Diamond Jubilee Conference of

NIRC of ICAI

Publication on

WTO, FEMA & INTERNATIONAL TAXATION

Northern India Regional Council of the ICAI

23rd-24th December 2011

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MESSAGE

For Chartered Accountants, updation of knowledge is of utmost importance. Continuing Professional Education is all about absorption, assimilation, comprehension and practical application of the knowledge acquired for the benefit of clients, employers and for the professionals themselves. It is my firm belief that by attending programmes of professional relevance and hearing the learned resource persons, one can emerge with a greater comprehension and knowledge, often loaded with invaluable tips and insights that come out of practical wisdom and experience and which cannot be readily found in a conventional text book or reference manual.

It is heartening to note that the NIRC of the ICAI is organizing a Diamond Jubilee Conference on International Taxation, WTO-FEMA on 23rd and 24th December, 2011 at New Delhi to enable our members to develop the domain expertise by way of discussions and deliberations in various areas under the International Taxation, WTO and FEMA.

I am sure that the Conference would be a great learning experience for all the participants and I wish the Conference a grand success.

CA. G. Ramaswamy
President, ICAI

MESSAGE FROM THE VICE-PRESIDENT

The Chartered Accountants with their deep knowledge and strong skills are often referred to as complete business solution provider. The type of functions generally performed by the Chartered Accountants are quite diversified. The Government and the society have immense confidence and trust in the profession.

The society has increasingly recognized the services of CAs in the whole gamut of accounting, auditing, taxation, management consultancy, system analysis and so on. Their services are being sought in almost all aspects of business. They are quickly rising in the career ladder to reach coveted positions of Chief Financial Officers and Chief Executive Officers.

In an era of expansion and growth, a need is felt to enhance the competencies of Chartered Accountants. I am pleased that a Diamond Jubilee Conference on WTO, FEMA & International Taxation is being organized by the Northern India Regional Council of ICAI. The initiative is praiseworthy and I compliment the Chairman, office-bearers and other members of the of the Northern India Regional Council for the efforts.

Programmes such as seminars, conferences are important tool in the direction of disseminating information and providing contemporary education through useful deliberations. Conferences have great significance as they involve personal interaction and provide opportunity to clarify doubts. The proposed Conference is designed to equip the members with the necessary skills and expertise for excelling in their profession.

I am sure that the eminent faculties would provide excellent value addition to this conference, which will enable the members to update their knowledge and give quality services to their clients, their organizations and to the nation.

I wish the programme to achieve a grand success.

CA. Jaydeep Narendra Shah
Vice-President
The Institute of Chartered Accountants of India

MESSAGE

At this precious moment, let us first express our gratitude to the Merciful God who has granted us with blessings and grace that we could gather here today to attend theDiamond Jubilee Conference on WTO, FEMA & International Taxation.

An Indian Chartered Accountant is viewed with respect for the competence, independence, integrity and other professional attributes possessed. This we actually owe to our forefathers who have worked with utmost sincerity in laying down the foundation of this esteemed profession. It is very important for us not only to maintain that level but also to pass this on to our next generation with a lot of addition in the value chain.

The membership in the Northern Region alone is around 35,000.Members should be pro-actively involved in updating their knowledge and upgrading their service delivery. Each of our members may be at different stages of knowledge-base and experience in various areas of professional work. Thus, we believe, every one of us has something to give to the others out of his knowledge and experience.

This two days Conference is going to be unique in more than one way. WTO, FEMA & International Taxation Research Group of NIRC of ICAI is organizing this 2 Days Conference on WTO, FEMA & International Taxation on 23rd&24th December, 2011 at NCUI Auditorium, Delhi. The subjects viz.: Critical Issues in FDI, Overview of Facilities available to NRIs / Resident Individuals and Foreign Nationals, Technical Session: Introduction of WTO Regime & India Perspective, Professional Opportunities for Chartered Accountants in Emerging Area (WTO), Institutionalisation of Transfer Pricing in an organisation & Major Issues in Transfer Pricing Assessment, International Tax-Future of Profession and Case Studies on critical issues in International Taxation. I congratulate all the Team Members of WTO, FEMA & International Taxation Research Group of NIRC for organizing this Conference. This is virtually being organized by such people who have actual interest in and knowledge of the subject. Also, the programmes are being designed to address the varied needs of the membership. For example, the programmes on International Taxation are being structured and organized by a group of members who completed a certificate course on International Taxation of the Institute. Some way, more and more members are invited to take on the other areas of professional interest so that the quality of content of the programmes goes up.

I believe that this Publication will surely find a suitable place in the library which would be used as a Guide and reference in cases of any required information and doubts.

I place on record my grateful thanks for the whole hearted help and support extended by the office bearers and my Colleagues in the Regional Council for their encouragement in organizing this Conference today.

Finally, I wish the Conference a complete success, and wish all the participants a good time.

Thank You!

With Warm Regards

CA. Rajesh Sharma
Chairman, NIRC of ICAI

PREFACE

India's impressive economic growth is result of opening up of the economy and rapidly increasing domestic demand. This has resulted in massive growth in international trade. Not only foreign investment is flowing in but Indian investment abroad is also gaining momentum. Government of India, through its policy framework, is promoting and regulating foreign direct investment and foreign trade in such a way that domestic industry is not adversely affected and at the same time sufficient capital is available for development of infrastructure.

India being one of the founder members of World Trade Organisation (WTO) has lots of obligations to international trade. Keeping a right balance between permitting free trade to foreign entities and domestic players is a crucial task. Free movement of foreign capital also has various connected issues and collection of due tax is the most important one. Tax authorities do their best to ensure that non- resident entities pay their due tax on income earned in India. Double tax avoidance agreements with other nations also create conducive background for increased business relationship.

In the above background, foreign direct investment policy, foreign trade policy, transfer pricing mechanism, levy and collection of tax on non-resident appear to be well connected to each other.

Under the dynamic leadership of CA. Rajesh Sharma, present Chairman of NIRC of ICAI, a special research study group has been carved out to focus on providing practical tips to the CA fraternity for dealing with FEMA, WTO and International Taxation related laws and provisions.

It is a matter of great honour for this Research Study Group to organise for and on behalf of NIRC a two days conference on FEMA, WTO and International Taxation. The Group decided to bring out a publication on this occasion on some of the very important aspects of FEMA, WTO and International Taxation. The publication covers areas like Facilities available to Residents, NRIs and Non- Residents under FEMA, Overview of WTO, Salient feature of GATS and Professional Opportunities under WTO Regime, Withholding tax provisions relating to Payments to Non-Residents.

I am very confident that this publication shall prove to be a very good reference material for the members of ICAI as well as for other users.

Anil Sharma
Convenor
FEMA, WTO and International Taxation Research Study Group

ACKNOWLEDGEMENT

FEMA, WTO and International Taxation Research Study Group is thankful to CA. Vijay Gupta, CA. Rekha Kiron and CA. Deepender Aggarwal for their contribution in preparing the drafts for publication on FEMA, WTO and International Taxation respectively. All of them have put lot of their time, experience and efforts into the respective publications. The Group also acknowledges with great sincerity the efforts put in by CA. Hariom Jindal in fine tuning the publication on International Taxation.

I would also like to place on record my deep appreciation for other members of the Research Study Group for their active participation and support.

Anil Sharma
Convenor
FEMA, WTO and International Taxation Research Study Group

FACILITIES AVAILABLE
TO
NRIS/PIOS, RESIDENT INDIVIDUALS &
FOREIGN NATIONALS
UNDER
THE FOREIGN EXCHANGE
MANAGEMENT ACT, 1999 (FEMA)

FACILITIES AVAILABLE TO NRIS/PIOS, RESIDENT INDIVIDUALS AND FOREIGN NATIONALS UNDER FEMA

CONTENTS

CHAPTER 1

OVERVIEW OF FEMA & INTRODUCTION

Q.1. What is the legal framework for administration of foreign exchange transactions in India?

Ans. The legal framework for administration of foreign exchange transactions in India is provided by the Foreign Exchange Management Act, 1999 (FEMA), which came into force with effect from June 1, 2000. FEMA consists of 49 sections:

Chapter I	Sections 1-2	Short title, extent, application and commencement, definitions
Chapter II	Sections 3-9	Regulation and management of foreign exchange:
	3	Dealing in foreign exchange
	4	Holding of foreign exchange
	5	Current account transactions
	6	Capital account transactions
	7	Export of goods and services
	8	Realisation and repatriation of foreign exchange
	9	Exemption from realisation and repatriation
Chapter III	Sections 10-12	Authorised person
Chapter IV	Sections 13-15	Contravention and penalties, power to compound contravention
Chapter V	Sections 16-35	Adjudication and appeal
Chapter VI	Sections 36-38	Directorate of enforcement
Chapter VII	Sections 39-49	Miscellaneous.
	46	Power to make rules
	47	Power to make regulations

Q.2. What are the main functions of RBI under FEMA?

Ans. FEMA mandates main functions of RBI as:

(a) Control over dealings in foreign exchange by giving general or special permission for dealing in foreign exchange, excluding those cases where specific provision have been made in the Act, Rules or Regulations;

(b) Prior approval of RBI is required for certain current account transactions as provided in Foreign Exchange Management (Current Account Transactions) Rules, 2000. Restrictions on current account transactions be imposed by Central Government in consultation with RBI by making Rules;

(c) Prescribing conditions for capital account transactions;

(d) Make regulations for (i) Transfer or issue of foreign security to resident, and Indian security to non-resident, (ii) Borrowing and lending in foreign exchange or to a foreign person, (iii) Export/ import of currency or currency notes, (iv) Transfer of immovable property outside India, and (v) Giving guarantee or surety where foreign exchange transaction is involved;

(e) Make regulations for realisation of foreign exchange due from export of goods and services;

(f) Make regulations for realisation, possession and repatriation of foreign currency or foreign coins, foreign currency accounts, foreign exchange acquired from employment, business, trade, services etc.;

(g) Granting authorisation to 'Authorised Person' to deal in foreign exchange, and give directions; and

(h) To make any other Regulations.

Q.3. What broadly are the contraventions under FEMA, and is compounding facility available under FEMA?

Ans. As per section 13 of FEMA, if any person contravenes any provision of FEMA, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under FEMA, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be **liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable**, **or up to two lakh rupees where the amount is not quantifiable**, and where such **contravention is a continuing one**, **further penalty which may extend to five thousand rupees for every day** after the first day during which the contravention continues.

If any **person fails to make full payment of the penalty imposed** on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be **liable to civil imprisonment under this section**.

As per section 15 of FEMA, 15, any contravention under section 13 **except the contraventions under section 3 (a) of FEMA** may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application subject to Foreign Exchange **(Compounding Proceedings) Rules, 2000 r**ead with A.P. (DIR Series) Circular No. 56 dated June 28, 2010, Circular No. 57 dated December 13, 2011 and FAQ dated October 21, 2011. Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. CEFA (Cell for Effective Implementation of FEMA) is a Cell in the Foreign Exchange Department of the Reserve Bank of India, Central Office, Mumbai, attending to all matters relating to compounding.

Q.4. Under FEMA, what transactions involving foreign exchange have been classified either as capital or current account transactions?

Ans. Under FEMA, all transactions involving foreign exchange have been classified either as capital or current account transactions. 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, and (*iii*) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.

As per Section 2(*j*) of FEMA, **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**.

As per Section 2(e) of FEMA, **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 i.e.**

(*a*) Transfer or issue of any foreign security by a person resident in India;

(*b*) Transfer or issue of any security by a person resident outside India;

(*c*) Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;

(*d*) Any borrowing or lending in foreign exchange in whatever form or by whatever name called;

(*e*) Any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;

(*f*) Deposits between persons resident in India and persons resident outside India;

(*g*) Export, import or holding of currency or currency notes;

(*h*) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;

(*i*) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;

(*j*) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred

(*i*) by a person resident in India and owed to a person resident outside India; or

(*ii*) by a person resident outside India.

Q.5. What constitutes Transfer? Does it include mortgage, pledge, gift, loan?

Ans. As per Section 2(ze) of FEMA, Transfer includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Q.6. What is meant by Person resident in India?

Ans. As per section 2(*v*) of FEMA, **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**;

To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the preceding financial year) but has to also comply with the condition of the purpose/intention of stay.

Illustrations:

If a person stayed in India in the preceding year for 182 days or less, he can never be 'person resident in India' in next following year, irrespective of his stay in India and irrespective of his purpose to come to India for employment, carrying on business or vocation or stay in India indefinitely.

If a person stayed in India during 2010-11 for less than 182 days, he will not be 'resident' during 2011-12 even if he resides in India for more than 182 days in 2011-12. However, if he resides in India for over 182 days in 2010-11, he will be 'resident' in 2011-12 provided he complies with any of the conditions of employment, business or vocation or indefinite stay in India. But, if he leaves India for the purpose of taking up employment outside India during 2011-12, or for carrying on business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure.

This provision equally applies to foreign citizen as well.

(*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**.

Q.7. What is meant by Person resident outside India?

Ans. As per section 2(*w*) of FEMA, Person resident outside India means a person who is not resident in India.

Q.8. What is the status of a student going abroad for studies?

Ans. Student going abroad for studies is treated as Non-Resident Indian (NRI) and is eligible for all the facilities available to NRI under FEMA, 1999.

CHANGE OF RESIDENTIAL STATUS FROM RESIDENT OUTSIDE INDIA TO RESIDENT IN INDIA

Q.9. Can a person resident in India hold, own, transfer or invest in **foreign currency, foreign security or any immovable property situated outside India?**

Ans. As per section 6(4) of FEMA, 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.

CHANGE OF RESIDENTIAL STATUS FROM RESIDENT IN INDIA TO RESIDENT OUTSIDE INDIA

Q.10. Can a person resident outside India hold, own, transfer or invest in **Indian currency, security or any immovable property situated in India?**

Ans. As per section 6(5) of FEMA, 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.

Any fresh investments in shares or expansion of the activities of the companies in which investment is made would be subject to the prevailing sectoral FDI cap and conditionalities. Further, sale proceeds of the assets would have to be deposited in the NRO Account and disposal thereof would be as per the applicable guidelines.

Q.11. On which subject matters Reserve bank has issued Rules & regulations, and under whose authority these are issued?

Ans. Central Government, by notification, makes Rules. Reserve Bank, by notification, makes Regulations. Reserve Bank has made following Rules & Regulations under FEMA:

- FEM (Adjudication Proceedings and Appeals) Rules, 2000,
- FEM (Compounding proceedings) Rules, 2000,
- FEM (Current Account Transactions) Rules, 2000,
- FEM (Authentication of Documents) Rules, 2000,
- FEM (Permissible Capital Account Transactions) Regulations, 2000 (FEMA 01),
- FEM (Transfer or Issue of Security by a Person resident Outside India) Regulations, 2000 (FEMA 20),
- FEM (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000,
- FEM (Export of Goods and Services) Regulations, 2000 (FEMA 23),
- FEM (Transfer or Issue of any Foreign Security) Regulations, 2004 (FEMA 120),
- FEM (Establishment in India of Branch or Office or Other Place of Business) Regulations, 2000 (FEMA 22),
- FEM (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (FEMA 03),
- FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 (FEMA 21),
- FEM (Issue of Security in India by a branch, office or a person resident outside India) Regulations, 2000 (FEMA 02),
- FEM (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2000 (FEMA 07),
- FEM (Realisation, repatriation and surrender of foreign exchange) Regulations, 2000 (FEMA 09),
- FEM (Foreign currency accounts by a person resident in India) Regulations, 2000 (FEMA 10),
- FEM (Possession and retention of foreign currency) Regulation, 2000 (FEMA 11),
- FEM (Insurance) Regulations, 2000 (FEMA 12),
- FEM (Investment in Firm or Proprietary Concern in India) Regulations, 2000 (FEMA 24),
- FEM (Borrowing and Lending in Rupees) Regulations, 2000 (FEMA 04),
- FEM (Guarantees) Regulations, 2000 (FEMA 08),
- FEM (Foreign Exchange Derivative Contracts) Regulations, 2000 (FEMA 25),
- FEM (Deposit) Regulations, 2000 (FEMA 05),
- FEM (Export & Import of Currency) Regulations, 2000 (FEMA 06),
- FEM (Manner of Receipt & Payment) Regulations, 2000 (FEMA 14),
- FEM (Remittance of Assets) Regulations, 2000 (FEMA 13), and
- FEM (Withdrawal of General Permission to OCBs) Regulations, 2000 (FEMA 101).

Q.12. On which subject matters Reserve bank has issued Master Circulars, and how often these are issued?

Ans. Master Circulars are consolidated instructions covering Act, Regulations, Rules, Circulars and Notifications, and are issued on July 01 every year with sunset clause of one year. Any changes affected during the year are consolidated in next Master Circular. As at present, Reserve bank has issued following Master Circulars:

- Foreign Investment in India,
- Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) Abroad,
- External Commercial Borrowings and Trade Credits,
- Acquisition and Transfer of Immovable Property in India by NRIs-PIOs-Foreign Nationals of Non- Indian Origin,
- Establishment of Liaison - Branch - Project Offices in India by Foreign Entities,
- Opening of Branch-Subsidiary-Joint Venture-Representative office or Undertaking Investment Abroad by NBFCs,
- Miscellaneous Remittances from India - Facilities for Residents,
- Remittance Facilities for Non-Resident Indians - Persons of Indian Origin - Foreign Nationals,
- Export of Goods and Services,
- Import of Goods and Services,
- Non-Resident Ordinary Rupee (NRO) Account, and
- Compounding of Contraventions under FEMA, 1999.

Q.13. On which subject matters Reserve bank has issued Frequently Asked Questions (FAQs), and how often these are issued?

Ans. Frequently Asked Questions (FAQs) are issued by Reserve Bank, from time to time, as and when felt necessary. These FAQs are to be read along with and in relation to FEMA, respective Rules & Regulations made and Master circulars so issued every year on July 01.

As at present, Reserve bank has issued following FAQs:

- Foreign Investments in India,
- Direct Investment by Residents in Joint Venture (JV)-Wholly Owned Subsidiaries (WOS) abroad,
- Liberalised Remittance Scheme,
- Acquisition and Transfer of Immovable Property in India by a person resident outside India,
- Facilities for NRIs and PIOs Features of various Deposit Schemes available to Non-Resident Indians (NRIs),
- Account Opened by Foreign Nationals and Foreign Tourists Forex Facilities for Residents (Individuals),
- Compounding of Contraventions under FEMA, 1999 Exchange Earner's Foreign Currency (EEFC) Account, and
- Foreign Contribution Regulation Act.

Q.14. Where to get information on web on RBI, DIPP & FIPB?

Ans. Website of RBI: http://www.rbi.org.in for Master Circulars every year 1st July, FAQs, Circulars, Notification, Press Release, FEM Act.

