

FDI in Real Estate Sector and Buying & Selling of Immovable Property in and outside India

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- Meaning of FDI in Real Estate.....Revised notification 20(R)
- Indian resident's transactions for IP outside India – Notification no. 7(R) and LRS.
- Non-resident's transactions for IP in India – Notification no. 21.
- Investment in Immovable property in India under Schedule I (Construction Sector)
- Investment outside India
Master Direction & FAQs are also issued for guidance.

FDI In Real Estate

- Immovable Property transactions across borders are Capital Account Transactions.
- Notification 20(R)/2017 issued by RBI regulates Foreign Direct Investment in India
- DIPP issues FDI Policy

- FDI in Real Estate is covered under –
- Construction Development : Townships, Housing, Built – up Infrastructure

- Industrial Parks

FDI In Real Estate – 20(R)

- 100% FDI Permitted into construction development projects
- Include Residential / commercial premises, roads, bridges, hotels, resorts, hospitals, institutions, recreational facilities, townships.
- City and regional level infrastructure.
- Each phase to be a separate project

FDI In Real Estate – 20(R)

- Exit option to investor – on completion of project / development of trunk infrastructure.
- What comprises of trunk infrastructure?
- Early exit option available? Yes – after lock in of 3 years (from each tranche) under Automatic route
- Transfer of stake instead of repatriation is permissible.

FDI In Real Estate – 20(R)

- Indian investee company permitted to sell only “developed plots”
- “Developed plots – where truck infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.
- What is “made available”? Whether raw road which is not cemented to no mortar road can be considered?

FDI In Real Estate – 20(R)

- Indian investee company responsible for obtaining necessary approvals.
- Monitoring agency for compliance of FDI conditions laid – State government / Municipal / Local body concerned which approves the building / development plans. **How?**
- FDI not permitted in Real Estate business, construction of farm house or trading in TDR

FDI In Real Estate – 20(R)

- Lock in not applicable to:
 - Hotels & Tourist resorts
 - Hospitals
 - SEZs
 - Educational Institutions
 - Old age Homes
 - Investment by NRI / OCIs

Thus, can a foreign investor exit keeping above projects under developed / incomplete and take its funds back?

FDI In Real Estate – 20(R)

- Transfer of ownership/control, post construction / completion of projects –
from person resident in India to person resident outside India – subject to lock in of 3 years of each tranche.

Transfer of IP not permitted in lock in period.

“Transfer” term defined – wide to cover any transaction of transfer. [10.2.(5) of Sectoral regulations]

FDI In Real Estate – 20(R)

(a) “**Real estate business**” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships.

(b) Earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business.

- REIT is excluded from Real Estate Business definition

FDI in Industrial Parks

- **"Industrial Park"** is a project in which quality infrastructure in the form of plots of developed land or built up space or a combination with common facilities, is developed and made available to all the allottee units for the purposes of industrial activity.
- Term “Infrastructure”, “Common Facilities”, “Allocable area” & “Industrial Activity” has been specifically defined.

FDI in Industrial Parks

- Foreign investment in Industrial Parks would to meet with the under-mentioned conditions:
- (a) it would comprise of a minimum of 10 units and no single unit shall occupy more than 50 percent of the allocable area;
- (b) the minimum percentage of the area to be allocated for industrial activity shall not be less than 66 percent of the total allocable area.

IMMOVABLE PROPERTY OUTSIDE INDIA BY INDIAN RESIDENTS

IP Abroad – by Residents

- IP acquired abroad is a Capital Account Transaction. Notification No. 7 (R) regulates it.
- IP abroad can be acquired as under:
 - Gift / Inheritance under certain circumstances.
 - Purchase under LRS.
 - From RFC account.

Purchase of Immovable Property Abroad by Residents

- Permitted to Residents:
 - Purchase under LRS.
 - Lease of IP.
 - Sale of IP.
- Retaining of funds abroad from rent & sale is permitted.
- Re-investment thereof is permitted.

IP by Resident

- 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.

This is specific requirement of RBI for IP

Loan for IP

- One cannot take a loan – in India or abroad – to buy IP.
- AP circular 32 dated 4.9.2013 : If there is a contract for payment in instalments, payment may be made within LRS.

Corporate Structure - LRS

- How different Individuals can invest in single property abroad under Corporate structure?
 - Group of Individuals investing in Fco
 - Fco buying property outside India (for bonafide purpose)
 - Permitted

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

IP under LRS

Issues:

- Can person resident in India gift IP 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).

- Returning Indian can keep IP abroad which was acquired as a NR. (Sec 6(4))

Immovable Property in India by Non-residents

What NRI / PIO cannot do?

