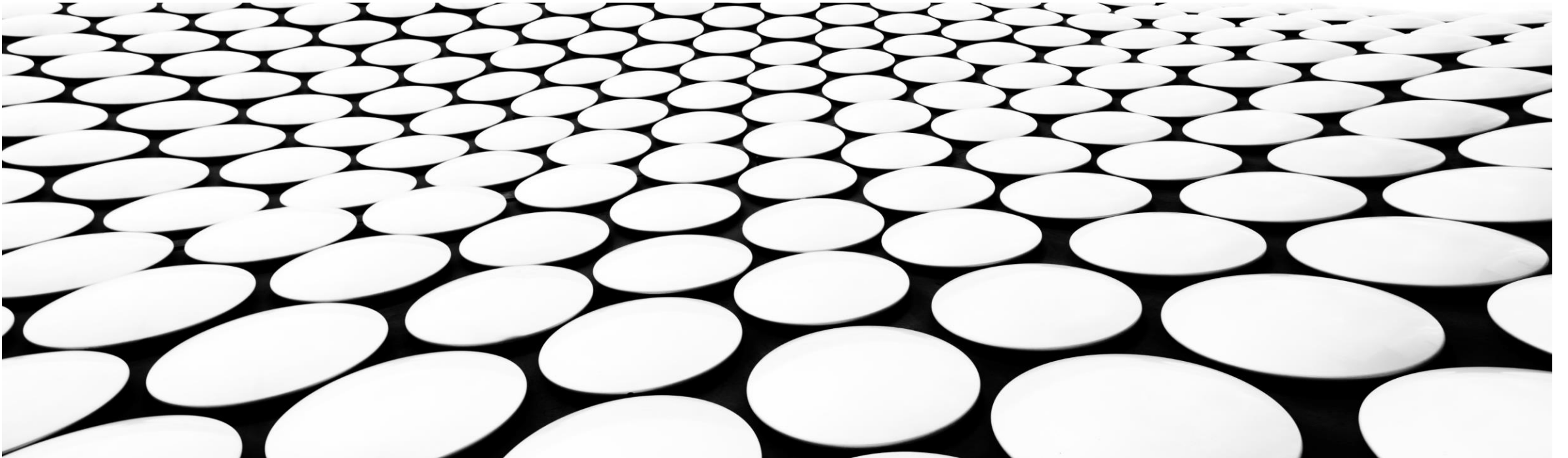


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# FEMA BASIC AND DEFINITIONS

CA VISHAL D SHAH



# AGENDA

- Overview
- Objective
- Applicability
- Structure
- Rules & Regulations
- Important Definition
- Interplay of Definition vis a vis various Notifications



# OVERVIEW

## ■ FEMA -

- Aims at facilitating external trade and payments.
- Promoting the orderly development and maintenance of forex markets in India.

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## ■ FEMA -

- Replaced FERA, 1973.
- India transited FROM era of regulation, control and prohibition TO New Era of Consolidation & Management of Forex Reserves.

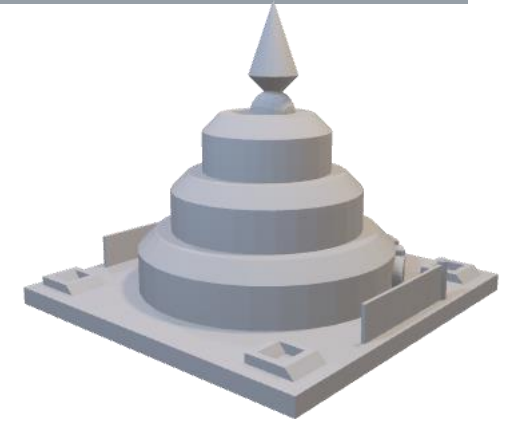
# OVERVIEW

- Post liberalization (i.e. New Industrial policy of 1991) there was need to remove shackles of regulatory and legal provisions.
- Need to consolidate and amend the law relating to foreign exchange with the objectives of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.
- Need to take various steps to make 'New Industrial Policy' - workable and meaningful.
- Industrial licensing was made pragmatic and objective oriented.
- It was decided to review provisions of Foreign Exchange Regulation Act, 1973 (FERA).

