firm outside India can also be continued in terms of Section 6(4)?
  - ❖ 6(4) also only refers to specific assets viz. currency, securities and immovable property.
  - ❖ However intention is to permit resident to own all assets outside which he was owning prior to turning resident.
  - ❖ Thus, all assets can be continued.
  - ❖ However with regards to Interest in Firm/LLP abroad it is advisable to take RBI permission.





## Impact on transactions done at time when person was resident outside India

### ODI-FDI structure:

- An individual was having a company outside India while he was being a non-resident.
- At that time such overseas company had made FDI in India.
- Upon return to India 6(4) permits to continue existing investment outside India.
- Therefore, whether ODI-FDI structure still be continued to be allowed?
- Whether Overseas company [i.e. 6(4) - Company] can make fresh FDI in India? Will it amount to round tripping?



## Impact on transactions done at time when person was resident outside India

### Bank Accounts:

- Foreign Bank Accounts can be continued to be held u/s 6(4).
- NRE accounts should be re-designated to resident accounts immediately upon return to India (for employment or business or vocation outside India).
- Funds in NRE accounts can even be transferred to RFC at option of the account holder.
- NRO accounts to be re-designated to resident rupee accounts.
- FCNR deposits can be continued till maturity. On maturity the same shall be converted to rupee deposit accounts or RFC account.



## Impact on transactions done at time when person was resident in India

### Insurance Policies:

- Life /General Insurance Policy taken outside India can be continued.
- No permission required for payment of premium.
- Maturity proceeds or amount of any claim due shall be repatriated to India within 7 days of receipt.



## Resident Foreign Currency (RFC) Account

- Individuals can open RFC Account
- No restrictions on utilization of funds in / outside India including restrictions of Schedule III to Current Account Rules.
- However Schedule I and II restrictions will apply like purchase of overseas lottery etc.
- Permissible Debits:
  - received as pension or any other superannuation or other monetary benefits from his employer outside India; or
  - realised on conversion of the assets referred to in sub-section (4) of section 6 of the Act, and repatriated to India; or
  - received or acquired as gift or inheritance from a person referred to in sub-section (4) of section 6 of the Act; or
  - referred to in clause (c) of section 9 of the Act, or acquired as gift or inheritance there from; or



## Resident Foreign Currency (RFC) Account

- received as the proceeds of life insurance policy claims/ maturity/ surrender values settled in foreign currency from an insurance company in India permitted to undertake life insurance business by the Insurance Regulatory and Development Authority.
- Balances in NRE.FCNR account on change in residential status.



## Analysis of Sec 3(b) of FEMA

- **3(b)-** *Save as otherwise provided in the Act, rules or regulations made there under, or with the general or with special permission of the Reserve Bank, no person shall no person shall-*

Make any payment to, or for the credit of any person resident outside India (NR) **in any manner.**

- **To the credit of NR**
- **For the credit of NR (on behalf of NR)**

Intention is to prohibit fulfilment of foreign exchange **obligation of a NR** by third party. Such third party could be R or NR.

- Can therefore it be said that resident's obligation if fulfilled by NR - it doesn't lead to contravention of 3(b)?



## SEC 3(b) read with FEMA Notification No. 14R

- As per Regulation 6(2) of FEMA Notification No. 14R any person resident in India can make payment in rupees:
  - 6(2)(i) - (For the credit of NR) Towards meeting expenses on account of boarding, lodging and services related thereto and travel to and from and within India of a person resident outside India who is on a visit to India.
  - 6(2)(iii) by company or person resident in India to non whole time director who is resident outside India and is on visit to India for company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India.
- Other payment otherwise not allowed. Does it lead to contravention of Section 3(b)?



## Sec 3(b) Case Laws

- For the credit of NR -
- A.V. Francis Alukka vs. Assistant Director, Directorate of Enforcement, Cochin [2015] 56 taxmann.com 31 (Kerala)
  - Petitioner made payment towards customs duty payable by the non-resident while importing car in India.
  - The adjudicatory authority with reference to FEMA Notification No. 16 held that payment for customs duty was not covered by the said notification and hence imposed penalty.





## Sec 3(b) Case Laws

- For the credit of NR -
- [2017] 81 taxmann.com 175 (ATFFE - New Delhi), Jaipur IPL Cricket (P.) Ltd. v. Special Director, Enforcement Directorate, Mumbai

Where 'E' of UK was successful bidder for Jaipur IPL franchise, i.e., Rajasthan Royales, in tender invited by BCCI and performance deposit was transferred from UK by person other than investor without approval from RBI, remittances were in contravention of section 3(b) and penalty was to be imposed on Rajasthan Royales



## Borrowing by Resident in INR

### ■ Regulation 6(B)(vi) of FEMA Notification No. 3(R)

- Resident can borrow in INR from NRIs/OCIs who are close relatives.
- RBI has not yet prescribed terms and conditions.
- Therefore, prior RBI approval may be obtained in absence of any guidelines.
- Borrowed funds must not be used for restricted end uses defined in Notification.
- In erstwhile regulations loan was to be repaid in 3 years.
- In case resident makes delay in repayment of loan beyond 3 years, leads to contravention and RBI may even ask for compounding.
- Refer CA No. 4537/2017 dated November 24, 2017 in matter of Basant Gurnani.



**THANK YOU**

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*AND*

*THEN DESIRE!!*

