

The Chamber of Tax Consultants

Immovable Property in India and outside India – FEMA provisions

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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- Notification 21(R) has been replaced by Non-debt instrument Rules, 2019 w.e.f. 17.10.2019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- Largely Master Direction & FAQs are no longer valid – but practically useful.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. General meaning has to be applied.

However acquisition, sale or dealing directly in immovable property is considered as “Non-debt 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 **OCI** 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 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 properties in case of residential houses. No restriction on commercial properties.

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.
- PIO can sell the IP to Indian resident. [R. 30(2)]
- 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)]
- Existing loan - Repayment of loan can be made from NRE A/c / foreign funds / NRO A/c.
- On sale of IP, 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/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)
However an OCI from these countries is exempted from this prohibition.

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 IV of Non-debt instruments rules on non-repatriable basis in Indian entity or a proprietary concern.
- 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 specifically – but sale also should be through banking channels. See R. 32(a)]

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.)

No restriction even on entities or citizens of 11 countries referred to earlier.

- It is not a capital account transaction.

Immovable Property – Other issues

Inheritance / Bequests

- An NRI can acquire property through inheritance from:
 - Non-resident if he had acquired IP as per then prevailing law, or
 - 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 if inheritor is a Non-resident. (Agri. Activities cannot be carried out.)

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 all assets.)
- For IP, an approval is required for repatriation.
- However if inheritance is from non-resident u/s. 6(5), upto US\$ 1 mn. can be repatriated. [Notn. 13(R), Reg. 4(1)(ii)]
For remittance above US\$ 1 mn., approval is required. [R. 29(1)]

Inheritance by Non-NRIs

- Widow/widower of Indian resident citizen can remit upto US\$ 1 mn. due to inheritance. [Notn. 13(R), Reg. 4(1)(iii).]
(This facility is for all assets and not just for IP.)

Change of Residential Status / Citizenship

- Resident who becomes NR – can continue to hold property in India. [S. 6(5)]
Agricultural activities cannot be conducted in case of agricultural properties.
- 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

- Indian residents availing ECB can create a charge on IP in India. [R. 30(1)(b)]
- 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.) [R. 29(3)]

Charge on IP – Loan abroad

- NRI / OCI can mortgage his IP in India for loan taken from a foreign lender by a foreign company, of which he is a director. Mortgage should be with a Bank in India which is Indian correspondent of an overseas lender.
- Funds should be used by the borrowing company only for its core business purposes overseas.
- In case of invocation of charge, the Indian bank can sell the IP to an eligible acquirer and remit the sale proceeds to the overseas lender.

[R. 30(1)(c)]

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 [separate rules].
 - 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

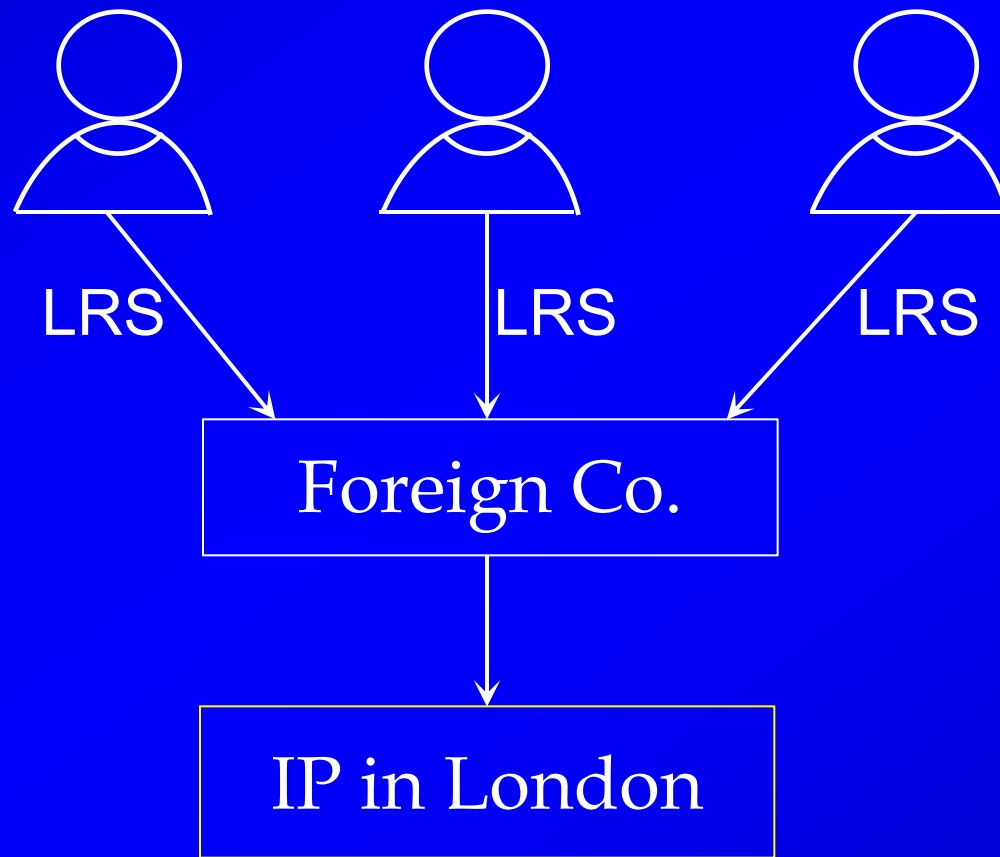
- An individual can remit money under LRS in foreign bank account and buy IP when sufficient funds are available.
- Family members can remit the funds & buy it jointly – **with all members as joint holders.**