# OVERVIEW

- Intention was to bring provisions of FERA in line with emerging trend of liberalization so as to remove obstacles in the inward flow of foreign exchange and foreign investment.
- To consolidate and amend the law relating to forex with the objective of -
- External trade and payments;
- Orderly development and maintenance of forex market in India.
- Act authorises Central Government and RBI to frame Rules and Regulations to govern FEMA.

# STRUCTURE



Section	Particulars
Section 2	Definitions
Section 3 - 9	Regulations & Foreign Exchange Management
Section 2(c) & 10 - 12	Provisions relating to Authorized Person
Section 13 - 15	Contravention & Penalty
Section 16 - 35	Adjudication & Appeals
Section 36 - 38	Enforcement Directorate
Section 39 - 49	Miscellaneous

# STRUCTURE

Applies to the **whole of India** and all branches, offices and agencies outside India which are owned or controlled by a person resident in India.

FEMA has **49 sections** of which 9 (section 1 to 9) are substantive and the rest are procedural/ administrative.

**Sec 37A** - power to seize value equivalent Indian assets for overseas assets viz., foreign exchange, foreign security, immovable property outside India held in contravention of Sec 4.

Section 46 of FEMA grants power to **Central Government** to make rules to carry out the provision of FEMA.

Section 47 of FEMA grants power to **RBI** to make regulations to **implement** its provisions and the rules made there under.

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# STRUCTURE

- FEMA ACT
- NOTIFICATIONS
- RULES
- MASTER DIRECTIONS
- A.P. DIR CIRCULARS
- FAQs will not prevail over Act, Notifications etc. in case of conflict

RBI is entrusted with the administration and implementation of FEMA.



# STRUCTURE / RATIONALE

- FEMA was enacted with 25 original notifications in 1999 and over years had > MULTIPLE amendments.
- A need was felt to consolidate the regulations and rationalize them. Master Circulars & Directions
- RBI has started revising regulations issued under FEMA. Consequently, on issue of revised regulations, original notifications and subsequent amendments stands repealed.
- Revised regulations carry the same numbers as in the old regulations with a suffix '(R)' along with the year in which they are published.

# RULES

- Notified by Central Government to carry out provisions under the FEMA.
- Powers derived from Section 46 of FEMA.
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- Rules Includes:
  - Current Account transactions (Current A/c Rules are most frequently referred).
  - Compounding Procedures.
  - Adjudication procedure & Appeals.

# REGULATIONS

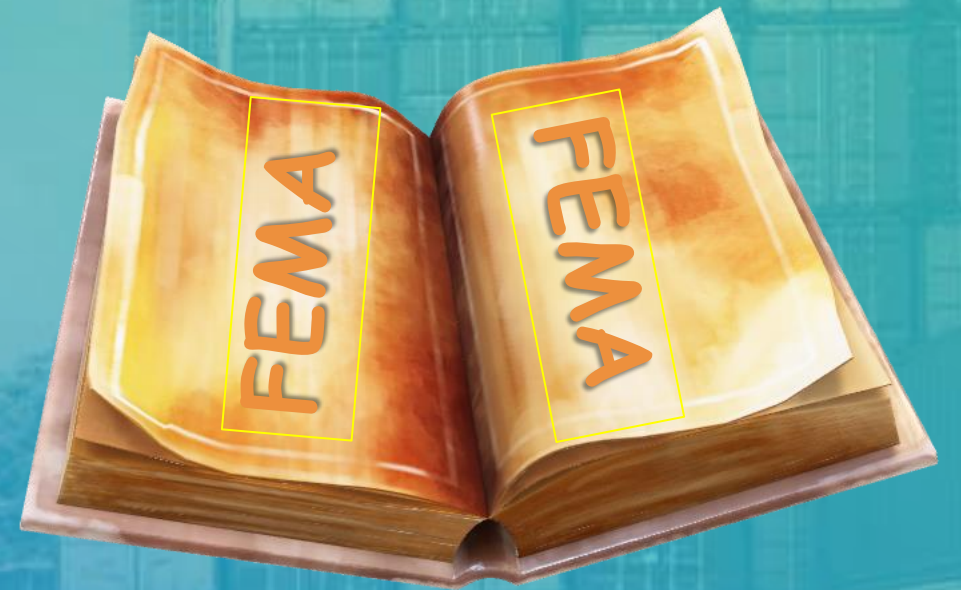
- Notified by RBI to carry out provisions under the FEMA.
- Powers derived from Section 47 of FEMA.
- Regulations Includes:
  - Capital Account transactions.
  - Export of goods & services.
  - Realisation and Repatriation of Foreign Exchange (certain exemptions).