Website of DIPP: dipp.nic.in for Consolidated FDI Policy, Industrial Policy, policy, Circular, Press Notes/releases/Clarifications on FDI.

Website of FIPB: finmin.nic.in/fipbweb for FIPB related matters.

CHAPTER 2

FACILITIES TO RESIDENT INDIVIDUALS IN INDIA

CHAPTER 2.1

REMITTANCES & OTHER FOREX FACILITIES

Q.15. What is the definition of a 'Person resident in India' being an Individual under FEMA?

Ans. As per Section 2(*v*), **Person resident in India means 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**.

To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the preceding financial year) but has to also comply with the condition of the purpose/intention of stay.

Illustrations:

If a person stayed in India in the preceding year for 182 days or less, he can never be 'person resident in India' in next following year, irrespective of his stay in India and irrespective of his purpose to come to India for employment, carrying on business or vocation or stay in India indefinitely.

If a person stayed in India during 2010-11 for less than 182 days, he will not be 'resident' during 2011-12 even if he resides in India for more than 182 days in 2011-12. However, if he resides in India for over 182 days in 2010-11, he will be 'resident' in 2011-12 provided he complies with any of the conditions of employment, business or vocation or indefinite stay in India. But, if he leaves India for the purpose of taking up employment outside India during 2011-12, or for carrying on business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure.

This provision equally applies to foreign citizen as well.

Accordingly, person resident outside India means a person who is not resident in India.

Q.16. What is a Current Account Transaction for individuals resident in India?

Ans. All transactions undertaken by a **Resident in India** that do not alter his/her assets or liabilities, including contingent liabilities, outside India are current account transactions.

As per Section 2(*j*) of FEMA, **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**.

Q.17. What constitute capital account transactions of persons resident in India?

Ans. 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.

(*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.

Q.18. Can a person resident in India freely buy or sell foreign exchange to facilitate a current account transaction?

Ans. Any person resident in India may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction subject to Foreign Exchange Management (Current Account Transactions) Rules, 2000.

Q.19. Are there any current account transactions for which drawal of foreign exchange is prohibited by Central Government?

Ans. In terms of Section 5 of the FEMA, persons resident in India are free to buy or sell foreign exchange for any current account transaction except for those transactions for which drawal of foreign exchange (includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM Card) has been **prohibited by Central Government**, namely (Schedule I to the Foreign Exchange Management (Current Account Transactions) Rules, 2000s):

(*a*) a transaction for:

1. Remittance out of lottery winnings (remittance in any form and under different heads, such as, processing fees/transaction fees/tax clearance charges/conversion charges, clearing fees, etc. towards participation in lottery schemes for the purpose of securing prize money/awards, etc. are prohibited.);
2. Remittance of income from racing/riding, etc., or any other hobby.
3. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
4. Payment of commission on exports made towards equity investment in Joint Ventures/ Wholly Owned Subsidiaries abroad of Indian companies.
5. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
6. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
7. Payment related to 'Call Back Services' of telephones.
8. Remittance of interest income on funds held in Non-resident Special Rupee Scheme account.

(*b*) a travel to Nepal and/or Bhutan; or

(c) a transaction with a person resident in Nepal or Bhutan.

Q.20. Are there any current account transactions for which a person cannot draw foreign exchange without prior approval of RBI?

Ans. A person shall draw foreign exchange for a transaction mentioned below if it exceeds the limits prescribed **with prior approval of the Reserve Bank** (Schedule III to the Rules):

1	One or more **private visits** to any country (except Nepal and Bhutan). A resident Indian is allowed to take INR of denomination of Rs.100 or lesser denomination to Nepal and Bhutan without limit.	Exceeding US$ 10,000 or its equivalent in one financial year on a self declaration basis. This limit can also be availed of by a person who is availing of foreign exchange for travel abroad for any purposes, such as, for employment or immigration or studies.
2	**Gift**	Exceeding US$ 5,000 per financial year per remitter or donor other than resident individual. Remittance of gift by resident individuals are subsumed under the Liberalised Remittance Scheme.
3	**Donation**	Exceeding US$ 5,000 per financial year per remitter or donor other than resident individual. Remittance of donation by resident individuals are subsumed under the Liberalised Remittance Scheme.
4	**Donations by corporate** for, (*a*) creation of Chairs in reputed educational institutes; (*b*) to funds (not being an investment fund) promoted by educational institutes; and (*c*) to a technical institution or body or association in the field of activity of the donor company.	Exceeding one per cent of their foreign exchange earnings during the previous three financial years or US$ 5,000,000, whichever is less.
5	Exchange facilities for persons **going abroad for employment**	Exceeding US $ 100,000 on the basis of self-declaration.
6	Exchange facilities **for emigration**	Exceeding US $ 100,000 or amount prescribed by country of emigration

7	Remittance for **maintenance of close relatives abroad**	(*i*) Exceeding net salary (after deduction of taxes, contribution to provident fund and other deductions) of a person who is resident but not permanently resident in India and (*a*) is a citizen of a foreign State other than Pakistan; or (*b*) is a citizen of India, who is on deputation to the office or branch or subsidiary or joint venture in India of such foreign company, (*ii*) Exceeding US$ 100,000 per year per recipient, in all other cases. *Explanation*: For the purpose of this item, 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 three years, is a resident but not permanently resident.
8	For **business travel, or attending a Conference or specialised training, study tour** or for **maintenance expenses of a patient going abroad** for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up	Exceeding US $ 25,000 to a person, irrespective of period of stay.
9	For meeting expenses for **medical treatment abroad**	Exceeding the estimate from the doctor in India or hospital/doctor abroad.
10	For **studies abroad**	Exceeding the estimates from the institution abroad or US $ 100,000 per academic year, whichever is higher.
11	**Commission**, per transaction, to agents abroad for **sale of residential flats or commercial plots** in India	Exceeding US $ 25,000 or 5% of the inward remittance whichever is more.
12	Remittances for any **consultancy services in respect of infrastructure projects** viz. Power, Telecommunication, Railways, Roads including bridges, Sea port and airport, Industrial parks, and Urban infrastructure (water supply, sanitation and sewage)	Exceeding US$ 10,000,000 per project.
13	Remittances for other **consultancy services** procured from outside India	Exceeding US$ 1,000,000 per project.
14	By an entity in India by way of **reimbursement of pre-incorporation expenses**	Exceeding five per cent of the investment brought into India or US$ 1,00,000 whichever is higher.

The above **restriction shall not apply** where the payment is made out of funds held in Resident Foreign Currency (RFC) Account, or EEFC account of the remitter (except item nos. 2, 3, 11, & 14 above if out of EEFC account).

Q.21. What is the procedure to be followed for release of foreign exchange exceeding the above limits as prescribed in Schedule III to the Rules?

Ans. All applications for release of foreign exchange exceeding the limits as prescribed in Schedule III to the Rules should be referred to the Regional Office concerned of the Foreign Exchange Department of the Reserve Bank, under whose jurisdiction the applicant is functioning/residing.

Q.22. Who are authorized by the Reserve Bank to sell foreign exchange for travel purposes?

Ans. Foreign exchange can be purchased from any authorised person, such as Authorised Dealer (AD) Category-I bank and AD Category II. Full-Fledged Money Changers (FFMCs) are also permitted to release exchange for business and private visits.

Q.23. Can the Authorised Dealers remit foreign exchange directly abroad on behalf of Travellers from India?

Ans. Yes. Authorised Dealers may **remit foreign exchange** up to a reasonable limit, at the request of a traveller **towards his hotel accommodation, tour arrangements, etc.**, in the countries proposed to be visited by him or for making other tour arrangements for travellers from India, provided in each case the Authorised Dealer is satisfied that the remittance is being made out of the foreign exchange purchased by the traveller concerned from an Authorised Person (including exchange drawn for private travel abroad), in accordance with the Rules, Regulations and Directions in force.

Q.24. Can the Authorised Dealers remit foreign exchange directly abroad at the request of agents in India?

Ans. Yes. Authorised Dealers may **affect remittances** at the request of agents in India who have **tie-up arrangements with hotels/agents, etc., abroad for providing hotel accommodation or making other tour arrangements for travel from India**, provided the Authorised Dealer is satisfied that the remittance is being made out of the foreign exchange purchased by the traveller concerned from an Authorised Person (including exchange drawn for private travel abroad) in accordance with the Rules, Regulations and Directions in force.

Q.25. Is it necessary to endorse the amount of foreign exchange sold for travel abroad on the passport of the traveler?

Ans. No. It is not mandatory for Authorised Dealers to **endorse** the amount of foreign exchange sold for travel abroad on the **passport** of the traveller. However, if requested by the traveller, they may record under their stamp, date, signature and details of foreign exchange sold for travel.

Q.26. Will Reserve Bank prescribe the documents which should be verified by the Authorised Dealers?

Ans. Reserve Bank will not prescribe the documents which should be verified by the Authorised Dealers while permitting remittances for various transactions, particularly of current account. In case the person on whose behalf the transaction is being undertaken refuses or does not give satisfactory compliance of the requirements of an authorised person, he shall refuse in writing to undertake the transactions. Where an authorized person has reasons to believe that a contravention or evasion of the Act or the Rules or Regulations made or Notifications issued there under was contemplated in the transaction that he has refused to undertake, he shall report the matter to the Reserve Bank.

Q.27. What is simplified Application-cum-Declaration form?

Ans. Authorized dealers may release foreign exchange not exceeding US$ 5,000 or its equivalent, for all permissible current account transactions. Authorised Dealers may obtain simplified Application-cum-Declaration form.

Q.28. What are the limitations for remittances etc. for Nepal and Bhutan?

Ans. No release of foreign exchange is admissible for any kind of travel to Nepal and Bhutan or for any transaction with persons resident in Nepal. A resident Indian is allowed to take INR of denomination of Rs. 100 or lesser denomination to Nepal and Bhutan without limit. Investments in Bhutan are permitted in Indian Rupees as well as in freely convertible currencies. If investment is made in freely convertible currency/ies, sale/winding up proceeds are required to be repatriated to India in freely convertible currencies.

Q.29. How much foreign currency can be taken while buying foreign exchange for travel abroad?

Ans. Travellers going to all countries other than (a) and (b) below are allowed to purchase foreign currency notes/coins only up to US$ 3000. Balance amount can be carried in the form of travellers cheque or banker's draft.

Exceptions to this are (a) travellers proceeding to **Iraq and Libya** who can draw foreign exchange in the form of foreign currency notes and coins not exceeding US$ 5000 or its equivalent; (b) travellers proceeding to the Islamic Republic of **Iran, Russian Federation and other Republics of Commonwealth of Independent States** who can draw entire foreign exchange in the form of foreign currency notes or coins. In case of issue of travellers cheques, the traveller should sign the cheques in the presence of an authorised official and the purchaser's acknowledgement for receipt of the travellers cheques should be held on record.

Q.30. How much foreign exchange can be drawn for medical treatment abroad?

Ans. AD Category I banks and AD Category II, may release foreign exchange up to US$ 100,000 or its equivalent to resident Indians for medical treatment abroad on self declaration basis, without insisting on any estimate from a hospital/doctor in India/abroad. A person visiting abroad for medical treatment can obtain foreign exchange exceeding the above limit, provided the request is supported by an estimate from a hospital/doctor in India/abroad.

Q.31. Can foreign exchange be released to a person for accompanying as attendant to a patient going abroad for medical treatment/check-up?

Ans. An amount up to US$ 25,000 is allowed **for maintenance expenses** of a patient going abroad for medical treatment or check-up abroad, **or to a person for** accompanying as attendant to a patient going abroad for medical treatment/check-up. The amount of US$ 25,000 allowed to the patient going abroad is in addition to the limit of US$ 100,000 mentioned above.

Q.32. Can foreign exchange be released by an Authorised Dealer for medical treatment outside India for a person who has fallen sick after proceeding abroad?

Ans. Yes. A person who has fallen sick after proceeding abroad may also be released foreign exchange by an Authorised Dealer for medical treatment outside India.

Q.33. Can Residents bear medical expenses of visiting NRIs/PIOS close relatives?

Ans. Yes. Earlier, a person resident in India was free to make any payment in Indian Rupees towards meeting expenses, on account of boarding, lodging and services related thereto or travel to and from and within India only, of a person resident outside India (including NRIs/PIOS), who is on a visit to India. Now, he can also bear medical expenses of visiting NRIs/PIOS close relatives, who is on a visit to India.

Q.34. What are the facilities available to students for pursuing their studies abroad?

Ans. For studies abroad the estimate received from the institution abroad or US$ 100,000, per academic year, whichever is higher, may be availed of from an AD Category I bank and AD Category II. Students going abroad for studies are treated as Non-Resident Indians (NRIs) and are eligible for all the facilities available to NRIs under FEMA, 1999. Educational and other loans availed of by students as residents in India can be allowed to continue. A student holding NRO account may withdraw and repatriate up to US$ 1 million per financial year from his NRO account. The student may avail of an amount of US$ 10,000 or its equivalent for incidental expenses out of which US$ 3000 or its equivalent may be carried in the form of foreign currency while going for study abroad.

As non-residents, they will be eligible to receive remittances from India (i) up to US$ 100,000 from close relatives in India, on self declaration, towards maintenance, which could include remittances towards their studies also (ii) up to US$ 1 million per financial year, out of sale proceeds of assets/balances in their NRO account maintained with an Authorised Dealer bank in India and (iii) upto US$ 200,000 per financial year under the Liberalized Remittance Scheme.

All other facilities available to NRIs under FEMA are equally applicable to the students.

Q.35. How much foreign exchange is available to a person going abroad on emigration?

Ans. A person going abroad on emigration can draw foreign exchange from AD Category I bank and AD Category II up to the amount prescribed by the country of emigration or US$ 100,000, whichever is higher. He can draw foreign exchange up to US$ 100,000 on self- declaration basis from an Authorised

Dealer in India. This amount is only to meet the incidental expenses in the country of emigration. No amount of foreign exchange can be remitted outside India to become eligible or for earning points or credits for immigration. All such remittances require prior permission of the Reserve Bank. If requirement exceeds USD 100,000, the person requires to obtain the prior approval from the Reserve Bank.

Q.36. Is there any category of visit which requires prior approval from the Reserve Bank or the Government of India?

Ans. Dance troupes, artistes, etc., who wish to undertake cultural tours abroad, should obtain prior approval from the Ministry of Human Resources Development (Department of Education and Culture), Government of India, New Delhi.

Q.37. How many days in advance one can buy foreign exchange for travel abroad?

Ans. Permissible foreign exchange can be drawn 60 days in advance. In case it is not possible to use the foreign exchange within the period of 60 days, it should be immediately surrendered to an authorised **person.** However, residents are free to retain foreign exchange up to US$ 2,000, in the form of foreign currency notes or TCs for future use or credit to their Resident Foreign Currency (Domestic) [RFC (Domestic)] Accounts.

Q.38. Can one pay by cash full rupee equivalent of foreign exchange being purchased for travel abroad?

Ans. Foreign exchange for travel abroad can be purchased from an authorized **person** against rupee payment in cash only up to Rs. 50,000. However, if the Rupee equivalent exceeds Rs. 50,000, the entire payment should be made by way of a crossed cheque/banker's cheque/pay order/demand draft/ debit card/credit card/prepaid card only. Where the rupee equivalent of foreign exchange drawn exceeds Rs 50,000 either for any single drawal or more than one drawal reckoned together for a single journey/visit, it should be paid by cheque or draft.

Q.39. How much foreign exchange can a resident individual send as gift/donation to a person resident outside India?

Ans. Any resident individual, if he so desires, may remit the entire limit of US$ 200,000 in one financial year under Liberalised Remittance Scheme as gift to a person residing outside India or as donation to a charitable/educational/religious/cultural organization outside India. Remittances exceeding the limit of US$ 200,000 will require prior permission from the Reserve Bank.

Q.40. Is it permitted to use International Credit Card (ICC)/ATM/Debit card (IDC)/Store Value Card/Charge Card/Smart Card for undertaking foreign exchange transactions?

Ans. Use of International Credit Cards (ICCs)/ATMs/Debit Cards can be made for travel abroad in connection with various purposes and for making personal payments like subscription to foreign journals, internet subscription, etc. The entitlement of foreign exchange on International Credit Cards (ICCs) is limited by the credit limit fixed by the card issuing authority only. With ICCs one can (i) meet expenses/make purchases while abroad (ii) make payments in foreign exchange for purchase of books and other items through internet in India. If the person has a foreign currency account in India or with a bank overseas, he/she can even obtain ICCs of overseas banks and reputed agencies.

Use of these instruments for payment in foreign exchange in Nepal and Bhutan is not permitted.

Use of International Credit Cards (ICCs) by residents for making payment towards expenses, while on a visit outside India is permitted.

Residents can use ICCs on internet for any purpose for which exchange can be purchased from an Authorised Dealer in India, e.g. for import of books, purchase of downloadable software or import of any other item permissible under Foreign Trade Policy (FTP).

ICCs/IDCs cannot be used on internet or otherwise for purchase of prohibited items, like lottery tickets, banned or proscribed magazines, participation in sweepstakes, payment for call-back services, etc., since no drawal of foreign exchange is permitted for such items/activities.

There is no aggregate monetary ceiling separately prescribed for use of ICCs through internet.

IDCs can be used only for permissible current account transactions and the item-wise limits as mentioned in the Schedules to the Rules, as amended from time to time, are equally applicable to payments made through use of these cards.

Resident individuals maintaining foreign currency accounts with an Authorised Dealer in India or a bank abroad, as permissible under extant Foreign Exchange Regulations, are free to obtain ICCs issued by overseas banks and other reputed agencies. The charges incurred against the card either in India or abroad, can be met out of funds held in such foreign currency account/s of the card holder or through remittances, if any, from India only through a bank where the card holder has a current or savings account. The remittance for this purpose should also be made directly to the card issuing agency abroad, and not to a third party.

Certain Authorised Dealer banks are also issuing Store Value Card/Charge Card/Smart Card to residents traveling on private/business visit abroad which are used for making payments at overseas merchant establishments and also for drawing cash from ATM terminals. No prior permission from the Reserve Bank is required for issue of such cards. However, the use of such cards is limited to permissible current account transactions and subject to the prescribed limits under the Rules, as amended from time to time.

Q.41. How much Indian currency can a person carry while going abroad?

Ans. Residents are free to take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 7,500 per person. They may take or send outside India (other than to Nepal and Bhutan) commemorative coins not exceeding two coins each.

Explanation: 'Commemorative Coin' includes coin issued by Government of India Mint to commemorate any specific occasion or event and expressed in Indian currency.

Q.42. How much Indian currency can be brought in while coming into India?

Ans. A resident of India, who has gone out of India on a temporary visit may bring into India at the time of his return from any place outside India (other than Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 7,500.

A person can take or send out of India to Nepal or Bhutan, currency notes of Government of India and Reserve Bank notes, in denominations not exceeding Rs. 100.