Loan for IP

- One cannot take a loan – in India or abroad – to buy IP.
- Booking of IP 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.

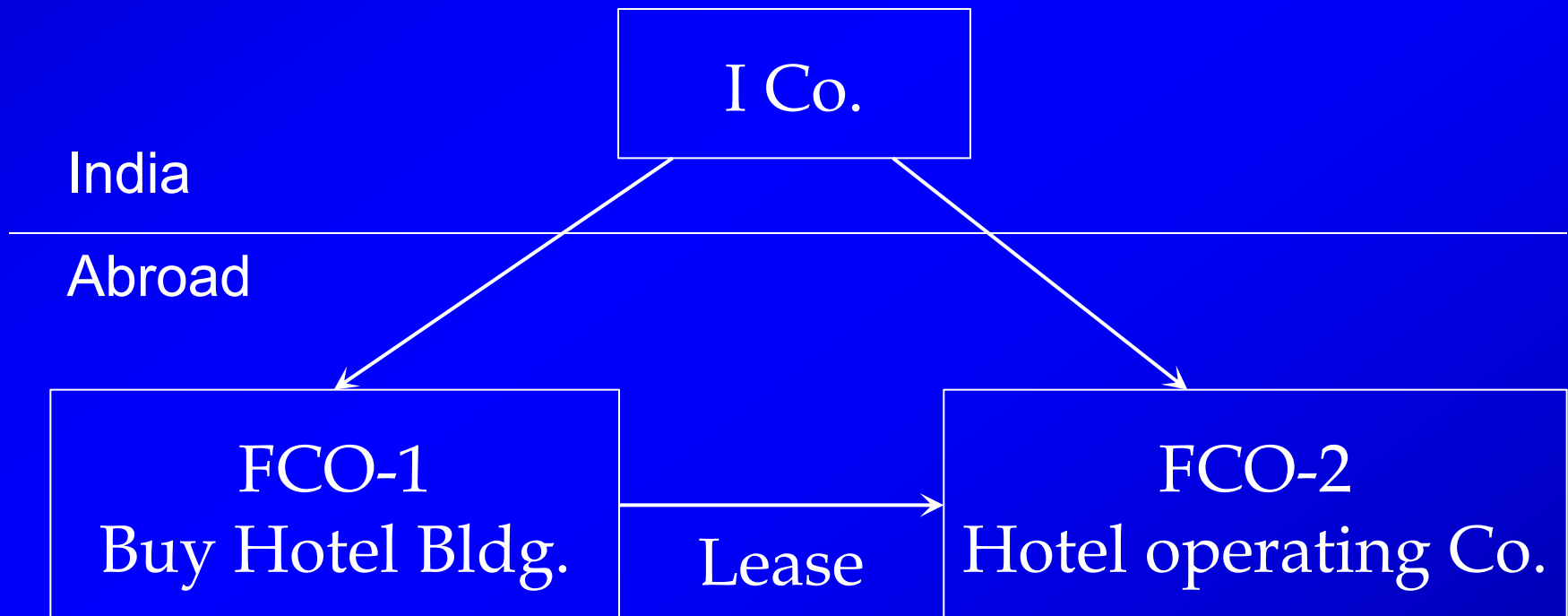
Business Investment - Corporate

- 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 a resident **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)].