# MASTER DIRECTIONS

- RBI has come up with Master Directions covering foreign exchange transactions.
- Master Directions consolidate instructions, rules and regulations.
- One Master Direction is issued for each subject matter covering all instructions on the subject.
- Master Directions are updated as and when there is change in rules/regulations or change in policy.
- Existing set of Master Circulars stands withdrawn with issue of Master Directions.

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# IMPORTANT DEFINITIONS



# DEFINITIONS SEC 2

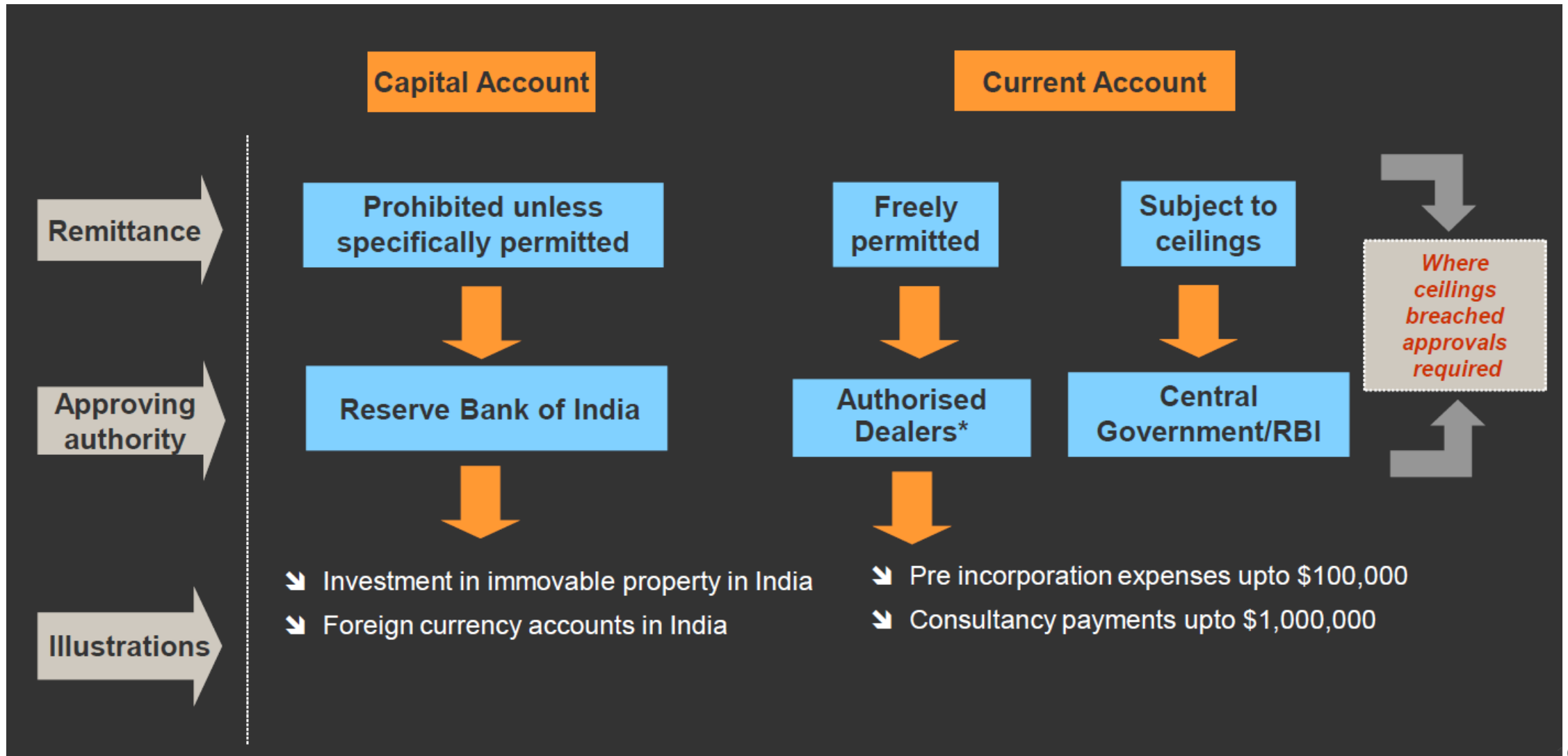
- (j) "current account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,—
  - (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,
  - (ii) payments due as interest on loans and as net income from investments,
  - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
  - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;