Q.43. How much foreign exchange can be brought in while visiting India?

Ans. A person coming into India from abroad can bring with him foreign exchange without any limit. However, if the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers cheques brought in exceeds US$ 10,000 or its equivalent and/or the value of foreign currency alone exceeds US$ 5,000 or its equivalent, it should be declared to the Customs Authorities at the Airport in the Currency Declaration Form (CDF), on arrival in India.

Q.44. Is it required to follow complete export procedure when a gift parcel is sent outside India?

Ans. A person resident in India is free to send (export) any gift article of value not exceeding Rs. 5,00,000 provided export of that item is not prohibited under the extant Foreign Trade Policy and the exporter submits a declaration that goods of gift are not more than Rs. 5,00,000 in value.

Export of goods or services up to Rs. 5,00,000 may be made without furnishing the declaration in Form GR/SDF/PP/SOFTEX, as the case may be.

Q.45. How much jewellery can be carried while going abroad?

Ans. Taking personal jewellery out of India is as per the Baggage Rules, governed and administered by Customs Department, Government of India. While no approval of the Reserve Bank is required in this case, approvals, if any, required from Customs Authorities may be obtained.

Q.46. Can a resident extend local hospitality to a non-resident?

Ans. A person resident in India is free to make any payment in Indian Rupees towards meeting expenses, on account of boarding, lodging and services related thereto or travel to and from and within India, of a person resident outside India, who is on a visit to India.

Q.47. Can residents purchase air tickets in India for their travel not touching India?

Ans. Residents may book their tickets in India for their visit to any third country. For instance, residents can book their tickets for travel from London to New York, through domestic/foreign airlines in India itself.

REALISATION, REPATRIATION AND SURRENDER OF FOREIGN EXCHANGE

Q.48. What are the duties of a resident in India in respect of realization and repatriation of Foreign Exchange?

Ans. A person resident in India to whom any amount of foreign exchange is due or has accrued shall take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do, or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing:

(*a*) that the receipt by him of the whole or part of that foreign exchange is **delayed**; or

(*b*) that the foreign exchange **ceases** in whole or in part to be receivable by him.

Q.49. What are the permitted actions for a resident in India post repatriation of Foreign Exchange to India?

Ans. On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and

(*a*) sell it to an authorised person in India in exchange for rupees; or

(*b*) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or

(*c*) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

Q.50. When is the person deemed to have repatriated the realised foreign exchange to India?

Ans. A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Q.51. Is there any time-frame for a traveller who has returned to India to surrender foreign exchange?

Ans. On return from a foreign trip, travellers are required to surrender unspent foreign exchange held in the form of currency notes and travellers cheques within 180 days of return. However, they are free to retain foreign exchange up to US$ 2,000, in the form of foreign currency notes or TCs for future use or credit to their Resident Foreign Currency (Domestic) [RFC (Domestic)] Accounts. Exchange so brought back can be utilized by the individual for his/her subsequent visit abroad.

A person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc., to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

Where a person approaches an Authorised Person for surrender of unspent/unutilized foreign exchange after the prescribed period of 180 days, Authorised Person should not refuse to purchase the foreign exchange merely on the ground that the prescribed period has expired.

Q.52. Should foreign coins be surrendered to an Authorised Dealer on return from abroad?

Ans. The residents can hold foreign coins without any limit.

Q.53. How much of foreign currency notes, bank notes and foreign currency travellers cheques etc. can be retained by a person resident in India?

Ans. Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers cheques not exceeding US $ 2,000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques;

(*a*) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India;

or

(*b*) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation;

or

(*c*) was acquired by him by way of honorarium or gift while on a visit to any place outside India;

or

(*d*) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

CHAPTER 2.2

LIBERALISED REMITTANCE SCHEME FOR RESIDENT INDIVIDUALS

Q.54. What is the Liberalised Remittance Scheme ('the Scheme'/'LRS')?

Ans. Under the Liberalised Remittance Scheme, **all resident individuals**, including minors, are allowed to freely remit up to US$ 200,000 per financial year (April - March) for any permissible current or capital account transaction or a combination of both.

Q.55. What is the illustrative list of capital account transactions permitted under the Scheme?

Ans. Under the LRS, resident individuals can acquire and hold immovable property or shares or debt instruments or any other assets outside India, without prior approval of the Reserve Bank.

Q.56. Are Individuals allowed to open foreign currency accounts with banks outside India for carrying out transactions permitted under the LRS?

Ans. Yes. Individuals can also open, maintain and hold foreign currency accounts with banks outside India for carrying out transactions permitted under LRS.

Q.57. What are the prohibited items under the Scheme?

Ans. The remittance facility under the Scheme is not available for the following:

(i) Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000;

(ii) Remittance from India for margins or margin calls to overseas exchanges/overseas counterparty;

(iii) Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market;

(iv) Remittance for trading in foreign exchange abroad;

(v) Remittance by a resident individual for setting up a company abroad;

(vi) Remittances directly or indirectly to Bhutan, Nepal, Mauritius and Pakistan;

(vii) Remittances directly or indirectly to countries identified by the Financial Action Task Force (FATF) as 'non co-operative countries and territories', from time to time as available on FATF website www.fatf-gafi.org. Or as notified by the Reserve Bank; and

(viii) Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

Q.58. Whether LRS facility is in addition to existing facilities detailed in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000?

Ans. Yes. The facility under the Scheme is in addition to those already available for private travel, business travel, studies, medical treatment, etc., as described in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000. The Scheme can also be used for these purposes - other than Gift and donation remittances.

Q.59. Whether LRS facility is in addition to existing facilities for gift and donation remittances detailed in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000?

Ans. No. Gift and donation remittances cannot be made separately and have to be made under the Scheme only. Accordingly, resident individuals can remit gifts and donations up to US$ 200,000 per financial year under the Scheme.

Q.60. Are remittances under the Scheme on gross basis or net basis (net of repatriation from abroad)?

Ans. Remittance under this scheme is on a gross basis.

Q.61. Can remittances under the facility be consolidated in respect of family members?

Ans. Yes. Remittances under the facility can be consolidated in respect of family members subject to the individual family members complying with the terms and conditions of the Scheme.

Q.62. Can one use the Scheme for purchase of objects of art (paintings, etc.) either directly or through auction house?

Ans. Yes. Remittances under the Scheme can be used for purchasing objects of art subject to the provision of other applicable laws such as the extant Foreign Trade Policy of the Government of India.

Q.63. Is the AD required to check permissibility of remittances based on nature of transaction or allow the same based on remitters declaration?

Ans. AD will be guided by the nature of transaction as declared by the remitter and will certify that the remittance is in conformity with the instructions issued by the Reserve Bank.

Q.64. Can remittance be made under this Scheme for acquisition of ESOPs?

Ans. Yes. The Scheme can also be used for remittance of funds for acquisition of ESOPs.

Q.65. Is this scheme in addition to acquisition of ESOPs linked to ADR/GDR (i.e. US$ 50,000 for a block of 5 calendar years)?

Ans. Yes. The remittance under the Scheme is in addition to acquisition of ESOPs linked to ADR/GDR.

Q.66. Is this Scheme is in addition to acquisition of qualification shares (i.e. US$ 20,000 or 1% of paid up capital of overseas company, whichever is lower)?

Ans. Yes. The remittance under the Scheme is in addition to acquisition of qualification shares.

Q.67. Can a resident individual invest in units of Mutual Funds, Venture Funds, unrated debt securities, promissory notes, etc., under this Scheme?

Ans. Yes. A resident individual can invest in units of Mutual Funds, Venture Funds, unrated debt securities, promissory notes, etc. under this Scheme. Further, the resident can invest in such securities out of the bank account opened abroad under the Scheme.

Q.68. Can an individual, who has availed of a loan abroad while as a non-resident Indian can repay the same on return to India, under this Scheme as a resident?

Ans. Yes. This is permissible.

Q.69. Is it mandatory for resident individuals to have PAN number for sending outward remittances under the Scheme?

Ans. Yes. It is mandatory to have PAN number to make remittances under the Scheme.

Q.70. In case a resident individual requests for an outward remittance by way of issuance of a demand draft (either in his own name or in the name of the beneficiary with whom he intends putting through the permissible transactions) at the time of his private visit abroad, whether the remitter can effect such an outward remittance against self declaration?

Ans. Yes. Such outward remittance in the form of a DD can be affected against the declaration by the resident individual in the format prescribed under the Scheme.

Q.71. Are there any restrictions on the frequency of the remittance?

Ans. There is no restriction on the frequency. However, the total amount of foreign exchange purchased from or remitted through, all sources in India during a financial year should be within the cumulative limit of US$ 200,000.

Q.72. What are the requirements to be complied with by the remitter?

Ans. The individual will have to designate a branch of an AD through which all the remittances under the Scheme will be made. The applicants should have maintained the bank account with the bank for a minimum period of one year prior to the remittance. If the applicant seeking to make the remittance is a new customer of the bank, Authorised Dealers should carry out due diligence on the opening, operation and maintenance of the account. Further, the AD should obtain bank statement for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by the applicant may be obtained. He has to furnish an application-cum-declaration (revised vide circular No. 32 dated 10.10.2011) in the specified format regarding the purpose of the remittance and declare that the funds belong to him and will not be used for purposes prohibited or regulated under the Scheme.

Q.73. Are resident individuals under this Scheme required to repatriate the income (accrued interest/ dividend on deposits/investments abroad etc.), and sale proceeds of assets acquired abroad under the Scheme?

Ans. No. The investor can retain and reinvest the income earned on investments made under the Scheme as also sale proceeds of assets held abroad. The Resident Individual investor is not required to repatriate to India the income (accrued interest/dividend on deposits/investments abroad etc.) on investments/deposits held abroad.

Q.74. Can an individual, who has repatriated the amount remitted during the financial year, avail of the facility once again?

Ans. Once a remittance is made for an amount up to US$ 200,000 during the financial year, he would not be eligible to make any further remittances under this Scheme, even if the proceeds of the investments have been brought back into the country.

Q.75. Can remittances be made only in US Dollars or any freely convertible foreign currency?

Ans. The remittances can be made in any freely convertible foreign currency equivalent to US$ 200,000 in a financial year.

Q.76. In the past resident individuals could invest in overseas companies listed on a recognised stock exchange abroad and which has the shareholding of at least 10 per cent in an Indian company listed on a recognised stock exchange in India. Does this condition still exist?

Ans. Investment by resident individual in overseas companies is subsumed under the Scheme of US$ 200,000. The requirement of 10 per cent reciprocal shareholding in the listed Indian companies by such overseas companies has since been dispensed with.

Q.77. Are intermediaries expected to seek specific approval for making overseas investments available to clients?

Ans. Yes. Banks including those not having operational presence in India are required to obtain prior approval from Reserve Bank for soliciting deposits for their foreign/overseas branches or for acting as agents for overseas mutual funds or any other foreign financial services company.

Q.78. Are there any restrictions on the kind/quality of debt or equity instruments an individual can invest in?

Ans. No ratings or guidelines have been prescribed under the Scheme of US$ 200,000 on the quality of the investment an individual can make. However, the individual investor is expected to exercise due diligence while taking a decision regarding the investments which he or she proposes to make.

Q.79. Whether credit facilities in Indian Rupees or foreign currency would be permissible against security of such deposits?

Ans. No. The Scheme does not envisage extension of credit facility against the security of the deposits. Further, the banks should not extend any kind of credit facilities to resident individuals to facilitate remittances under the Scheme.

Q.80. Can bankers open foreign currency accounts in India for residents under the Scheme?

Ans. No. Banks in India cannot open foreign currency accounts in India for residents under the Scheme.

Q.81. Can a resident individual make a rupee gift to a NRI/PIO who is a close relative in India under the Scheme?

Ans. Yes. A resident individual is permitted to make a rupee gift to a NRI/PIO who is a close relative of the resident individual (as defined in Section 6 of the Companies Act, 1956) by way of crossed cheque/electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) account of the NRI/PIO and credit of such gift amount may be treated as an eligible credit to NRO account. The gift amount would be within the overall limit of US$ 200,000 per financial year as permitted under the Liberalised Remittance Scheme (LRS) for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount being remitted is under the LRS and all the remittances under the LRS during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

Q.82. Can resident individuals lend in Rupees to their non-resident NRIs/PIOs close relative (as defined in Section 6 of the Companies Act, 1956) for any personal purpose or business activities other than agricultural/plantation activities or real estate or relending business, under the Scheme?

Ans. Yes. A resident individual is permitted to lend to a Non resident Indian (NRI)/Person of Indian Origin (PIO) close relative [as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque/electronic transfer, subject to the following conditions:

(i) The loan is free of interest and the minimum maturity of the loan is one year;

(ii) The loan amount should be within the overall limit under the Liberalised Remittance Scheme of US$ 200,000 per financial year available for a resident individual. It would be the responsibility of the lender to ensure that the amount of loan is within the Liberalised Remittance Scheme limit of US$ 200,000 during the financial year;

(iii) The loan shall be utilised for meeting the borrower's personal requirements or for his own business purposes in India;

(iv) The loan shall not be utilised, either singly or in association with other person, for any of the activities in which investment by persons resident outside India is prohibited, namely;

(a) The business of chit fund, or

(b) Nidhi Company, or

(c) Agricultural or plantation activities or in real estate business, or construction of farm houses, or

(d) Trading in Transferable Development Rights (TDRs).

Explanation: For the purpose of item (c) above, real estate business shall not include development of townships, construction of residential/commercial premises, roads or bridges.

(v) The loan amount should be credited to the NRO a/c of the NRI/PIO. Credit of such loan amount may be treated as an eligible credit to NRO account;

(vi) The loan amount shall not be remitted outside India; and

(vii) Repayment of loan shall be made by way of inward remittances through normal banking channels or by debit to the Non-resident Ordinary (NRO)/Non-resident External (NRE)/ Foreign Currency Non-resident (FCNR) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted.

CHAPTER 2.3

FOREIGN CURRENCY DENOMINATED ACCOUNT IN INDIA BY A RESIDENT IN INDIA

Persons resident in India are permitted to maintain foreign currency accounts in India under the following three Schemes:

i. Exchange Earners Foreign Currency Accounts (EEFC),

ii. Resident Foreign Currency Accounts, and

iii. Resident Foreign Currency (Domestic) Account.

EXCHANGE EARNERS FOREIGN CURRENCY ACCOUNTS (EEFC):

Q.83. Who can open an EEFC account?

Ans. All categories of foreign exchange earners, such as individuals (including CAs), companies, etc. who are resident in India, may open EEFC accounts.

Q.84. What is an EEFC Account and what are its benefits?

Ans. Exchange Earners' Foreign Currency Account (EEFC) is an account maintained in foreign currency with an Authorised Dealer i.e. a bank dealing in foreign exchange. It is a facility provided to the foreign exchange earners, including exporters, to credit 100 per cent of their foreign exchange earnings to the account, so that the account holders do not have to convert foreign exchange into Rupees and vice versa, thereby minimizing the transaction costs.

Q.85. What are the different types of EEFC accounts? Can interest be paid on these accounts?

Ans. An EEFC account can be held only in the form of a current account. No interest is payable on EEFC accounts.

Q.86. How much of one's foreign exchange earnings can be credited into an EEFC account?

Ans. One can credit up to 100 per cent of his/her foreign exchange earnings into the EEFC account, subject to permissible credits and debits.

Q.87. Is there any Cheque facility available?

Ans. Yes. Cheque facility is available for operation of the EEFC account with separate series with the superscription 'EEFC Account'.

Q.88. Are any credit facilities permitted against the security of balances held in EEFC accounts?

Ans. No credit facilities, either fund based or non-fund based shall be permitted against the security of balances held in EEFC accounts by the AD Category - I banks.

Q.89. What are the permissible credits into this account?

Ans.

(i) Inward remittance through normal banking channels, other than remittances received on account of foreign currency loan or investment received from abroad or received for meeting specific obligations by the account holder;

(ii) Payments received in foreign exchange by a 100 per cent Export Oriented Unit or a unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park for supply of goods to similar such units or to a unit in Domestic Tariff Area;

(iii) Payments received in foreign exchange by a unit in the Domestic Tariff Area for supply of goods to a unit in the Special Economic Zone (SEZ);

(iv) Payment received by an exporter from an account maintained with an authorised dealer for the purpose of counter trade. Counter trade is an arrangement involving adjustment of value of goods imported into India against value of goods exported from India in terms of the Reserve Bank guidelines;

(v) Advance remittance received by an exporter towards export of goods or services;

(vi) Payment received for export of goods and services from India, out of funds representing repayment of State Credit in U.S. Dollar held in the account of Bank for Foreign Economic Affairs, Moscow, with an authorised dealer in India;

(vii) Professional earnings including directors fees, consultancy fees, lecture fees, honorarium and similar other earnings received by a professional by rendering services in his individual capacity;

(viii) Re-credit of unutilised foreign currency earlier withdrawn from the account;

(ix) Amount representing repayment by the account holder's importer customer, of loan/advances granted, to the exporter holding such account; and

(x) The disinvestment proceeds received by the resident account holder on conversion of shares held by him to ADRs/GDRs under the Sponsored ADR/GDR Scheme approved by the Foreign Investment Promotion Board of the Government of India.

Q.90. Can foreign exchange earnings received through an international credit card be credited to the EEFC account?

Ans. Yes, foreign exchange earnings received through an international credit card for which reimbursement has been made in foreign exchange may be regarded as a remittance through normal banking channel and the same can be credited to the EEFC account.

Q.91. What are the permissible debits into this account?

Ans.

(i) Payment outside India towards a permissible current account transaction in accordance to the provision of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, and permissible capital account transaction [in accordance to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000;

(ii) Payment in foreign exchange towards cost of goods purchased from a 100 percent Export Oriented Unit or a Unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park;

(iii) Payment of customs duty in accordance with the provision of the Foreign Trade Policy of the Central Government for the time being in force;

(iv) Trade related loans/advances, extended by an exporter holding such account to his importer customer outside India, subject to compliance with the Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000;

(v) Payment in foreign exchange to a person resident in India for supply of goods/services including payments for airfare and hotel expenditure.

Q.92. Is there any restriction on withdrawal in rupees of funds held in an EEFC account?

Ans. No, there is no restriction on withdrawal in Rupees of funds held in an EEFC account. However, the amount withdrawn in Rupees shall not be eligible for conversion into foreign currency and for re-credit to the account.

Q.93. Whether the EEFC balances can be covered against exchange risk?

Ans. Yes, the EEFC account balances can be hedged. The balances in the account sold forward by the account holders has to remain earmarked for delivery. However, the contracts can be rolled over.

Q.94. If there is change of residential status from resident to non-resident, what would happen to balance lying in EEFC account?

Ans. Balance in EEFC account may be transferred to his NRE/FCNR(B) account at his option.

Q.95. Are Resident individuals permitted to include resident close relative(s) as defined in the Companies Act, 1956 as a joint holder(s) in their EEFC bank accounts?