- NRI / PIO cannot buy agricultural property, plantations & farm houses.
- NRI / PIO cannot do Real Estate Trading, or trade in Transferable Development Rights.

What NRI / PIO can do?

- NRI / PIO 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.

Categories of people who can buy IP

Indian Citizen - NRI

Overseas Citizen of India - OCI

Foreign Citizen – NON PIO (but Resident in India)

Meaning of NRI

- FEMA Notification No. 21 – FEM(Acquisition and Transfer of IP in India) does not define it.
- Master Direction No. 12 defines it as **citizen of India resident outside India.**

[“NRI” word is not used in Notification 21 at all. The object is to equate NRI & PIO. However, due to legal language, there are some differences.]

Acquiring IP

- Indian citizens (NRI):
 - They can acquire any immovable property – except agricultural property.
 - Acquisition can be by purchase or gift.
 - No approval from RBI is required nor any declarations to be filed.
 - Payment for purchase can be paid from:
 - 1) Abroad or
 - 2) Indian funds.

Acquiring IP

- PIO:
 - They can buy immovable property – except agricultural property.
 - No approval from RBI is required. No declarations have to be filed.
 - Payment for purchase can be made from:
 - (1) Abroad or
 - (2) Indian funds.
- Can acquire property as gift from – Indian resident or NRI. (Agricultural property cannot be acquired).

Transfer of IP

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

Transfer of IP

- PIO:
 - - They can transfer immovable property without any approval except as under:
 - - They can sell or gift non-agricultural property to an Indian resident or NRI, without any approval.
 - - They can sell or gift agricultural property only to an Indian citizen & Indian resident.

Repatriation of sale proceeds

- Subject to guidelines, funds can be repatriated abroad without any approval.
- Repatriable Investment:
 - If property was purchased in FOREIGN EXCHANGE, sale proceeds can be remitted upto the cost of property.
 - Property should not be agricultural property.
 - Repatriation is restricted to **two house properties** in case of residential houses.
- Non-Repatriable Investment:
 - Upto U.S. \$ 1 million can be repatriated. **This limit is inclusive of all purposes.**

Loan for IP

- NRI can take a loan from Indian banks / FIs and employers.
- 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 (as defined in Companies Act, 1956) is permitted. Sale proceeds will go to NRO A/c.

Renting of IP

- NRIs can rent their property.
- Rent can be repatriated abroad after payment of taxes.

Foreign Citizens resident in India

- FEMA applies only to non-residents.
- Foreigners - property in Goa.
- Restriction on citizens of some countries (if they are residents) on acquisition of property is ultravires.

Foreign citizen resident in India – **can buy?**

IP for Business – Branch LO

- Non-residents who have permission to set up branches in India, can buy immovable property, which is necessary & incidental to carrying out the activities.
- Entities of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau or Hong Kong require prior approval
- Liaison office cannot buy immovable property.

IP for Business – Branch LO

- A declaration has to be filed within 90 days in form IPI.
- Mortgage of property for loan - permitted.
- For sale, RBI approval is required.
- NRI / OCI card holders are permitted to invest under Schedule 4 of FEMA Notification no. 20(R) to invest on non-repatriable basis.

Foreign Embassy

- Foreign embassy/ Diplomat/ Consulate General can purchase or sell IP (other than agriculture property) if –
 - Clearance from Ministry of External Affairs required.

Lease of Property

- Acquiring property by non-residents by way of lease upto 5 years, is permitted.
- Not considered as capital account transaction.

Inheritance / Bequests

- An NRI can acquire property (incl Agricultural) through inheritance.
- An NRI can bequeath property (incl Agricultural) in his will to another non-resident or an Indian resident.
- An Indian resident can also bequeath property to non-resident.

Bequeath IP to NR Heir

- IP in India can be bequeathed to NR heir.

Can it be distributed before death?

- Indian resident can gift the IP to NRI. **LRS limit does not apply.**
- Indian resident should not buy & gift to NRI.

Things directly not possible cannot be done directly.

Inheritance by Non-NRIs

- Non-NRIs (foreign citizens who are non-residents) can acquire IP on inheritance.
- They require approval to sell.
- They can repatriate upto US \$ 1 mn. paid per annum without approval.

Notn. 13(R), Reg. 4(1) and 7(1). [However Master Direction No. 12, para 7.1 states that an approval is required.]

- Are foreign entities covered as foreign citizens?`

Change of Residential Status / Citizenship

- Resident who becomes NR – can continue to hold property in India. Agricultural activities cannot be done in case of agricultural properties.
- **People** who acquire foreign citizenship – can continue to hold property in India.
- Non-resident who becomes Indian resident – can continue to hold property. Repatriability is lost.
- **People** 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.

Thank You