# DEFINITIONS SEC 5

- 5. Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction:

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

# DEFINITIONS





# DEFINITIONS SEC 2

- (e) "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

# DEFINITIONS SEC 6

- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify—
  - (a) any class or classes of capital account transactions, involving debt instruments, which are permissible;
  - (b) the limit up to which foreign exchange shall be admissible for such transactions;
  - (c) any conditions which may be placed on such transactions:

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

# DEFINITIONS SEC 6

- (2A) The Central Government may, in consultation with the Reserve Bank, prescribe—
  - (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible;
  - (b) the limit up to which foreign exchange shall be admissible for such transactions; and
  - (c) any conditions which may be placed on such transactions.

# DEFINITIONS SEC 6

- (4) 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.
- (5) 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.

# DEFINITIONS SEC 6

- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.
- (7) For the purposes of this section, the term "debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

# CURRENT ACCOUNT TRANX RULES

- Government has in public interest and in consultation with the RBI framed the Current Account Rules
- Determine whether current account transaction prohibited/restricted

Schedule I - Prohibited transactions (lottery purchase/winnings, gambling transactions, payment related to Call back services, etc.) and travel to Nepal/Bhutan or transactions with residents of Nepal/Bhutan - Rule 3

Schedule II - Transaction permitted against specific approval of relevant ministry/ Government department (Cultural tours, hiring charges for transponders, multi-modal transport operators remitting to overseas agents) - Rule 4

Schedule III - Specified remittances exceeding certain limits require prior RBI approval - Rule 5

# DEFINITIONS SEC 2

- (h) "currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;



- (m) "foreign currency" means any currency other than Indian currency;

# DEFINITIONS SEC 2

- (n) "foreign exchange" means foreign currency and includes,—
- (i) deposits, credits and balances payable in any foreign currency,
- (ii) drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
- (iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;



# DEFINITIONS SEC 2

- (q) "Indian currency" means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934);

## DEFINITIONS SEC 2

- (l) "export", with its grammatical variations and cognate expressions, means—
  - (i) the taking out of India to a place outside India any goods,
  - (ii) provision of services from India to any person outside India;
  
- (p) "import", with its grammatical variations and cognate expressions, means bringing into India any goods or services;

# DEFINITIONS SEC 7

- (1) Every exporter of goods shall—
  - (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;
  - (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds by such exporter.

# DEFINITIONS SEC 7

- (2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.
- (3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

# DEFINITIONS SEC 2

- (u) "person" includes—
- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and
- (vii) any agency, office or branch owned or controlled by such person;

# NRI & RIC

- The Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

“NRI” or “Non-Resident Indian” means an individual resident outside India who is a citizen of India;

*(old definition included PIO but now removed)*

“resident Indian citizen” means an individual who is a person resident in India and is a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955

# PERSON OF INDIAN ORIGIN

- Foreign Exchange Management (Deposit) Regulations, 2016
- Foreign Exchange Management (Remittance of Assets) Regulations, 2016
  
- '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:
  - a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
  - b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or

# PERSON OF INDIAN ORIGIN

- c) 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
- d) 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 was earlier also included in FEMA 21 - Immovable property now removed in NDI Rules)*



# OVERSEAS CITIZEN OF INDIA

- Foreign Exchange Management (Borrowing and Lending) Regulations, 2018
- The Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

"Overseas Citizen of India (OCI)" Cardholder shall have the same meaning as assigned to it under Section 7(A) of the Citizenship Act, 1955, as amended from time to time;

# DEFINITIONS SEC 2 – RESIDENTIAL STATUS

- (v) **"person resident in India" means—**
  - (i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—
- (A) **a person who has gone out of India or who stays outside India, in either case—**
  - (a) for or on taking up employment outside India, or
  - (b) for carrying on outside India a business or vocation outside India, or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
- (B) **a person who has come to or stays in India, in either case, otherwise than—**
  - (a) for or on taking up employment in India, or
  - (b) for carrying on in India a business or vocation in India, or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