Ans. Yes. Resident individuals are permitted to include resident close relative(s) as defined in the Companies Act, 1956 as a joint holder(s) in their EEFC bank accounts on 'former or survivor' basis. However, such resident Indian close relative, now being made eligible to become joint account holder, shall not be eligible to operate the account during the life time of the resident account holder.

RESIDENT FOREIGN CURRENCY (RFC) ACCOUNTS:

Q.96. What is an RFC Account & who can open such an account?

Ans. A person resident in India may open, hold and maintain with an Authorised Dealer in India a Resident Foreign Currency (RFC) Account to keep their foreign currency assets which were **held outside India at the time of return can be credited to such accounts.** A resident in India can maintain RFC account if the foreign exchange was earned when he was abroad, or he inherited the amount or obtained gift from a person who was not resident in India.

Q.97. What are the permissible credits into this account?

Ans. The foreign exchange received as followed may also be credited to this account:

(*a*) Received as pension or any other superannuation or other monetary benefits **from his employer outside India**; or

(*b*) **realized on conversion of the assets** acquired by a **person resident in India when he was resident outside India**, and repatriated to India; or

(*c*) **Received or acquired as gift or inheritance** from a person **who was resident outside India**; or

(*d*) Referred to in clause (*c*) of section 9 of the Act, or **acquired as gift or inheritance therefrom**; or

(*e*) 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.

Q.98. What are the different types of RFC accounts?

Ans. RFC account can be maintained in the form of current or savings or term deposit accounts.

Q.99. Is there any restriction on utilisation of foreign currency balances held in an RFC account?

Ans. The funds in RFC account are free from all restrictions regarding utilisation of foreign currency balances including any restriction on investment outside India.

Q.100. Are NRI/PIO permitted to open RFC account, and credit proceeds of sale of assets to RFC account?

Ans. Yes. NRI/PIO is permitted to hold, own and transfer or invest in foreign currency, foreign security or immovable property situated outside India, if such currency, security or property was held or owned when resident outside India. Proceeds of sale of assets outside India can be credited to RFC account.

Q.101. Are Resident individuals permitted to include resident close relative(s) as defined in the Companies Act, 1956 as a joint holder(s) in their RFC bank accounts?

Ans. Yes. Resident individuals are permitted to include resident close relative(s) as defined in the Companies Act, 1956 as a joint holder(s) in their RFC bank accounts on 'former or survivor' basis. However, such resident Indian close relative, now being made eligible to become joint account holder, shall not be eligible to operate the account during the life time of the resident account holder.

RESIDENT FOREIGN CURRENCY (DOMESTIC) ACCOUNT:

Q.102. What is an RFC (Domestic) Account?

Ans. A resident individual may open, hold and maintain with an Authorised Dealer in India a foreign currency account, to be known as Resident Foreign Currency (Domestic) Account, out of foreign exchange acquired in the form of currency notes, bank notes and travellers cheques.

Q.103. What are the permissible credits into this account?

Ans. Foreign exchange as followed acquired in the form of currency notes, bank notes and travellers cheques:

(*a*) While on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or

(*b*) From any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or

(*c*) By way of honorarium or gift while on a visit to any place outside India; or

(*d*) Represents the unspent amount of foreign exchange acquired by him from an authorised person for travel abroad; or

(*e*) As gift from a close relative (means relatives as defined in section 6 of the Companies Act, 1956); or

(*f*) By way of earning through export of goods/services, or as royalty, honorarium or by any other lawful means; or

(*g*) Representing the disinvestment proceeds received by the resident account holder on conversion of shares held by him to ADRs/GDRs under the Sponsored ADR/GDR Scheme approved by the Foreign Investment Promotion Board of Government of India; or

(*h*) By way of earnings 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.

Q.104. What are the permissible debits into this account?

Ans. Debits to the account shall be for payments towards a current account transaction in accordance with the provision of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and towards a capital account transaction permissible under the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

Q.105. What are the different types of RFC (Domestic) Accounts? Can interest be paid on these accounts?

Ans. The account shall be maintained in the form of Current Account and shall not bear any interest.

Q.106. Is there any ceiling on the balances in RFC (Domestic) Account?

Ans. There is no ceiling on the balances in the account.

Q.107. If there is change of residential status from resident to non-resident, what would happen to balance lying in RFC (Domestic) account?

Ans. Balance in RFC (Domestic) may be transferred to his NRE/FCNR(B) account at his option.

OTHER IMPORTANT CONDITIONS OF FOREIGN CURRENCY ACCOUNTS BY RESIDENTS

Q.108. How are funds out of the Foreign Currency Accounts remitted after the account holder's death?

Ans. On the death of a foreign currency account holder,—

(1) The authorised dealer with whom the account is held or maintained may remit to a nominee being a person resident outside India, funds to the extent of his share or entitlement from the account of the deceased account holder;

(2) A nominee being a person resident in India, who is desirous of remitting funds outside India out of his share for meeting the liabilities abroad of the deceased, may apply to the Reserve Bank for such remittance.

Q.109. Can a person resident in India who has gone abroad for studies or who is on a visit to a foreign country open a Foreign Currency Account?

Ans. A person resident in India who has gone abroad for studies or who is on a visit to a foreign country may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India, provided that on his return to India, the balance in the account is repatriated to India. Provided that short visits to India by a person who has gone abroad for studies, before completion of his studies, shall not be treated as his return to India.

Q.110. In what circumstances, a resident in India can open a Foreign Currency Account with a bank outside India?

Ans. A person resident in India who has gone out of India to participate in an exhibition/trade fair outside India may open, hold and maintain a Foreign Currency Account with a bank outside India for crediting the sale proceeds of goods on display in the exhibition/trade fair. However, the balance in the account is repatriated to India through normal banking channels within a period of one month from the date of closure of the exhibition/trade fair.

NON-RESIDENT CLOSE RELATIVE(S) PERMITTED TO BE A JOINT HOLDER(S) IN RESIDENT BANK ACCOUNTS MAINTAINED BY RESIDENTS IN INDIA

Q.111. Are non-resident close relative(s) permitted to be a joint holder(s) in resident bank accounts maintained by residents in India?

Ans. Yes. Individuals resident in India are permitted to include non-resident close relative(s) (relatives as defined in Section 6 of the Companies Act, 1956) as a joint holder(s) in their resident bank accounts on 'former or survivor' basis. However, such non- resident Indian close relatives shall not be eligible to operate the account during the life time of the resident account holder.

CHAPTER 2.4

ASSETS OUTSIDE INDIA BY A PERSON RESIDENT IN INDIA

Q.112. Can a person resident in India hold assets outside India?

Ans. In terms of sub-section 4, of Section (6) of the Foreign Exchange Management Act, 1999, a person resident in India is free to 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.

Q.113. Whether income and sale proceeds of assets held abroad by returning NRIs need to be repatriated?

Ans. Income and sale proceeds of assets held abroad by NRIs who have returned to India for permanent settlement need not be repatriated (Circular 37 dated 19.10.2011).

Q.114. Can resident individuals acquire and sell foreign securities under ESOP?

Ans. Resident individuals who are either employees or director of an Indian office or branch of a foreign company in which foreign holding is not less than 51 per cent are permitted to acquire foreign securities under ESOP Scheme without any monetary limit. They are also permitted to freely sell the shares provided the proceeds thereof are repatriated to India.

PERMISSION TO TAKE OR HOLD A GENERAL INSURANCE POLICY ISSUED BY AN INSURER OUTSIDE INDIA

Q.115. Whether a person resident in India allowed to take or hold a general insurance policy issued by an insurer outside India?

Ans. A person resident in India may take or continue to hold a general insurance policy issued by an insurer outside India, provided that, the policy is held, under a specific or general permission of the Central Government.

Q.116. What are the conditions need to be met by resident in India to continue holding any general insurance policy issued by an insurer outside India when such person was resident outside India?

Ans. A person resident in India may continue to hold any general insurance policy issued by an insurer outside India when such person was resident outside India. Provided that where the premium due on a general insurance policy has been paid by making remittance from India, the policy holder shall repatriate to India through normal banking channels, the maturity proceeds or amount of any claim due on the policy, within a period of seven days from the receipt thereof.

PERMISSION TO TAKE OR HOLD A LIFE INSURANCE POLICY ISSUED BY AN INSURER OUTSIDE INDIA.

Q.117. Whether a person resident in India allowed to take or hold a life insurance policy issued by an insurer outside India?

Ans. A person resident in India may take or continue to hold a life insurance policy issued by an insurer outside India, provided that, the policy is held, under a specific or general permission of the Reserve Bank of India.

Q.118. What are the conditions need to be met by resident in India to continue holding any life insurance policy issued by an insurer outside India when such person was resident outside India?

Ans. A person resident in India may continue to hold any life insurance policy issued by an insurer outside India when such person was resident outside India. Provided that where the premium due on a life insurance policy has been paid by making remittance from India, the policy holder shall repatriate to India through normal banking channels, the maturity proceeds or amount of any claim due on the policy, within a period of seven days from the receipt thereof.

FACILITIES FOR DIRECT INVESTMENT BY RESIDENT INDIVIDUALS ABROAD

Q.119. Can an Individual resident in India make investment in overseas Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS)**?**

Ans. No. Only an Indian party has been permitted to make investment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), not exceeding 400 per cent of the net worth as on the date of last audited balance sheet of the Indian party. Indian party means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932, making investment in a JV/WOS abroad and includes any other entity in India excluding individuals as may be notified by the Reserve Bank.

Q.120. What are the general permissions available to persons resident in India for purchase/ acquisition of securities abroad?

Ans. General permission has been granted to persons resident in India for purchase/acquisition of securities as under:

a. Out of funds held in the RFC account;

b. As bonus shares on existing holding of foreign currency shares;

c. When not permanently resident in India, from the foreign currency resources outside India.

Q.121. What are the prohibited activities for overseas direct investment?

Ans. Real estate and banking business are the prohibited sectors for overseas direct investment. Real estate business means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges.

Q.122. Can the partners hold shares of the overseas concerns for and on behalf of the firm?

Ans. Individual partners can hold shares for and on behalf of the firm in an overseas JV/WOS, where the entire funding for the investments has been done by the firm provided the host country regulations or operational requirements warrant such holding.

Q.123. Can a resident individual in India acquire/sell foreign securities without prior approval of the Reserve Bank?

Ans. Resident individuals can acquire/sell foreign securities **without prior approval** in the following cases:

(a) to acquire foreign securities as a gift from any person resident outside India;

(b) to acquire shares under cashless Employees Stock Option Programme (ESOP) issued by a company outside India, provided it does not involve any remittance from India;

(c) to acquire shares by way of inheritance from a person whether resident in or outside India;

(d) to purchase equity shares offered by a foreign company under its ESOP Schemes, if he is an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle (SPV), is not less than 51 per cent. AD Category - I banks are permitted to allow remittances for purchase of shares by eligible persons under this provision irrespective of the method of operationalisation of the scheme i.e where the shares under the scheme are offered directly by the issuing company or indirectly through a trust/a Special Purpose Vehicle (SPV)/step down subsidiary, provided (i) the company issuing the shares effectively, directly or indirectly, holds in the Indian company, whose employees/directors are being offered shares, not less than 51 per cent of its equity, (ii) the shares under the ESOP Scheme are offered by the issuing company globally on a uniform basis, and (iii) an Annual Return (Annex B) is submitted by the Indian company to the Reserve Bank through the AD Category - I bank giving details of remittances/beneficiaries, etc. A person resident in India may transfer by way of sale the shares acquired as stated above provided that the proceeds thereof are repatriated immediately on receipt thereof and in any case not later than 90 days from the date of sale of such securities.

(e) Foreign companies are permitted to repurchase the shares issued to residents in India under any ESOP Scheme provided (i) the shares were issued in accordance with the Rules/ Regulations framed under Foreign Exchange Management Act, 1999, (ii) the shares are being repurchased in terms of the initial offer document, and (iii) an annual return is submitted through the AD Category - I bank giving details of remittances/beneficiaries, etc.

Q.124. Can a resident individual acquire shares of a foreign company in his capacity as director?

Ans. Yes, Reserve Bank has given general permission to a resident individual to acquire foreign securities to the extent of the minimum number of qualification shares required to be held for holding the post of Director provided such shares do not exceed 1% of the paid-up capital of the overseas company and the amount to be remitted for such shares does not exceed US$ 20,000 in a calendar year.

Q.125. Can a resident individual subscribe to the rights issue of shares held by him?

Ans. Yes, a resident individual may acquire foreign securities by way of rights shares issued by a company incorporated outside India provided the existing shares were held in accordance with the provision of the law.

Q.126. Are there any relaxations for individual employees/directors of an Indian company engaged in the field of software for acquisition of shares in their JV/WOS abroad?

Ans. General permission is available for the individual employees/directors of an Indian promoter company engaged in the field of software for acquisition of shares of a JV/WOS abroad provided:

i. the consideration for purchase does not exceed US$ 10,000 or its equivalent per employee in a block of five calendar years;

ii. the shares acquired by all the employees/directors do not exceed 5% of the paid-up capital of the Joint Venture or Wholly Owned Subsidiary outside India; and

iii. after allotment of such shares, the percentage of shares held by the Indian promoter company, together with shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment.

Resident employees of Indian companies in the knowledge based sectors including working directors may purchase foreign securities under the ADR/GDR linked stock option scheme provided the consideration for purchase does not exceed USD 50,000 or its equivalent in a block of five calendar years.

OVERSEAS INVESTMENTS - PROPRIETORSHIP CONCERNS RENDERING PROFESSIONAL SERVICES TO FOREIGN COMPANIES

Q.127. What are the limitations for an Indian proprietary concern to accept shares of a company outside India in lieu of fees for professional services?

Ans. The two limitations for an Indian concern to accept shares of a company outside India in lieu of fees due to it for professional services rendered to the said company are as follows:

(*a*) the value of the shares accepted from each company outside India shall not exceed fifty per cent of the fees receivable by the Indian concern from that company; and (*b*) the Indian concern's shareholding in any one company outside India by virtue of shares accepted as aforesaid shall not exceed ten per cent of the paid-up capital of the company outside India, whose shares are accepted.

OVERSEAS INVESTMENTS - PROPRIETORSHIP CONCERNS BEING A RECOGNISED STAR EXPORT HOUSE

Q.128. What are the conditions need to be met by a Proprietary/unregistered partnership firm in India being a recognised Star Export House to set up a JV/WOS outside India?

Ans. Proprietary/unregistered partnership firm in India being a recognised Star Export House with a proven track record and a consistently high export performance satisfying the criteria as per Schedule II of FEMA 120 may set up a JV/WOS outside India with the prior approval of the Reserve Bank.

INVESTMENT BY INDIVIDUALS RENDERING PROFESSIONAL SERVICES TO FOREIGN COMPANIES

Q.129. Can a Resident individual acquire shares in a foreign entity offered as consideration for professional services rendered to the foreign entity?

Ans. A Resident individual may apply to the Reserve Bank for permission to acquire shares in a foreign entity offered as consideration for professional services rendered to the foreign entity.

Q.130. What are the factors considered by RBI while granting above permission to a resident individual to acquire shares in a foreign entity?

Ans. Reserve Bank may, after taking into account, *inter alia* the following factors, grant permission subject to such terms and conditions as are considered necessary:

(*i*) Credentials and net worth of the individual and the nature of his profession.

(*ii*) The extent of his forex earnings/balances in his EEFC and/or RFC account;

(*iii*) Financial and business track record of the foreign entity;

(*iv*) Potential for forex inflow to the country;

(*v*) Other likely benefits to the country.

CHAPTER 2.5

IMMOVABLE PROPERTY OUTSIDE INDIA

Q.131. Whether any approval required by a Resident in India to acquire or transfer any immovable property situated outside India?

Ans. Yes. No person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank.

A person resident in India who hold any immovable property situated outside India may continue to hold such immoveable property if such 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 (section 6(4) of FEMA).

Q.132. Whether above approval also required by a Foreign National resident in India?

Ans. No. Property held by a person resident in India who is a national of a foreign State is permitted.

Q.133. How can a person resident in India acquire immovable property situated outside India?

Ans. A person resident in India may acquire immovable property outside India,

(*a*) by way of gift or inheritance from a person referred to in sub-section (4) of section 6 of FEMA i.e. A person resident in India who hold any immovable property situated outside India if such 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.

(*b*) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account.

(*c*) under Liberalised Remittance Scheme.

Q.134. Can a person resident in India transfer such immovable property situated outside India?

Ans. Yes. A person resident in India, who has acquired immovable property outside India as above, may transfer it by way of gift to his relative who is a person resident in India.

CHAPTER 2.6

BORROWING OR LENDING IN FOREIGN EXCHANGE BY INDIVIDUAL RESIDENT IN INDIA

Q.135. Can an individual resident in India borrow foreign exchange from his close relatives outside India? If yes, to what extent?

Ans. Yes. An individual resident in India may borrow a sum not exceeding **US$ 250,000** or its equivalent from **his close relatives** (as defined in section 6 of the Companies Act, 1956) **outside India**, subject to the conditions that—

a. the minimum maturity period of the loan is one year;

b. the loan is free of interest; and

c. the amount of loan is received by inward remittance in free foreign exchange through normal banking channels or by debit to the NRE/FCNR account of the non-resident lender.

Q.136. Can Indian companies in India grant loans in foreign currency to the employees of their branches outside India?

Ans. Indian companies in India may **grant loans in foreign currency to the employees of their branches outside India** for personal purposes provided that the loan shall be granted for personal purposes in accordance with the lender's Staff Welfare Scheme/Loan Rules and other terms and conditions as applicable to its staff resident in India and abroad.

CHAPTER 3

FACILITIES TO NRIS/PIOS

Q.137. How are NRIs and PIOs defined in Regulations?

Ans. Definition of NRI:

For the purposes of (i) FEM (Deposit) Regulations, (ii) FEM (Investment in Firm or Proprietary Concern in India) Regulations, (iii) FEM (Transfer or Issue of Security by a Person Resident Outside India) Regulations, and (iv) FEM (Borrowing and Lending In Rupees) Regulations:

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

For the purposes of FEM (Remittance of Assets) Regulations:

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

Definition of PIO:

For the purposes of (i) FEM (Deposit) Regulations, (ii) FEM (Borrowing and Lending In Rupees) Regulations, and (iii) FEM (Remittance of Assets) Regulations

'Person of Indian Origin' means a citizen of any country **other than Bangladesh or Pakistan**, if (*a*) he at any time held Indian passport; or (*b*) he or either of his parents or any of his grand-parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or (*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*).

FEM (Investment in Firm or Proprietary Concern in India) Regulations

'Person of Indian Origin' means a citizen of any country **other than Bangladesh or Pakistan or Sri Lanka**, if (*a*) he at any time held Indian passport; or (*b*) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or (*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*).