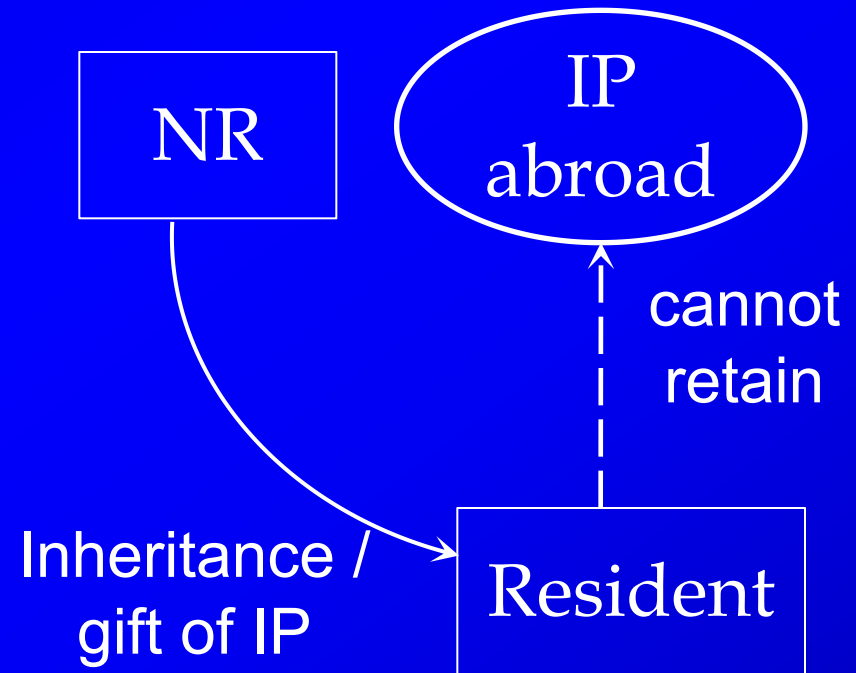
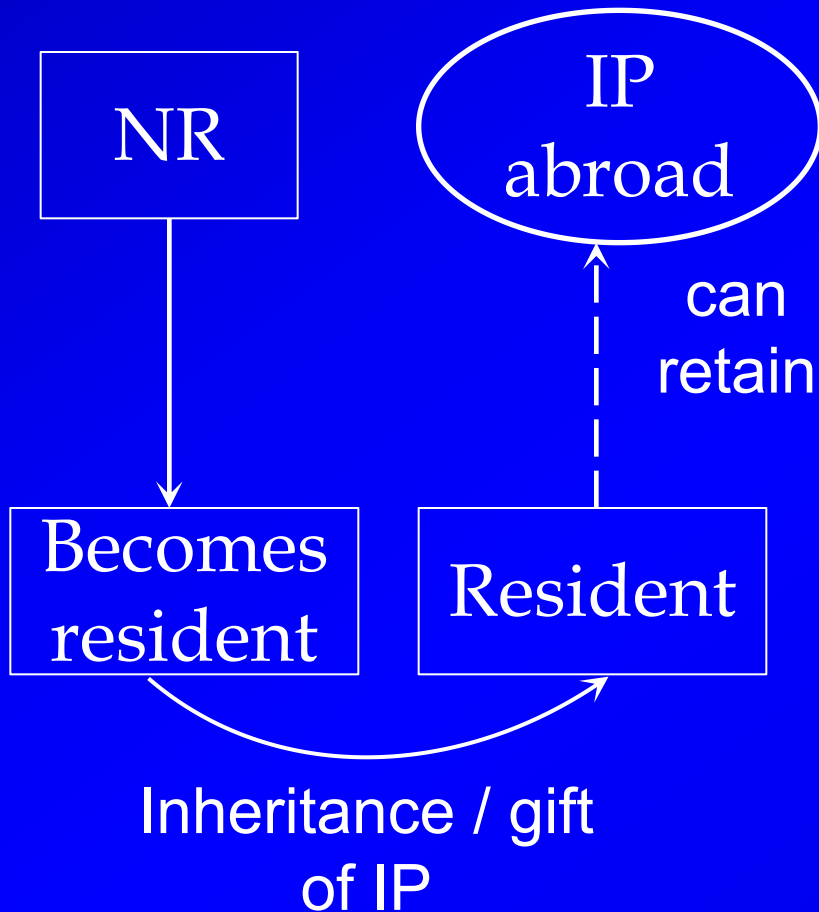
- As long as the Indian resident has acquired the IP as permitted under FEMA, the donee / inheritor can acquire the property from such person.

[Permitted from 21.1.2016.]

Returning Indian - S.6(4)

- Returning Indian can keep IP abroad which was acquired as a NR.
- If an 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 !
[Same issue is for acquiring IP as gift.]
[Notn. 7(R), Reg. 5(1)(a)]

Inheritance of IP - S. 6(4)



IP acquired prior to 8.7.1947

- Indian resident can acquire IP abroad as gift or inheritance from a person who had acquired the IP prior to 8.7.1947 and continues to hold it with RBI approval. [Notn. 7(R), Reg. 5(1)(a)].

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.

For more discussion on various subjects, visit our
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