# DEFINITIONS SEC 2 – RESIDENTIAL STATUS

- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India;
- (w) "person resident outside India" means a person who is not resident in India;

# RESIDENTIAL STATUS

- Under FEMA residential status is of two types:
- Under erstwhile FERA, citizenship was considered as deciding factor
- FEMA lays emphasis on 'residing' which denotes permanency
- Purpose is difference under FEMA vis a vis Income Tax, example..
- RBI has a very narrow approach towards non resident acquiring immovable property in India. significance to the arithmetic condition of staying in India more than 182 days during the preceding financial year. - onus is on an individual to prove his / her residential status

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# RESIDENTIAL STATUS - STUDENTS

- **A.P. (DIR Series) Circular No. 45 dated December 8, 2003**

While taking up studies, students may have to take up job or seek scholarships to supplement their income. As a result their stay gets prolonged than what is intended while leaving India.

They are not dependent for a dominant part of their expenses on remittances from their households in India.

Hence, their stay will be for more than 182 days and intention will also be to stay outside India for uncertain period. Thus they can be treated as Non Resident Indians (NRI).

# CAPITAL ACCOUNT TRANX

- Schedule I [Regulation 3(1)(A)]: Classes of capital account transactions of persons resident in India
  - a) Investment by a person resident in India in foreign securities
  - b) Foreign currency loans raised in India and abroad by a person resident in India
  - c) Transfer of immovable property outside India by a person resident in India
  - d) Guarantees issued by a person resident in India in favour of a person resident outside India
  - e) Export, import and holding of currency/currency notes
  - f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India

# CAPITAL ACCOUNT TRANX

- g) Maintenance of foreign currency accounts in India and outside India by a person resident in India
- h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- i) Loans and overdrafts by a person resident in India to a person resident outside India.
- j) Remittance outside India of capital assets of a person resident in India.
- k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

# CAPITAL ACCOUNT TRANX

Schedule II [Regulation 3(1)(B)]: Classes of capital account transactions of persons resident outside India.

- a) Investment in India by a person resident outside India, that is to say,
  - i. Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India;
  - &
  - ii. Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- b) Acquisition and transfer of immovable property in India by a person resident outside India.



# CAPITAL ACCOUNT TRANX

- c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- d) Import and export of currency/currency notes into/from India by a person resident outside India.
- e) Deposits between a person resident in India and a person resident outside India.
- f) Foreign currency accounts in India of a person resident outside India.
- g) Remittance outside India of capital assets in India of a person resident outside India.

# CERTAIN OTHER DEFINITIONS

"transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

"service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

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# SUBSTANTIVE SECTIONS

Dealing in foreign exchange, etc.

3. Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—

- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- (b) make any payment to or for the credit of any person resident outside India in any manner;
- (c) receive otherwise (than) through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;

# SUBSTANTIVE SECTIONS

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.—For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

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# SUBSTANTIVE SECTIONS

## 4. Holding of foreign exchange, etc.

Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India

## 8. Realisation and repatriation of foreign exchange.

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

# SUBSTANTIVE SECTIONS

## 9. Exemption from realisation and repatriation in certain cases.

The provisions of sections 4 and 8 shall not apply to the following, namely:—

- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;
- (b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;
- (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;

# SUBSTANTIVE SECTIONS

- (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising therefrom;
- (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.

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# OTHER FEMA TOPICS GLIMPSE

NDI RULES

ODI REGULATION

DEPOSIT REGULATIONS

EXPORT REGULATIONS

IMPORT REGULATIONS

LRS

1 MN SCHEME FOR NRIs



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# OTHER FEMA TOPICS GLIMPSE

ECB

IMMOVABLE PROPERTIES IN INDIA

IMMOVABLE PROPERTTIES OUTSIDE INDIA

LO/BO/PO

REPORTING REQUIREMENTS

COMPOUNDING REGULATIONS

ED AND APPELLATE PROCEEDINGS



**THE WAY TO  
GET STARTED  
IS TO QUIT  
TALKING AND  
BEGIN DOING.**

Walt Disney



# THANK YOU

CA Vishal D. Shah

Partner

M/s. Jayantilal Thakkar & Co