FEM (Acquisition and Transfer of Immovable Property In India) Regulations

2(c) 'Person of Indian origin' means an individual (**not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan**), who (*i*) at any time, held Indian passport; or (*ii*) who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

Accordingly, for the purposes of FEM (Investment in Firm or Proprietary Concern in India) Regulations, 'Sri Lanka' is also excluded from the definition of PIO.

For the purposes of FEM (Acquisition and Transfer of Immovable Property In India) Regulations, individuals being citizens of Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan are also excluded from the definition of PIO.

CHAPTER 3.1

CONSOLIDATED FOREIGN DIRECT INVESTMENT (FDI) POLICY AS APPLICABLE TO NRIs/PIOs

Q.138. Who frames the FDI Policy?

Ans. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India has put in place framework on Foreign Direct Investment which is embodied in the Circular on Consolidated FDI Policy, which are updated every six months.

Q.139. How are policy pronouncements on FDI made?

Ans. Government of India makes policy pronouncements on FDI through Press Notes/Press Releases which are notified by the Reserve Bank of India as amendment to the FEMA 20. These notifications take effect from the date of issue of Press Notes/Press Releases, unless specified otherwise therein. In case of any conflict, the relevant FEMA Notification will prevail. The procedural instructions are issued by the Reserve Bank of India vide A.P.Dir. (series) Circulars.

Q.140. What does an 'FDI' mean?

Ans. 'FDI' means investment by non-resident entity/person resident outside India in the capital of the Indian company under Schedule 1 of FEMA 20.

Q.141. What is the meaning of 'Capital'?

Ans. 'Capital' means equity shares; fully, compulsorily & mandatorily convertible preference shares; fully, compulsorily & mandatorily convertible debentures.

Q.142. Can Warrants and partly paid shares be issued to NRIs?

Ans. Warrants and partly paid shares can be issued to person/(s) resident outside India only after approval through the Government route.

Q.143. Who can invest in India?

Ans. A non-resident entity including NRIs/PIOs and Foreign Citizens Resident Outside India (other than a citizen of Pakistan or an entity incorporated in Pakistan) can invest in India, subject to the FDI Policy. A citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route.

Q.144. Is there any condition with regard to mode of payment in cases where investment in the capital of Indian companies is made by NRIs resident in Nepal and Bhutan or citizens of Nepal and Bhutan?

Ans. NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

Q.145. Who can invest/trade through a registered broker in the capital of Indian Companies on recognized Indian Stock Exchanges?

Ans. Only NRI as per Schedule 3 of FEMA 20 can invest/trade through a registered broker in the capital of Indian Companies on recognized Indian Stock Exchanges.

TYPES OF INSTRUMENTS

Q.146. What are the different types of instruments issued by Indian companies?

Ans. Indian companies can issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations. The price/conversion formula of convertible capital instruments should be determined upfront at the time of issue of the instruments. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant FEMA regulations [the DCF method of valuation for the unlisted companies and valuation in terms of SEBI (ICDR) Regulations, for the listed companies].

Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply. Since these instruments would be denominated in rupees, the rupee interest rate will be based on the swap equivalent of London Interbank Offered Rate (LIBOR) plus the spread as permissible for ECBs of corresponding maturity.

Q.147. What are the different types of Entities into which FDI can be made?

Ans.

1. **FDI in an Indian Company** - Indian companies can issue capital against FDI.
2. **FDI in Partnership Firm/Proprietary Concern**:
   - (i) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided;
     - (a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.
     - (b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.
     - (c) Amount invested shall not be eligible for repatriation outside India.
   - (ii) Investments with repatriation option: NRIs/PIO may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.
   - (iii) Investment by non-residents other than NRIs/PIO: A person resident outside India other than NRIs/PIO may make an application and seek prior approval of Reserve Bank for making investment in the capital of a firm or a proprietorship concern or any association of persons in India. The application will be decided in consultation with the Government of India.
   - (iv) Restrictions: An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or Print Media.
3. If a domestic Venture Capital Fund is set up as a trust, a person resident outside India (non-resident entity/individual including an NRI) can invest in such domestic VCF subject to approval of the Foreign Investment Promotion Board (FIPB). However, if a domestic VCF is set-up as an incorporated company under the Companies Act, 1956, then a person resident outside India (non-resident entity/individual including an NRI) can invest in such domestic VCF under the automatic route of FDI Scheme, subject to the pricing guidelines, reporting requirements, mode of payment, minimum capitalization norms, etc.
4. **FDI in Trusts**: FDI in Trusts other than VCF is not permitted.
5. **FDI in Limited Liability Partnerships (LLPs):** FDI in LLPs is permitted, subject to the following conditions:
   - (a) FDI will be allowed, through the Government approval route, only for LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance related conditions (such as 'Non Banking Finance

Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects' etc.).

(b) LLPs with FDI will not be allowed to operate in agricultural/plantation activity, print media or real estate business.

(c) An Indian company, having FDI, will be permitted to make downstream investment in an LLP only if both-the company, as well as the LLP- are operating in sectors where 100% FDI is allowed, through the automatic route and there are no FDI-linked performance conditions.

(d) LLPs with FDI will not be eligible to make any downstream investment.

(e) Foreign Capital participation in LLPs will be allowed only by way of cash consideration, received by inward remittance, through normal banking channels or by debit to NRE/FCNR account of the person concerned, maintained with an authorized dealer/authorized bank.

(f) Investment in LLPs by Foreign Institutional Investors (FIIs) and Foreign Venture Capital Investors (FVCIs) will not be permitted. LLPs will also not be permitted to avail External Commercial Borrowings (ECBs).

(g) In case the LLP with FDI has a body corporate that is a designated partner or nominates an individual to act as a designated partner in accordance with the provision of Section 7 of the LLP Act, 2008, such a body corporate should only be a company registered in India under the Companies Act, 1956 and not any other body, such as an LLP or a trust.

(h) For such LLPs, the designated partner "resident in India", as defined under the 'Explanation' to Section 7(1) of the LLP Act, 2008, would also have to satisfy the definition of "person resident in India", as prescribed under Section 2(v)(i) of the Foreign Exchange Management Act, 1999.

(i) The designated partners will be responsible for compliance with all the above conditions and also liable for all penalties imposed on the LLP for their contravention, if any.

(j) Conversion of a company with FDI, into an LLP, will be allowed only if the above stipulations are met and with the prior approval of FIPB/Government.

6. **FDI in other Entities**: FDI in resident entities other than those mentioned above is not permitted.

ISSUE OF SHARES

Q.148. What are the provision regarding Issue of Shares? What actions can be taken in case of Non-compliance with these provision?

Ans. The capital instruments should be issued within 180 days from the date of receipt of the inward remittance received through normal banking channels including escrow account opened and maintained for the purpose or by debit to the NRE/FCNR (B) account of the non-resident investor. In case, the capital instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR (B) account, the amount of consideration so received should be refunded immediately to the non-resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR (B) account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and would attract penal provision. In exceptional cases, refund of the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the RBI, on the merits of the case.

Q.149. How is the price of shares issued to persons resident outside India under the FDI Policy fixed?

Ans. Issue price of shares - Price of shares issued to persons resident outside India under the FDI Policy, shall not be less than –

a. the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company is listed on any recognised stock exchange in India;

b. the fair valuation of shares done by a SEBI registered Category - I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India; and

c. the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

Q.150. How is the valuation of shares done in case of investment by way of swap of shares?

Ans. In case of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Foreign Investment Promotion Board (FIPB) will also be a prerequisite for investment by swap of shares.

Q.151. What are the provision regarding transfer of shares and convertible debentures by NRIs under FDI Policy?

Ans.

(i) Subject to FDI sectoral policy (relating to sectoral caps and entry routes), applicable laws and other conditionalities including security conditions, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:

(a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs).

(b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.

Transfer of shares from NRI to NR or NR to NRI requires the prior approval of the Reserve Bank of India.

(c) A person resident outside India can transfer any security to a person resident in India by way of gift.

(d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.

(e) A person resident in India can transfer by way of sale, shares/convertible debentures (including transfer of subscriber's shares), of an Indian company in sectors other than financial services sectors (i.e. Banks, NBFC, Insurance, Asset Reconstruction Companies(ARCs), Credit Information Companies (CICs), infrastructure companies in the securities market viz. Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.) under private arrangement to a person resident outside India, subject to the RBI guidelines.

(f) General permission is also available for transfer of shares/convertible debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the RBI guidelines.

(g) The above General Permission also covers transfer by a resident to a non-resident of shares/convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under Automatic Route, as well as transfer of shares by a non-resident to an Indian company under buyback and/or capital reduction scheme of the company. However, this General Permission is not available in case of transfer of shares/debentures, from a Resident to a Non-Resident/ Non-Resident Indian, of an entity engaged in any activity in the financial services sector (i.e. Banks, NBFCs, Asset Reconstruction Companies (ARCs), Credit Information Companies (CICs), Insurance, infrastructure companies in the securities market such as Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.).

(h) The Form FC-TRS should be submitted to the AD Category-I Bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India.

(ii) The sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to a Know Your Customer (KYC) check by the remittance receiving AD Category - I bank at the time of receipt of funds. In case, the remittance receiving AD Category - I bank is different from the AD Category - I bank handling the transfer transaction, the KYC check should be carried out by the remittance receiving bank and the KYC report be submitted by the customer to the AD Category - I bank carrying out the transaction along with the Form FC-TRS.

(iii) **Escrow:** AD Category - I banks have been given general permission to open Escrow account and Special account of non-resident corporate for open offers/exit offers and delisting of shares. The relevant SEBI (SAST) Regulations or any other applicable SEBI Regulations/provision of the Companies Act, 1956 will be applicable. AD Category-I banks have also been permitted to open and maintain, without prior approval of RBI **non-interest bearing** Escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/or provide Escrow facilities for keeping securities to facilitate FDI transactions subject to the terms and conditions specified by RBI. SEBI authorised Depository Participants have also been permitted to pena and maintain, without prior approval of RBI. In both cases, the Escrow agent shall necessarily be an AD Category-I bank or SEBI authorized Depository Participant (in case of securities' accounts). These facilities will be applicable for both issue of fresh shares to the non-residents as well as transfer of shares from/to the non-residents.

PRIOR PERMISSION OF RBI IN CERTAIN CASES FOR TRANSFER OF CAPITAL INSTRUMENTS

Q.152. Under what circumstances, prior approval of RBI is required for transfer of capital instruments?

Ans. The following instances of transfer of capital instruments from resident to non-residents by way of sale require prior approval of RBI:

(a) Transfer of capital instruments of an Indian company engaged in financial services sector (i.e. Banks, NBFCs, Asset Reconstruction Companies (ARCs), Credit Information Companies (CICs), Insurance companies, infrastructure companies in the securities market such as Stock Exchanges, Clearing Corporations, and Depositories, Commodity Exchanges, etc.).

(b) Transactions which attract the provision of SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997.

(c) The activity of the Indian company whose capital instruments are being transferred falls outside the automatic route and the approval of the Government has been obtained for the said transfer.

(d) The transfer is to take place at a price which falls outside the pricing guidelines specified by the Reserve Bank from time to time.

(e) Transfer of capital instruments where the non-resident acquirer proposes deferment of payment of the amount of consideration, prior approval of the Reserve Bank would be required, as hitherto. Further, in case approval is granted for a transaction, the same should be reported in Form FC-TRS, to an AD Category - I bank for necessary due diligence, within 60 days from the date of receipt of the full and final amount of consideration.

Q.153. Under what circumstances, prior approval of RBI is not required anymore for transfer of capital instruments?

Ans. The following are now permitted without the prior approval of the Reserve Bank of India:

A. Transfer of shares from a Non Resident to Resident under the FDI scheme where the pricing guidelines under FEMA, 1999 are not met provided that :-

i. The original and resultant investment are in line with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation, etc.;

ii. The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST, buy back); and

iii. Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

B. Transfer of shares from Resident to Non Resident :

(i) where the transfer of shares requires the prior approval of the FIPB as per the extant FDI policy provided that :

(a) the requisite approval of the FIPB has been obtained; and

(b) the transfer of share adheres with the pricing guidelines and documentation requirements as specified by the Reserve Bank of India from time to time.

(ii) where SEBI (SAST) guidelines are attracted subject to the adherence with the pricing guidelines and documentation requirements as specified by Reserve Bank of India from time to time.

(iii) where the pricing guidelines under the Foreign Exchange Management Act (FEMA), 1999 are not met provided that:-

(a) The resultant FDI is in compliance with the extant FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc.;

(b) The pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST); and

(c) Chartered Accountants Certificate to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

(iv) where the investee company is in the financial sector provided that :

(a) NOCs are obtained from the respective financial sector regulators/regulators of the investee company as well as transferor and transferee entities and such NOCs are filed along with the form FC-TRS with the AD bank; and

(b) The FDI policy and FEMA regulations in terms of sectoral caps, conditionalities (such as minimum capitalization, etc.), reporting requirements, documentation etc., are complied with.

Q.154. Whether Government Approval also required in some cases?

Ans. The transfer of capital instruments of companies engaged in sectors falling under the Government Route from residents to non-residents by way of sale or otherwise requires Government approval followed by permission from RBI.

Q.155. What is the procedure followed by resident in India so as to transfer any capital instrument by way of gift to a person resident outside India?

Ans. A person resident in India, who intends to transfer any capital instrument, by way of gift to a person resident outside India, has to obtain prior approval from Reserve Bank. While forwarding applications to Reserve Bank for approval for transfer of capital instruments by way of gift, the prescribed documents should be enclosed.

Q.156. What factors are considered by RBI while processing applications for approval for transfer of capital instruments by way of gift?

Ans. Reserve Bank considers the following factors while processing such applications:

(a) The proposed transferee (donee) is eligible to hold such capital instruments under Schedules 1, 4 and 5 of Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.

(b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company/each series of debentures/each mutual fund scheme.

(c) The applicable sectoral cap limit in the Indian company is not breached.

(d) The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 6 of the Companies Act, 1956, as amended from time to time.

(e) The value of capital instruments to be transferred together with any capital instruments already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of US$ 50,000 per the financial year.

(f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.

CONVERSION OF ECB/LUMPSUM FEE/ROYALTY INTO EQUITY

Q.157. Under what conditions, general permission to Indian companies for conversion of External Commercial Borrowings (ECB) in convertible foreign currency into equity shares/fully compulsorily and mandatorily convertible preference shares been granted?

Ans. Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) (excluding those deemed as ECB) in convertible foreign currency into **equity shares/fully compulsorily and mandatorily convertible preference shares**, subject to the following conditions and reporting requirements.

(a) The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for foreign equity in the company;

(b) The foreign equity after conversion of ECB into equity is within the sectoral cap, if any;

(c) Pricing of shares is as per the provision of para 3.4.2 above;

(d) Compliance with the requirements prescribed under any other statute and regulation in force; and

(e) The conversion facility is available for ECBs availed under the Automatic or Government Route and is applicable to ECBs, due for payment or not, as well as secured/unsecured loans availed from non-resident collaborators.

Q.158. Is General permission also available for issue of shares/preference shares against lump sum technical know-how fee, royalty?

Ans. General permission is also available for **issue of shares/preference shares** against lump sum technical know-how fee, royalty, subject to entry route, sectoral cap and pricing guidelines (as per the provision of para 3.4.2 above) and compliance with applicable tax laws.

Q.159. Under what circumstances, issue of equity shares under FDI Policy is allowed under the Government route?

Ans. Issue of equity shares under the FDI Policy is allowed under the Government route for the following:

(I) import of capital goods/machinery/equipment (including second-hand machinery), subject to compliance with the following conditions:

(a) Any import of capital goods/machinery etc., made by a resident in India, has to be in accordance with the Export/Import Policy issued by Government of India/as defined by DGFT/FEMA provision relating to imports.

(b) There is an independent valuation of the capital goods/machinery/equipments (including second-hand machinery) by a third party entity, preferably by an independent valuer from the country of import alongwith production of copies of documents/certificates issued by the customs authorities towards assessment of the fair-value of such imports.

(c) The application clearly indicating the beneficial ownership and identity of the Importer Company as well as overseas entity.

(d) Applications complete in all respects, for conversions of import payables for capital goods into FDI being made within 180 days from the date of shipment of goods.

(II) pre-operative/pre-incorporation expenses (including payments of rent etc.), subject to compliance with the following conditions:

(a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred.

(b) Verification and certification of the pre-incorporation/pre-operative expenses by the statutory auditor.

(c) Payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations.

(d) The applications, complete in all respects, for capitalization being made within the period of 180 days from the date of incorporation of the company

General conditions:

(i) All requests for conversion should be accompanied by a special resolution of the company.

(ii) Government's approval would be subject to pricing guidelines of RBI and appropriate tax clearance.

Q.160. What are the provision regarding issue of Rights/Bonus Shares to NRIs?

Ans. FEMA provision allow Indian companies to freely issue Rights/Bonus shares to existing non-resident shareholders, subject to adherence to sectoral cap, if any. However, such issue of bonus/rights shares has to be in accordance with other laws/statutes like the Companies Act, 1956, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (in case of listed companies), etc. The offer on right basis to the persons resident outside India shall be:

(a) in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company;

(b) in the case of shares of a company not listed on a recognized stock exchange in India, at a price which is not less than the price at which the offer on right basis is made to resident shareholders.

PRIOR PERMISSION OF RBI FOR RIGHTS ISSUE TO ERSTWHILE OCBS

Q.161. What are the provision for Rights issue to erstwhile OCBs?

Ans. OCBs have been derecognized as a class of investors from September 16, 2003. Therefore companies desiring to issue rights share to such erstwhile OCBs will have to take specific prior permission from RBI. As such, entitlement of rights share is not automatically available to erstwhile OCBs. However bonus shares can be issued to erstwhile OCBs without the approval of RBI.

ADDITIONAL ALLOCATION OF RIGHTS SHARE BY RESIDENTS TO NON-RESIDENTS

Q.162. What are the provision for additional allocation of rights share by residents to non-residents?

Ans. Existing non-resident shareholders are allowed to apply for issue of additional shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares over and above their rights share entitlements. The investee company can allot the additional rights share out of unsubscribed portion, subject to the condition that the overall issue of shares to non-residents in the total paid-up capital of the company does not exceed the sectoral cap.

ACQUISITION OF SHARES UNDER SCHEME OF MERGER/DEMERGER/AMALGAMATION

Q.163. What is the procedure for acquisition of shares under Scheme of Merger/Demerger/Amalgamation?

Ans. Mergers/demergers/amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/amalgamation. Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject to the conditions that:

(i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and

(ii) the transferor company or the transferee or the new company is not engaged in activities which are prohibited under the FDI policy .

Q.164. What are the provision for issue of shares under ESOP?

Ans.

(i) Listed Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside India, other than to the citizens of Pakistan. ESOPs can be issued to citizens of Bangladesh with the prior approval of FIPB. Shares under ESOPs can be issued directly or through a Trust subject to the condition that:

  (a) The scheme has been drawn in terms of relevant regulations issued by the SEBI, and

  (b) The face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company.

(ii) Unlisted companies have to follow the provision of the Companies Act, 1956. The Indian company can issue ESOPs to employees who are resident outside India, other than to the citizens of Pakistan. ESOPs can be issued to the citizens of Bangladesh with the prior approval of the FIPB.

(iii) The issuing company is required to report (plain paper reporting) the details of granting of stock options under the scheme to non-resident employees to the Regional Office concerned of the

Reserve Bank, and thereafter the details of issue of shares subsequent to the exercise of such stock options within 30 days from the date of issue of shares in Form FC-GPR.

Q.165. What are the provision regarding Pledge of shares?

Ans.

(A) A person being a promoter of a company registered in India (borrowing company), which has raised external commercial borrowings, may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the ECB raised by the borrowing company, provided that a no objection for the same is obtained from a bank which is an authorised dealer. The authorized dealer, shall issue the no objection for such a pledge after having satisfied itself that the external commercial borrowing is in line with the extant FEMA regulations for ECBs and that:

(i) the loan agreement has been signed by both the lender and the borrower,

(ii) there exists a security clause in the Loan Agreement requiring the borrower to create charge on financial securities, and

(iii) the borrower has obtained Loan Registration Number (LRN) from the Reserve Bank: and the said pledge would be subject to the following conditions:

(a) the period of such pledge shall be co-terminus with the maturity of the underlying ECB;

(b) in case of invocation of pledge, transfer shall be in accordance with the extant FDI Policy and directions issued by the Reserve Bank;

(c) the Statutory Auditor has certified that the borrowing company will utilized/has utilized the proceeds of the ECB for the permitted end use/s only.

(B) Non-resident holding shares of an Indian company, can pledge these shares in favour of the AD bank in India to secure credit facilities being extended to the resident investee company for bonafide business purpose, subject to the following conditions:

(i) in case of invocation of pledge, transfer of shares should be in accordance with the FDI policy in vogue at the time of creation of pledge;

(ii) submission of a declaration/annual certificate from the statutory auditor of the investee company that the loan proceeds will be/have been utilized for the declared purpose;

(iii) the Indian company has to follow the relevant SEBI disclosure norms; and

(iv) pledge of shares in favour of the lender (bank) would be subject to Section 19 of the Banking Regulation Act, 1949.

(C) Non-resident holding shares of an Indian company, can pledge these shares in favour of an overseas bank to secure the credit facilities being extended to the non-resident investor/non-resident promoter of the Indian company or its overseas group company, subject to the following:

(i) loan is availed of only from an overseas bank;

(ii) loan is utilized for genuine business purposes overease and not for any investments either directly or indirectly in India;

(iii) overseas investment should not result In any capital inflow into India;

(iv) in case of invocation of pledge, transfer should be in accordance with the FDI policy in vogue at the time of creation of pledge; and

(v) submission of a declaration/annual certificate from a Chartered Accountant/Certified Public Accountant of the non-resident borrower that the loan proceeds will be/have been utilized for the declared purpose.

TOTAL FOREIGN INVESTMENT I.E. DIRECT AND INDIRECT FOREIGN INVESTMENT IN INDIAN COMPANIES

Q.166. What are Direct and Indirect Foreign Investment in Indian Companies?

Ans. Investment in Indian companies can be made both by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise of both resident and non-resident investment. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment i.e. through multi-layered structure.

For the purpose of computation of indirect Foreign investment, Foreign Investment in Indian company shall include all types of foreign investments i.e. FDI; investment by FIIs(holding as on March 31); NRIs; ADRs; GDRs; Foreign Currency Convertible Bonds (FCCB); fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures regardless of whether the said investments have been made under Schedule 1, 2, 3 and 6 of FEM (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000.

Investment made by an NRI on non-repatriable basis will be counted towards calculation of FDI. However, for calculation of indirect foreign investment, such non-repatriable NRI investment will not be taken into account.

GUIDELINES FOR CALCULATION OF TOTAL FOREIGN INVESTMENT I.E. DIRECT AND INDIRECT FOREIGN INVESTMENT IN AN INDIAN COMPANY

Q.167. What are the Guidelines for calculation of direct and indirect foreign investment in an Indian company?

Ans.

(i) **Counting the Direct Foreign Investment:** All investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.

(ii) **Counting of indirect foreign Investment:**

(a) The foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens.

(b) For cases where condition (a) above is not satisfied or if the investing company is owned or controlled by 'non resident entities', the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment,

Provided that, as an exception, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/investing company. This exception is made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidy is owned by the holding company.

(iii) The total foreign investment would be the sum total of direct and indirect foreign investment.

(iv) The above methodology of calculation would apply at every stage of investment in Indian Companies and thus to each and every Indian Company.

Q.168. What are the Entry Routes For Investment?

Ans. Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the Automatic Route and the Government Route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment. Under the Government Route, prior approval of the Government of India is required. Proposals for foreign investment under Government route, are considered by FIPB.

Q.169. What are the Guidelines for establishment of Indian companies/transfer of ownership or control of Indian companies, from resident Indian citizens to non-resident entities, in sectors with caps?

Ans. In sectors/activities with caps, including inter-alia defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, Government approval/FIPB approval would be required in all cases where:

(i) An Indian company is being established with foreign investment and is owned by a non-resident entity or

(ii) An Indian company is being established with foreign investment and is controlled by a non-resident entity or

(iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc. or

(iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc.

(v) It is clarified that these guidelines will not apply for sectors/activities where there are no foreign investment caps, that is, 100% foreign investment is permitted under the automatic route.

(vi) It is also clarified that Foreign investment shall include all types of foreign investments i.e. FDI, investment by FIIs, NRIs, ADRs, GDRs, Foreign Currency Convertible Bonds (FCCB) and fully, mandatorily & compulsorily convertible preference shares/debentures, regardless of whether the said investments have been made under Schedule 1, 2, 3 and 6 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations.

Q.170. Are there any caps on investments made by NRIs under FDI Policy?

Ans. Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The caps in various sector(s) are detailed in Chapter 6 of the master circular.

Q.171. Are there any Entry Conditions on Investments made by NRIs under FDI Policy?

Ans. Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc. The entry conditions in various sectors/activities are detailed in Chapter 6 of the FDI circular.

Q.172. Are there any other conditions besides Entry Conditions on Investments made by NRIs under FDI Policy?

Ans. Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

Q.173. What are the prohibited & permitted sectors where FDI is allowed?

Ans.

Prohibited Sectors

FDI is prohibited in:

(a) Retail Trading (except single brand product retailing)

(b) Lottery Business including Government/private lottery, online lotteries, etc.

(c) Gambling and Betting including casinos etc.

(d) Chit funds

(e) Nidhi company

(f) Trading in Transferable Development Rights (TDRs)

(g) Real Estate Business or Construction of Farm Houses

(h) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

(i) Activities/sectors not open to private sector investment e.g. Atomic Energy and Railway Transport (other than Mass Rapid Transport Systems).

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also completely prohibited for Lottery Business and Gambling and Betting activities.

Permitted Sectors

In the specified sectors/activities, FDI up to the limit indicated against each sector/activity is allowed, subject to applicable laws/regulation; security and other conditionalities. In sectors/activities not listed below, FDI is permitted upto 100% on the automatic route, subject to applicable laws/regulations; security and other conditionalities.

Wherever there is a requirement of minimum capitalization, it shall include share premium received along with the face value of the share, only when it is received by the company upon issue of the shares to the non-resident investor. Amount paid by the transferee during post-issue transfer of shares beyond the issue price of the share, cannot be taken into account while calculating minimum capitalization requirement;

Q.174. What are the provision for Remittance of sale proceeds/Remittance on winding up/ Liquidation of Companies?

Ans. Remittance of sale proceeds/Remittance on winding up/Liquidation of Companies:

(i) Sale proceeds of shares and securities and their remittance is 'Remittance of asset' governed by The Foreign Exchange Management (Remittance of Assets) Regulations 2000 under FEMA.

(ii) AD Category - I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC/tax clearance certificate from the Income Tax Department has been produced.

(iii) **Remittance on winding up/liquidation of Companies**

AD Category - I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up under the provision of the Companies Act, 1956. AD Category - I banks shall allow the remittance provided the applicant submits:

a. No objection or Tax clearance certificate from Income Tax Department for the remittance.

b. Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for.

c. Auditor's certificate to the effect that the winding up is in accordance with the provision of the Companies Act, 1956.

d. In case of winding up otherwise than by a court, an auditor's certificate to the effect that there are no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

Q.175. Can the sale proceeds of FDI investments e permitted to be credited to NRE/FCNR accounts of NRIs/PIOs.

Ans. Yes.

Q.176. What are the provision for Repatriation of Dividend?

Ans. Dividends are freely repatriable without any restrictions (net after Tax deduction at source or Dividend Distribution Tax, if any, as the case may be). The repatriation is governed by the provision of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

Q.177. What are the provision for Repatriation of Interest?

Ans. Interest on fully, mandatorily & compulsorily convertible debentures is also freely repatriable without any restrictions (net of applicable taxes). The repatriation is governed by the provision of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, as amended from time to time.

REPORTING OF FDI

Q.178. What are the provision for reporting of FDI?

Ans.

Reporting of Inflow

(i) An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the Advance Reporting Form.

(ii) Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category - I bank, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

Reporting of issue of shares

(i) After issue of shares (including bonus and shares issued on rights basis and shares issued under ESOP)/fully, mandatorily & compulsorily convertible debentures/fully, mandatorily & compulsorily convertible preference shares, the Indian company has to file Form FC-GPR, not later than 30 days from the date of issue of shares.

(ii) Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank. The following documents have to be submitted along with the form:

(a) A certificate from the Company Secretary of the company certifying that:

(A) all the requirements of the Companies Act, 1956 have been complied with;

(B) terms and conditions of the Government's approval, if any, have been complied with;

(C) the company is eligible to issue shares under these Regulations; and

(D) the company has all original certificates issued by authorized dealers in India evidencing receipt of amount of consideration.

Note: For companies with paid up capital with less than Rs.5 crore, the above mentioned certificate can be given by a practicing company secretary.

(b) A certificate from Statutory Auditor or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

(c) The report of receipt of consideration as well as Form FC-GPR have to be submitted by the AD Category-I bank to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

(d) Annual return of Foreign Liabilities and Assets should be filed on an annual basis by the Indian company, directly with the Reserve Bank. This is an annual return to be submitted by 15th of July every year, pertaining to all investments by way of direct/ portfolio investments/reinvested earnings/other capital in the Indian company made during the previous years (i.e. the information submitted by 31st July will pertain to all the investments made in the previous years up to March 31). The details of the investments to be reported would include all foreign investments made into the company which is outstanding as on the balance sheet date. The details of overseas investments in the company both under direct/portfolio investment may be separately indicated.

(e) Issue of bonus/rights shares or stock options to persons resident outside India directly or on amalgamation/merger/demerger with an existing Indian company, as well as issue of shares on conversion of ECB/royalty/lumpsum technical know-how fee/ import of capital goods by units in SEZs has to be reported in Form FC-GPR.

Reporting of transfer of shares

Reporting of transfer of shares between residents and non-residents and vice- versa is to be done in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category - I bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/transferee, resident in India. The AD Category - I bank, would forward the same to its link office. The link office would consolidate the Form FC-TRS and submit a monthly report to the Reserve Bank.

Reporting of Non-Cash

Details of issue of shares against conversion of ECB has to be reported to the Regional Office concerned of the RBI, as indicated below:

(i) In case of full conversion of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai - 400 051, within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

(ii) In case of partial conversion of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

CHAPTER 3.2

SPECIAL FACILITIES UNDER FDI SCHEME FOR NRIS (NOT AVAILABLE FOR OTHER NON-RESIDENT INVESTORS)

Q.179. Whether NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan permitted to invest in the capital of Indian companies?

Ans. NRIs resident in Nepal and Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

Q.180. Who can invest/trade through a registered broker in the capital of Indian Companies on recognized Indian Stock Exchanges?

Ans. Only NRI as per Schedule 3 of FEMA 20 can invest/trade through a registered broker in the capital of Indian Companies on recognized Indian Stock Exchanges.

TRANSFER OF SHARES AND CONVERTIBLE DEBENTURES

Q.181. What are the provision regarding transfer of shares and convertible debentures by NRIs?

Ans. Subject to FDI sectoral policy (relating to sectoral caps and entry routes), applicable laws and other conditionalities including security conditions, non-resident investors can also invest in Indian companies by purchasing/acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents/NRIs for acquisition of shares by way of transfer subject to the following:

(a) A person resident outside India (other than NRI and erstwhile OCB) may transfer by way of sale or gift, the shares or convertible debentures to any person resident outside India (including NRIs).

(b) NRIs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.

(c) A person resident outside India can transfer any security to a person resident in India by way of gift.

SECTOR SPECIFIC RELAXATION FOR NRIS:

Q.182. Are there any sector specific relaxations available to NRIs?

Ans.

Air Transport Services	% of FDI Cap/Equity	Entry Route
(a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non- Scheduled Air Transport Services, helicopter and seaplane services. (b) No foreign airlines would be allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in operating Scheduled, Non-Scheduled Air Transport Services except Cargo airlines. (c) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services.		
(1) Scheduled Air Transport Service/Domestic Scheduled Passenger Airline	**49% FDI (100% for NRIs)**	Automatic

Air Transport Services	% of FDI Cap/Equity	Entry Route
(2) Non-Scheduled Air Transport Service	**74% FDI (100% for NRIs)**	Automatic up to 49% Government route beyond 49% and upto 74%.
(3) Helicopter services/seaplane services requiring DGCA approval	100%	Automatic
Other services under Civil Aviation Sector		
(1) Ground Handling Services subject to sectoral regulations and security clearance	**74% FDI (100% for NRI)s)**	Automatic up to 49% Government route beyond 49% and up to 74%
(2) Maintenance and Repair organizations; flying training institutes; and technical training institutions	100%	Automatic
Construction Development: Townships, Housing, Built-up infrastructure		
Townships, housing, built-up infrastructure and construction-development projects (which would include, but not be restricted to, housing, commercial premises, hotels, resorts, hospitals, educational Institutions, recreational facilities, city and regional level infrastructure)	100%	Automatic
The conditions of Minimum area to be developed, Minimum capitalization, lock-in-period etc. would not apply to investment by NRIs.		

Q.183. Are NRIs/PIOs eligible for sector/investor specific relaxations if investment is made through incorporated entities wholly owned and/or otherwise owned & controlled by NRIs/PIOs?

Ans. No. Investments made in individual name(s) of the NRIs/PIOs shall only be eligible for sector/investor specific relaxations.

Q.183A. What are 'Sector-specific Policy for FDI' applicable to all categories of foreign investor?

Ans. Refer Annexure at the end of this document.

CHAPTER 3.3

BANKING ACCOUNTS FOR NRIs

Acceptance of deposits by an authorised dealer/authorised bank from persons resident outside India (NRIs)

Q.184. Can an Authorised Dealer/Authorised Bank accept deposits from an NRI?

Ans. An authorised dealer in India may accept deposit

(*i*) Under the Non-resident (External) Account Scheme (**NRE account**) **from a non-resident Indian**;

(*ii*) Under the Foreign Currency (Non-resident) Account Banks Scheme, (**FCNR-B account**) from a **non-resident Indian**;

(*iii*) Under the Non-resident (Ordinary) Account Scheme, (**NRO account**) from **any person resident outside India**;

(for summarised features of these deposits scheme, please refer table after Q/A. 237.)

NON-RESIDENT (EXTERNAL) RUPEE ACCOUNT SCHEME

Q.185. Who is eligible to open an NRE account?

Ans. The Non-resident Indians (NRIs) are permitted to open and maintain.

Q.186. Can NRE account be opened by the power of attorney holder in India?

Ans. The account should be opened by the non-resident account holder himself and not by the holder of the power of attorney in India.

Q.187. Whether any approval required to open NRE accounts in the names of individuals/entities of Bangladesh/Pakistan nationality/ownership?

Ans. Opening of NRE accounts in the names of individuals/entities of Bangladesh/Pakistan nationality/ownership requires approval of Reserve Bank.

Q.188. What are the different types of NRE accounts?

Ans. The accounts may be maintained in any form, *e.g.*, **savings, current, recurring or fixed deposit account** etc.

Q.189. What are the Permitted Credits into this account?

Ans.

(*a*) Proceeds **of remittances to India** in any permitted currency.

(*b*) **Proceeds of personal cheques** drawn by the account holder on his foreign currency account and of **travellers cheques, bank drafts** payable in any permitted currency including instruments expressed in Indian rupees for which reimbursement will be received in foreign currency, deposited by the account holder in person during his temporary visit to India, provided the authorised dealer/bank is satisfied that the account holder is still resident outside India, the travellers" cheques/drafts are standing/endorsed in the name of the account holder and in the case of travellers" cheques, they were issued outside India.

(*c*) Proceeds of **foreign currency/bank notes** tendered by account holder during his temporary visit to India, provided (*i*) the amount was declared on a Currency Declaration Form (CDF), where applicable, and (*ii*) the notes are tendered to the authorised dealer in person by the account holder himself and the authorised dealer is satisfied that account holder is a person resident outside India.

(*d*) **Transfers from other NRE/FCNR accounts**.

(*e*) **Interest** accruing on the funds held in the account.

(*f*) **Interest on Government securities and dividend on units of mutual funds, provided the securities/units were purchased by debit to the account holder's NRE/FCNR account or out of inward remittance through normal banking channels**.

(*g*) **Maturity proceeds** of Government securities including National Plan/Savings Certificate as well as proceeds of Government securities and units of mutual funds sold on a recognised stock exchange in India and sale proceeds of units received from mutual funds, provided the securities/units were originally purchased by debit to the account holder's NRE/FCNR account or out of remittances received from outside India in free foreign exchange.

(*h*) **Refund of share/debenture subscriptions** to new issues of Indian companies or portion thereof, if the amount of subscription was paid from the same account or from other NRE/FCNR account of the account holder or by remittance from outside India through normal banking channels.

(*i*) **Refund of application/earnest money/purchase consideration made by the house building** agencies/seller on account of non-allotment of flat/plot/cancellation of bookings/deals for purchase of residential/commercial property, together with interest, if any (net of income-tax payable thereon), provided the original payment was made out of NRE/FCNR account of the account holder or remittance from outside India through normal banking channels and the authorised dealer is satisfied about the genuineness of the transaction.]

(*j*) Any other credit if covered under general or special permission granted by Reserve Bank.

Q.190. What are the Permitted Debits to this account?

Ans.

(*a*) **Local disbursements**.

(*b*) **Remittances outside India**.

(*c*) **Transfer to NRE/FCNR accounts of the account holder or any other person eligible to maintain such account**.

(*d*) Investment in **shares/securities/commercial paper of an Indian company or for purchase of immovable property in India** provided such investment/purchase is covered by the regulations made, or the general/special permission granted, by the Reserve Bank.

(*e*) Any other transaction if covered under general or special permission granted by the Reserve Bank.

Q.191. What is the applicable Rate of interest?

Ans. Rate of interest applicable to these accounts shall be in accordance with the directions instructions issued by the Reserve Bank from time to time.

LOANS AGAINST SECURITY OF FUNDS HELD IN NRE ACCOUNT

Q.192. Are there any credit facilities permitted against security of funds held in the account and to whom?

Ans.

(*a*) **To Account holder –**

(*i*) personal purposes or for carrying on business activities except for the purpose of relending or carrying on agricultural/plantation activities or for investment in real estate business. The authorised dealer/bank should ensure that the advances are fully secured by the fixed deposits and regulations relating to normal margin, interest rate, etc., are complied with. Repayment shall be made either by adjustment of the deposit or by fresh inward remittances from outside India through normal banking channels.

The loan can also be repaid out of local rupee resources in the NRO account of the borrower. The interest on such loans shall be in accordance with directives issued by Reserve Bank from time to time;

(*ii*) the purpose of making direct investment in India on non-repatriation basis by way of contribution to the capital of Indian firms/companies subject to compliance with the provision of the Foreign Exchange Management (Transfer of Indian Security by a Person Resident outside India) Regulations, 2000 and Foreign Exchange Management (Investment in Proprietary or a Partnership Firm) Regulations, 2000;

(*iii*) the purpose of acquisition of flat/house in India for his own residential use subject to the provision of the relevant Regulations made under the Act.

(*b*) **To Third Parties** - Authorised dealers and authorised banks may grant any type of fund based and/or non-fund based facilities to resident individuals/firms/companies in India against the collateral of fixed deposits held in NRE account subject to the following conditions:

(*i*) There should be no direct or indirect foreign exchange consideration for the non-resident depositor agreeing to pledge his deposits to enable the resident individual/firm/company to obtain such facilities.

(*ii*) Regulations relating to margin, interest rate, purpose of loan, etc., as stipulated by Reserve Bank from time to time should be complied with.

(*iii*) The loan should be utilised for personal purposes or for carrying on business activities other than agricultural/plantation activities or real estate business. The loan should not be utilised for relending.

(*iv*) The usual norms and considerations as applicable in the case of advances to trade/industry shall be applicable to such credit facilities.

(*c*) **Loans outside India** - Authorised dealers may allow their branches/correspondents outside India to grant any type of fund based and/or non-fund based facilities to or in favour of non-resident depositor or to third parties at the request of depositor for *bona fide* purpose against the security of funds held in the NRE accounts in India and also agree to remittance of the funds from India, if necessary, for liquidation of the outstandings.

(*d*) The loans and facilities granted under this paragraph shall be subject to such directions as may be issued by the Reserve Bank from time to time.

CHANGE OF RESIDENT STATUS OF THE ACCOUNT HOLDER

Q.193. What is the impact of change of resident status of the NRE account holder?

Ans. NRE accounts should be redesignated as resident accounts or the funds held in these accounts may be **transferred to the RFC accounts** (if the account holder is eligible for maintaining RFC account) at the option of the account holder **immediately upon the return of the account holder to India** for taking up employment or for carrying on business or vocation or for any other purpose indicating intention to stay in India for an uncertain period. **Where the account holder is only on a short visit to India, the account may continue to be treated as NRE account even during his stay in India.**

REPATRIATION OF FUNDS TO NON-RESIDENT NOMINEE

Q.194. How are funds lying in the NRE account of the deceased account holder repatriated?

Ans. Authorised dealers/authorised banks may allow remittance of funds lying in the NRE account of the deceased account holder to his non-resident nominee.

MISCELLANEOUS

Q.195. Can two or more non-resident individuals open Joint accounts? What happens if one of the joint holders becomes resident?

Ans. Joint accounts in the names of two or more non-resident individuals may be opened provided all the account holders are persons of Indian nationality or origin. When one of the joint holders becomes resident, the authorised dealer may either delete his name and allow the account to continue as a NRE account or redesignate the account as a resident account, at the option of the account holders.

Q.196. Can a non-resident jointly open an NRE A/c with a resident?

Ans. Opening of these accounts by a non-resident jointly with a resident is not permissible. However, NRI is permitted to open NRE/FCNR(B) account with their resident close relative (relative as defined in Section 6 of the Companies Act, 1956) on 'former or survivor' basis. The resident close relative shall be eligible to operate the account as a Power of Attorney holder in accordance with extant instructions during the life time of the NRI/PIO account holder.

Q.197. Can an NRI open an NRE account during his temporary visit to India?

Ans. An account may be opened in the name of an eligible NRI during his temporary visit to India against tender of foreign currency travellers cheques or foreign currency notes and coins tendered, provided the authorised dealer is satisfied that the person has not ceased to be a non-resident.

Q.198. What types of operations are allowed on an NRE account by a Resident Power of Attorney holder? Who is eligible to operate the account as PoA holder?

Ans. Authorised dealers/authorised banks may allow operations on an NRE account in terms of Power of Attorney or other authority granted in favour of a resident by the non-resident account holder, provided such operations are restricted to withdrawals for local payments or remittance to the account holder himself through normal banking channels. In cases where the account holder or a bank designated by him is eligible to make investments in India, the Power of Attorney holder may be permitted by the authorized dealers/banks to operate the account to facilitate such investment. The resident Power of Attorney holder shall not, however, be allowed to repatriate outside India funds held in the account under any circumstances other than to the account holder himself, nor to make payment by way of gift to a resident on behalf of the account holder or to transfer funds from the account to another NRE account. **The resident close relative shall be eligible to operate account as PoA holder during life time of NRI.**

Q.199. What kind of extra care must be taken by AD while issuing cheque books to NRE account holders?

Ans. For easy identification and quicker processing of cheques drawn on NRE accounts, authorised dealers/banks shall issue cheque books containing a special series of cheques to their constituents holding NRE accounts.

Q.200. What are the provision regarding over drawings?

Ans. Authorised dealers/authorised banks may at their discretion/commercial judgment allow for a period of not more than two weeks, over drawings in NRE savings bank accounts, upto a limit of Rs. 50,000 subject to the condition that such over drawings together with the interest payable thereon are cleared/repaid within the said period of two weeks, out of inward remittances through normal banking channels or by transfer of funds from other NRE/FCNR accounts.

Q.201. What is the procedure followed by Resident Nominee for remittance of funds outside India to meet the liabilities of the deceased account holder?

Ans. Application from a resident nominee for remittance of funds outside India for meeting the liabilities, if any, of the deceased account holder or for similar other purposes, should be forwarded to the Reserve Bank for consideration.

Q.202. Whether interest on NRE accounts chargeable to Income Tax? Is NRE A/c an eligible asset under Wealth Tax Act?

Ans. Income from interest on balances standing to the credit of NRE Accounts is exempt from income-tax. Likewise balances held in such accounts are exempt from wealth-tax.

Q.203. Whether transactions in NRE accounts need to be reported to RBI?

Ans. The transactions in these accounts shall be reported to the Reserve Bank in accordance with the directions issued by it from time to time.

FOREIGN CURRENCY (NON-RESIDENT) ACCOUNT (BANKS) SCHEME - FCNR(B)

Q.204. Who is eligible to open FCNR(B) accounts?

Ans. NRIs are eligible to open and maintain these accounts with an authorised dealer.

Q.205. Whether any approval required to open FCNR accounts in the names of individuals/entities of Bangladesh/Pakistan nationality/ownership?

Ans. Opening of FCNR(B) accounts in the names of NRIs of Bangladesh/Pakistan nationality/ ownership requires approval of Reserve Bank.

Q.206. How can FCNR(B) accounts be opened?

Ans. These accounts may be opened with funds remitted from outside India through normal banking channels or funds received in rupees by debit to the account of a non-resident bank maintained with an authorised dealer in India or funds which are of repatriable nature in terms of the regulations made by the Reserve Bank. Accounts may also be opened by transfer of funds from existing NRE/FCNR accounts.

Q.207. Is it necessary to open FCNR(B) accounts in the Designated Currency?

Ans. Remittances from outside India for opening of or crediting to these accounts should be made in the designated currency in which the account is desired to be opened/maintained. Without prejudice to this, if the remittance is received in a currency other than the designated currency (including funds received in rupees by debit to the account of the non-resident bank), it should be converted into the latter currency by the authorised dealer at the risk and cost of the remitter and account should be opened/credited in only the designated currency.

Q.208. How can a depositor with any convertible currency other than designated currency deposit in these accounts?

Ans. In case the depositor with any convertible currency other than designated currency desires to place a deposit in these accounts, authorised dealers may undertake with the depositor a fully covered swap in that currency against the desired designated currency. Such a swap may also be done between two designated currencies.

Q.209. What are Designated currencies?

Ans. Deposit of funds in the accounts may be accepted in such permissible currencies as may be designated by the Reserve Bank from time to time.

Q.210. What are the different types of FCNR accounts?

Ans. These accounts may be opened only in the form of **term deposit** with maturity of such period as may be specified by the Reserve Bank from time to time.]

Q.211. What is the applicable Rate of interest?

Ans. The rate of interest on funds held in these deposit accounts will be in accordance with the directives issued by the Reserve Bank from time to time.

Q.212. What are the Permissible Debits/Credits to these accounts?

Ans. All debits/credits permissible in respect of NRE accounts as specified shall be permissible in respect of these accounts also.

Q.213. What is the applicable Rate for conversion of rupees into designated currencies and vice versa?

Ans.

(*i*) Remittances received in Indian rupees for opening these accounts shall be converted by the authorised dealer into the designated foreign currency at the clean T.T. selling rate for that currency ruling on the date of conversion.

(*ii*) For the purpose of payment in rupees, funds held in these accounts shall be converted into rupees at the authorised dealer's clean T.T. buying rate for the concerned currency ruling on the date of withdrawal.

Q.214. Whether any inland commission charged to facilitate Inland Movement of Funds? Can an AD receiving foreign currency remittances in these accounts pass on the foreign currency to another AD?

Ans. Any inland movement of funds for the purpose of opening these accounts as well as for repatriation outside India of balances held in these accounts will be free of inland exchange or commission for the non-resident depositors. The Authorised Dealer receiving foreign currency remittances in these accounts will also, on request, pass on the foreign currency to another authorised dealer if the account has to be opened with the latter, at no extra cost to the remitter.

MANNER OF PAYMENT OF INTEREST

Q.215. What are the provision regarding payment of interest?

Ans.

(*i*) Interest on balances held in these accounts may be paid half-yearly or on an annual basis as desired by the depositor.

(*ii*) Interest may be credited to a new FCNR(B) account or an existing/new NRE/NRO account in the name of the account holder, at his option.

LOANS/OVERDRAFTS AGAINST SECURITY OF FUNDS HELD IN THE ACCOUNT

Q.216. Are there any credit facilities permitted against security of funds held in the account and to whom?

Ans.

(1) The terms and conditions as applicable to NRE deposits in respect of loans and overdrafts in India to depositor and to third parties as also loans outside India against security of deposits, shall apply *mutatis mutandis* to FCNR(B) deposits.

(2) The margin requirement shall be notionally calculated on the rupee equivalent of the deposits.

CHANGE OF RESIDENT STATUS OF THE ACCOUNT HOLDER

Q.217. What is the impact of change of resident status of the FCNR(B) account holder?

Ans. When an account holder becomes a person resident in India, deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by him. However, except the provision relating to rate of interest and reserve requirements as applicable to FCNR(B) deposits, for all other purposes such deposits shall be treated as resident deposits from the date of return of the account holder to India. Authorised dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder and interest on the new deposit (rupee account or RFC account) shall be payable at the relevant rates applicable for such deposits.

Q.218. What are the terms & conditions in respect of Joint account, repatriation of balances, etc.

Ans. Terms and conditions as applicable to NRE accounts in respect of joint accounts, repatriation of funds, opening accounts during temporary visit, operation by power of attorney, loans/overdrafts against security of funds held in accounts, shall apply *mutatis mutandis* to FCNR(B) accounts.

Q.219. Can AD permit remittance of the maturity proceeds of FCNR(B) deposits to third parties outside India?

Ans. Authorised dealer may permit remittance of the maturity proceeds of FCNR(B) deposits to third parties outside India, provided the transaction is specifically authorised by the account holder and the authorised dealer is satisfied about the *bona fides* of the transactions.

Q.220. Whether transactions in FCNR accounts need to be reported to RBI?

Ans. The transactions in these accounts shall be reported to Reserve Bank in accordance with the directions issued by it from time to time.

Q.221. Whether any kind of exchange rate guarantee provided by RBI to AD?

Ans. Reserve Bank will not provide exchange rate guarantee to authorised dealers for deposits of any maturity in these accounts.

Q.222. Is lending of resources under these accounts subject to any interest rate stipulations?

Ans. Lending of resources mobilised by authorised dealers under these accounts are not subject to any interest rate stipulations.

Non-resident Ordinary (NRO) Rupee Account Scheme

Q.223. Who is eligible to open an NRO account?

Ans. Any person resident outside India may open NRO account with an authorised dealer or an authorised bank for the purpose of putting through ***bona fide*** **transactions** in rupees not involving any violation of the provision of the Act, rules and regulations made thereunder.

Q.224. Can an NRO account holder give foreign exchange from such account to a resident in India against reimbursement in Rupees?

Ans. The operations on the accounts should not result in the account holder making available foreign exchange to any person resident in India against reimbursement in rupees or in any other manner.

Q.225. Whether any kind of undertaking required to be furnished by NRO A/c holder to AD with regard to investments/disinvestments?

Ans. At the time of opening of the account, the account holder should furnish an undertaking to the authorised dealer/authorised bank with whom the account is maintained that in cases of debits to the account for the purpose of investment in India and credits representing sale proceeds of investments, he will ensure that such investments/disinvestments will be in accordance with the regulations made by Reserve Bank in this regard.

Q.226. Whether any approval required to open NRO accounts in the names of individuals/entities of Bangladesh/Pakistan nationality/ownership?

Ans. Opening of accounts by individuals/entities of Bangladesh/Pakistan nationality/ownership requires approval of Reserve Bank.

Q.227. Can Post offices in India maintain savings bank accounts in the names of persons resident outside India? What are the terms & conditions?

Ans. Post offices in India may maintain savings bank accounts in the names of persons resident outside India and allow operations on these accounts subject to the same terms and conditions as are applicable to NRO accounts maintained with an authorised dealer/authorised bank.

Q.228. What are the different types of NRO accounts?

Ans. NRO accounts may be opened/maintained in the form of **current, savings, recurring or fixed deposit accounts**. The requirements laid down in the directives issued by Reserve Bank in regard to resident account shall apply to NRO accounts.

Q.229. What are the Permissible Credits/Debits to these accounts?

Ans.

(A) Credits

(i) Proceeds of remittances received in any permitted currency from outside India through normal banking channels or any permitted currency tendered by the account holder during his temporary visit to India or transfers from rupee accounts of non-resident banks.

(ii) Legitimate dues in India of the account holder.

(iii) Rupee gift from a resident individual to a NRI/PIO who is a close relative of the resident individual (as defined in Section 6 of the Companies Act, 1956) by way of crossed cheque/electronic transfer, within the overall limit under the Liberalised Remittance Scheme.

(iv) Lending in Rupees by resident individuals to their non-resident NRIs/PIOs close relative (as defined in Section 6 of the Companies Act, 1956) for any personal purpose or business activities other than agricultural/plantation activities or real estate or relending business, within the overall limit under the Liberalised Remittance Scheme.

(B) *Debits*

(*i*) All local payments in rupees including payments for investment subject to compliance with the relevant regulations made by the Reserve Bank.

(*ii*) **Remittance outside India of current income in India of the account holder net of applicable taxes**.

Q.230. What are the provision regarding Remittance of funds held in NRO accounts?

Ans. Balances in NRO accounts are not eligible for remittance outside India without the approval of Reserve Bank. Funds received by way of remittances from outside India in foreign exchange which have not lost their identity as remittable funds will only be considered by Reserve Bank for remittance outside India. Where an account (current/savings) is opened by a foreign tourist visiting India, with funds remitted from outside India in a specified manner or by sale of foreign exchange brought by him to India, authorised dealers may convert the balance in the account at the time of departure of the tourist from India to foreign currency for payment to the account holder provided the account has been maintained for a period not exceeding six months and the account has not been credited with any local funds, other than interest accrued thereon.

GRANT OF LOANS/OVERDRAFTS

Q.231. Are there any credit facilities permitted against security of funds held in the account and to whom?

Ans.

(A) ***To Account holders***

(*i*) Loans to non-resident account holders may be granted in rupees against the security of fixed deposits subject to usual norms as are applicable to resident accounts, for personal purposes or for carrying on business activities except for the purpose of relending or carrying on agricultural/plantation activity or for investment in real estate business.

(*ii*) Authorised dealer/bank may permit overdraft in the account of the account holder subject to his commercial judgment and compliance with the interest rate etc. directives.

B. ***To Third Parties*** - Loans/overdrafts to resident individuals/firms/companies in India may be granted against the security of deposits held in NRO accounts, subject to the following terms and conditions:

(*i*) The loans shall be utilised only for meeting borrower's personal requirements and/or business purpose and not for carrying on agricultural/plantation activities or real estate business or for relending.

(*ii*) Regulations relating to margin and rate of interest as stipulated by Reserve Bank from time to time shall be complied with

(*iii*) The usual norms and considerations as applicable in the case of advances to trade/industry shall be applicable for such loans/facilities.

Q.232. What is the treatment of Loans/Overdrafts in the event of change in the resident status of the borrower?

Ans. In case of person who had availed of loan or overdraft facilities while resident in India and who subsequently becomes a person resident outside India, the authorised dealer may at their discretion and commercial judgment allow continuance of the loan/overdraft facilities. In such cases, payment of interests and repayment of loan may be made by inward remittance or out of legitimate resources in India of the person concerned.

JOINT ACCOUNTS WITH RESIDENTS

Q.233. Can NRO accounts be jointly held with residents?

Ans. The accounts may be held jointly with residents.

OPERATIONS BY POWER OF ATTORNEY

Q.234. What types of operations are allowed on an NRO account by a Resident Power of Attorney holder?

Ans. Authorised dealers/authorized banks may allow operations on an NRO account in terms of a Power of Attorney, provided such operations are restricted to (*i*) all local payments in rupees including payments for eligible investments subject to compliance with relevant regulations made by the Reserve Bank; and (*ii*) remittance outside India of current income in India of the non-resident individual account holder, net of applicable taxes. The resident Power of Attorney-holder shall not repatriate outside India funds held in the account under any circumstances other than to the non-resident individual account-holder himself nor shall make payment by way of gift to a resident on behalf of the non-resident account holder or transfer funds from the account to another NRO account. Any remittance outside India shall be within the ceiling as may be prescribed by the bank from time to time and subject to tax compliance.]

CHANGE OF RESIDENT STATUS OF ACCOUNT HOLDER

Q.235. What is the impact of change of resident status of the NRO account holder?

Ans.

(*a*) ***From Resident to Non-resident*** - When a person resident in India leaves India for a country (other than Nepal or Bhutan) for taking up employment, or for carrying on business or vocation outside India or for any other purpose indicating his intention to stay outside India for an uncertain period, his existing account should be designated as a Non-Resident (Ordinary) Account.

(*b*) ***From Non-Resident to Resident*** - NRO accounts may be re-designated as resident rupee accounts on the return to the account holder to India for taking up employment, or for carrying on business or vocation or for any other purpose indicating his intention to stay in India for an uncertain period. Where the account holder is only on a temporary visit to India, the account should continue to be treated as non-resident during such visit.

Q.236. How is the payment of funds made to Non-Resident Nominee from NRO account of a deceased account holder?

Ans. The amount due/payable to non-resident nominee from the account of a deceased account holder, shall be credited to NRO account of the nominee with an authorised dealer/authorised bank in India.

REPORTING OF TRANSACTIONS

Q.237. What kinds of transactions in NRO accounts need to be reported to RBI?

Ans.

(*i*) The transaction in the account which may appear to represent reimbursement in rupees against foreign exchange made available to a person resident in India other than authorised dealer, as well as any other transaction of suspicious nature, should be reported to Reserve Bank.

(*ii*) The transaction in these accounts shall be reported to the Reserve Bank in accordance with the directions issued by it from time to time.

SUMMARISED FEATURES OF VARIOUS DEPOSIT SCHEMES AVAILABLE FOR NON-RESIDENT INDIANS (NRIS)

Particulars	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident (External) Rupee Account Scheme [NRE Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
Who can open an account	NRIs (individuals/ entities of Bangladesh/ Pakistan nationality ownership require prior approval of RBI)	NRIs (individuals/ entities of Bangladesh/ Pakistan nationality/ownership require prior approval of RBI)	Any person resident outside India (other than a person resident in Nepal and Bhutan). Individuals entities of Bangladesh Pakistan nationality/ ownership as well as erstwhile Overseas Corporate Bodies require prior approval of the Reserve Bank.

Particulars	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident (External) Rupee Account Scheme [NRE Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
Joint account	In the names of two or more non-resident individuals provided all the account holders are persons of Indian nationality or origin.	In the names of two or more non-resident individuals provided all the account holders are persons of Indian nationality or origin.	May be held jointly with residents
Nomination	Permitted	Permitted	Permitted
Currency in which account is denominated	Pound Sterling, US Dollar, Japanese Yen, Euro, Canadian Dollar and Australian Dollar	Indian Rupees	Indian Rupees
Repatriablity	Repatriable	Repatriable	Not repatriable except for the following: i) current income ii) up to US$ 1 (one) million per financial year (April-March), for any bonafide purpose, out of the balances in the account, e.g., sale proceeds of assets in India acquired by way of purchase inheritance legacy inclusive of assets acquired out of settlement subject to certain conditions.
Type of Account	Term Deposit only	Savings, Current, Recurring, Fixed Deposit	Savings, Current, Recurring, Fixed Deposit
Period for fixed	For terms not less than 1 year	At the discretion of the bank.	As applicable to resident

Particulars	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident (External) Rupee Account Scheme [NRE Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
deposits	and not more than 5 years.		accounts.
Rate of Interest	Subject to cap as stipulated by the Department of Banking Operations and Development, Reserve Bank of India: At present, with effect from the close of business on November 15, 2008, interest shall be paid within the ceiling rate of LIBOR/ SWAP rates plus 125 basis points for the respective currency corresponding maturities. On floating rate deposits, interest shall be paid within the ceiling of SWAP rates for the respective currency/ maturity plus 100 basis points. For floating rate deposits, the interest reset period shall be six months.	Subject to cap as stipulated by the Department of Banking Operations and Development, Reserve Bank of India: Fixed/Recurring Deposits : At present, with effect from the close of business on November 15, 2008, interest rates on NRE deposits for one to three years should not exceed the LIBOR/SWAP rates plus 275 basis points for corresponding maturities, as on the last working day of the previous month, for US dollar of corresponding maturities. The interest rates as determined above for three year deposits will also be applicable in case the maturity period exceeds three years. Savings Bank Account : Interest rate shall be at the rate applicable to domestic savings account. Currently, the rate is 4.0 per cent.	Fixed/ Recurring Deposits Banks are free to determine interest rates for term deposits. Savings Bank Account: Interest rate shall be at the rate applicable to domestic savings account. Currently, the rate is 4.0 per cent.
Operations by Power of Attorney in favour of a resident by the non-resident	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible local payments or	Operations in the account in terms of Power of Attorney is restricted to withdrawals for permissible

Particulars	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident (External) Rupee Account Scheme [NRE Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
account holder	payments or remittance to the account holder himself through normal banking channels.	remittance to the account holder himself through normal banking channels.	local payments in rupees, remittance of current income to the account holder outside India or remittance to the account holder himself through normal banking channels. Remittance is subject to the ceiling of USD 1(one) million per financial year.
Loans **a. In India** **i) to the Account holder** **i) to Third Parties**	Permitted only up to Rs.100 lakhs Permitted only up to Rs.100 lakhs	Permitted up to Rs.100 lakhs Permitted up to Rs.100 lakhs	Permitted subject to the extant rules[3] Permitted, subject to conditions[4]
b. Abroad **i) to the Account holder** **ii) to Third Parties**	Permitted (Provided no funds are remitted back to India and are used abroad only) Permitted (Provided no funds are remitted back to India and are used abroad only)	Permitted (Provided no funds are remitted back to India and are used abroad only) Permitted (Provided no funds are remitted back to India and are used abroad only)	Not Permitted Not Permitted
c. Foreign Currency Loans in India **i) to the Account holder**	Permitted up to Rs.100 lakhs Not Permitted	Not Permitted Not Permitted	Not Permitted Not Permitted

Particulars	Foreign Currency (Non-Resident) Account (Banks) Scheme [FCNR (B) Account]	Non-Resident (External) Rupee Account Scheme [NRE Account]	Non-Resident Ordinary Rupee Account Scheme [NRO Account]
ii) to Third Parties			
Purpose of Loan a. In India i) to the Account holder	i) Personal purposes or for carrying on business activities * ii) Direct investment in India on non-repatriation basis by way of contribution to the capital of Indian firms/ companies iii) Acquisition of flat/house in India for his own residential use. (Please refer to para 9 of Schedule 2 to FEMA 5).	i) Personal purposes or for carrying on business activities.* ii) Direct investment in India on non-repatriation basis by way of contribution to the capital of Indian firms/companies.iii) Acquisition of flat/ house in India for his own residential use. (Please refer to para 6(a) of Schedule1 to FEMA 5).	Personal requirement and/or business purpose.*
ii) to Third Parties	Fund based and/ or non-fund based facilities for personal purposes or for carrying on business activities *. (Please refer to para 9 of Schedule 2 to FEMA 5).	Fund based and/or non-fund based facilities for personal purposes or for carrying on business activities *. (Please refer to para 6(b) of Sch. 1 to FEMA 5)	Personal requirement and/or business purpose *
b. Abroad To the account holder and Third Parties	Fund based and/ or non-fund based facilities for bonafide purposes.	Fund based and/or non-fund based facilities for bonafide purposes.	Not permitted.

*** The loans cannot be utilised for the purpose of on-lending or for carrying on agriculture or plantation activities or for investment in real estate business.**

Note :

a. When a person resident in India leaves India for Nepal and Bhutan for taking up employment or for carrying on business or vocation or for any other purpose indicating his intention to stay in Nepal and Bhutan for an uncertain period, his existing account will continue as a resident account. Such account should not be designated as Non-resident (Ordinary) Rupee Account.

b. Authorised Dealers (ADs) may open and maintain NRE/FCNR (B) Accounts of persons resident in Nepal and Bhutan who are citizens of India or of Indian origin, provided the funds for opening these accounts are remitted in free foreign exchange. Interest earned in NRE/FCNR (B) accounts can be remitted only in Indian rupees to NRIs and PIO resident in Nepal and Bhutan.

c. In terms of Regulation 4(4) of the Notification No.FEMA.5/2000-RB dated May 3, 2000, ADs may open and maintain Rupee accounts for a person resident in Nepal and Bhutan.

d. The regulations relating to the various deposit schemes available to Non-Resident Indians have been notified vide Notification No.FEMA.5 dated 3rd May 2000, as amended from time to time. The relevant Notifications and A.P. (DIR Series) Circulars are available on our website [www.rbi.org.in ? Sitemap ? FEMA ? Notifications/A.P.(DIR Series) Circulars]. The Master Circular on Non-Resident Ordinary Rupee (NRO) Account [www.rbi.org.in ? Sitemap ? Master Circulars] may also be referred to. The details of rate of interest on the various accounts, are available in the "**Master Circular on Interest Rates on Rupee Deposits held in Domestic, Ordinary Non-Resident (NRO) and Non-Resident (External) (NRE) Accounts" and "Master Circular of instructions relating to deposits held in FCNR (B) Accounts"** issued by our Department of Banking Operations and Development, available on our website [www.rbi.org.in ? Sitemap ? Master Circulars].

e. AD Category - I banks and authorized banks may credit the proceeds of account payee cheques/ demand drafts/bankers' cheques, issued against encashment of foreign currency to the NRE account of the NRI account holder where the instruments issued to the NRE account holder are supported by encashment certificate issued by AD Category-I/Category-II.

f. AD Category - I banks and authorised banks may permit remittance of the maturity proceeds of FCNR (B) deposits to third parties outside India, provided the transaction is specifically authorised by the account holder and the Authorised Dealer is satisfied about the bonafides of the transaction.

[1] NRI means a person resident outside India who is a citizen of India or is a person of Indian origin [Regulation 2 (vi) of Notification FEMA 5/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Deposit) Regulations, 2000].

[2] Overseas Corporate Body (OCB) means a company, partnership firm, society and other corporate body owned directly or indirectly to the extent of at least sixty per cent by Non-Resident Indians and includes overseas trust in which not less than sixty percent beneficial interest is held by Non-resident Indians directly or indirectly but irrevocably, which was in existence as on September 16, 2003 and was eligible to undertake transactions pursuant to the general permission granted under Foreign Exchange Management Regulations.

[3] Subject to usual norms as are applicable to resident accounts, for personal purposes or for carrying on business activities except for the purpose of relending or carrying on agricultural/plantation activity or for investment in real estate business.

[4] Subject to conditions such as (i) the loans shall be utilised only for meeting borrower's personal requirements and/or business purpose and not for carrying on agricultural/plantation activities or real estate business, or for relending, (ii) Regulations relating to margin and rate of interest as stipulated by the Reserve Bank from time to time shall be complied with and (iii) The usual norms and considerations as applicable in the case of advances to trade/industry shall be applicable for such loans/facilities.

CHAPTER 3.4

DEPOSITS REGULATIONS UNDER FEMA 5

Q.238. What is the meaning of a 'Non-Resident Indian' for purposes of Deposit Regulations (FEMA 5)?

Ans. "Non-resident Indian (NRI)" means a **person resident outside India who is a citizen of India or is a person of Indian origin**.

Q.239. What is the meaning of a 'Person of Indian Origin' for purposes of Deposit Regulations (FEMA 5)?

Ans. "**Person of Indian Origin**" means a citizen of any country **other than Bangladesh or Pakistan**, if

(*a*) he at any time held Indian passport; or

(*b*) he or either of his parents or any of his grand-parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

(*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*).

Q.240. Can a person resident in India accept/make deposits from/with an NRI?

Ans. No person resident in India shall accept any deposit from, or make any deposit with, a person resident outside India.

ACCEPTANCE OF DEPOSITS BY PERSONS OTHER THAN AUTHORISED DEALER/ AUTHORISED BANK

Q.241. Can a company or body corporate accept deposits from an NRI?

Ans. A company registered under the Companies Act, 1956, or a body corporate created under an Act of Parliament or State Legislature shall **not accept deposits on repatriation basis from a non-resident Indian**.

Q.242. On what conditions an Indian company can accept deposits by issue of Commercial Paper to an NRI?

Ans. Deposits accepted by an Indian company by **issue of Commercial Paper to a Non-Resident Indian** shall be subject to the following conditions, namely:

(*a*) the issue is in due compliance with the Non-Banking Companies (Acceptance of Deposits through Commercial Paper) Directions, 1989 issued by the Reserve Bank as also any other law, rule, directions, orders issued by the Government or any other regulatory authority, in regard to **acceptance of deposits by issue of Commercial Paper**;

(*b*) payment for issue of Commercial Paper is received by the issuing company by inward remittance from outside India through normal banking channels or out of funds held in a deposit account maintained by a Non-Resident Indian in accordance with the Regulations made by Reserve Bank in that regard;

(*c*) the amount invested in Commercial Paper shall **not be eligible for repatriation** outside India; and

(*d*) the Commercial **Paper shall not be transferable**.

ACCEPTANCE OF DEPOSITS BY A COMPANY INCORPORATED IN INDIA (INCLUDING A NON-BANKING FINANCE COMPANY REGISTERED WITH RESERVE BANK) ON REPATRIATION BASIS FROM A NON-RESIDENT INDIAN OR A PERSON OF INDIAN ORIGIN RESIDENT OUTSIDE INDIA

Q.243. What are the conditions under which an Indian company can accept deposits on repatriation basis from NRIs/PIO resident outside India?

Ans. A company incorporated in India (including a non-banking finance company registered with the Reserve Bank) may accept deposits **from NRIs, on repatriation basis** subject to the following conditions:

(*i*) The deposits are received **under a public deposit scheme**.

(*ii*) If the deposit accepting company is a non-banking finance company, it should be registered with the Reserve Bank and should have obtained the required credit rating as stipulated under the guidelines issued by Reserve Bank for such companies.

(*iii*) The amount representing the deposit is received by inward remittance from outside India through normal banking channels or by debit to the Non-Resident (External) Account or Foreign Currency (Non-Resident) (Bank) Account maintained with an authorised dealer/authorised bank in India.

(*iv*) If the deposit accepting company is a non-banking finance company the rate of interest payable on deposits shall be in conformity with the guidelines/directions issued by Reserve Bank for such companies. In other cases the rate of interest payable on deposits shall not exceed the ceiling rate prescribed from time to time under the Companies (Acceptance of Deposit) Rules, 1975.

(*v*) The maturity period of deposits shall not exceed 3 years.

(*vi*) The company accepting the deposit shall comply with the provision of any other law, rules, regulations, orders issued by the Government of India or any other competent authority, as are applicable to it in regard to acceptance of deposits.

(*vii*) The amount of aggregate deposits accepted by the company shall not exceed 35% of its net owned funds.

(*viii*) The payment of interest net of taxes may be made by the company to the depositor by remittance through an authorised dealer or by credit to the depositor's NRE/FCNR(B)/NRO account as desired by him.

(*ix*) The amount of deposits so collected shall not be utilised by the company for re-lending (not applicable to a Non-Banking Finance Company) or for undertaking agricultural/plantation activities or real estate business or for investing in any other concern, firm or a company engaged in or proposing to engage in agricultural/plantation activities or real estate business.

(*x*) The repayment of the deposit may be made by the company to the depositor by remittance from India through an authorised dealer or by credit to the depositor's NRE/FCNR(B) account maintained with an authorised dealer in India, provided the depositor continues to be a non-resident at the time of repayment. While applying to the authorised dealer for remittance of maturity proceeds of deposit or credit thereof to NRE/FCNR(B) account, the company should certify that the amount of deposit was received either by inward remittance from outside India through normal banking channels or by debit to the depositor's NRE/FCNR(B) account, as the case may be.

(*xi*) The amount representing repayment of deposit may also be credited to the depositor's NRO account, at the depositor's option.

ACCEPTANCE OF DEPOSITS BY INDIAN PROPRIETORSHIP CONCERN/FIRM OR COMPANY (INCLUDING NON-BANKING FINANCE COMPANY REGISTERED WITH RESERVE BANK) ON NON-REPATRIATION BASIS FROM NON-RESIDENT INDIANS AND PERSONS OF INDIAN ORIGIN RESIDENT OUTSIDE INDIA

Q.244. What are the conditions under which an Indian proprietorship concern/firm or company (including non-banking finance company registered with Reserve Bank) can accept deposits on non-repatriation basis from NRIs/PIO resident outside India?

Ans. A proprietorship concern or a firm in India, may accept deposits on non-repatriation basis from NRIs, and a company incorporated in India (including a non-banking finance company registered with Reserve Bank) may accept deposits on non-repatriation basis from NRIs [1] [***] subject to the following conditions :

(*i*) In the case of a company, the **deposits may be accepted either under private arrangement, or under a public deposit scheme.**

(*ii*) If the deposit accepting company is a non-banking finance company, it should be registered with the Reserve Bank and should have obtained the required credit rating as stipulated under the guidelines issued by Reserve Bank for such companies.

(*iii*) The **maturity period of deposit shall not exceed 3 years.**

(*iv*) If the deposit accepting company is a non-banking finance company the rate of interest payable on deposits shall be in conformity with the guidelines/directions issued by Reserve Bank for such companies. In other cases the rate of interest payable on deposits shall not exceed the ceiling rate prescribed from time to time under the Companies (Acceptance of Deposit) Rules, 1975.

(*v*) **The amount of deposit shall be received by debit to NRO account only, provided that the amount of the deposit shall not represent inward remittances or transfer of funds from NRE/ FCNR(B) accounts into the NRO account.**

(*vi*) The proprietorship concern/firm/company accepting the deposit should comply with the provision of any other law, rules, regulations or orders made by Government or any other competent authority, as are applicable to it in regard to acceptance of deposits.

(*vii*) The proprietorship concern, firm or company accepting the deposit shall not utilise the amount of deposits for relending (not applicable to a Non-Banking Finance Company) or for undertaking agricultural/plantation activities or real estate business or for investing in any other concern or firm or company engaged in or proposing to engage in agricultural/plantation activities or real estate business.

(*viii*) The amount of deposits accepted **shall not be allowed to be repatriated outside India.**

Q.245. Can the amount of deposit be received by debit to NRE/FCNR(B) accounts, out of transfer of funds from NRE/FCNR(B) accounts into NRO account of NRI/PIO.

Ans. No.

CHAPTER 3.5

BORROWING AND LENDING IN RUPEES UNDER FEMA 4

Q.246. What is the meaning of a 'Non-Resident Indian' for purposes of Borrowing and Lending In Rupees Regulations (FEMA 4)?

Ans. "Non-resident Indian (NRI)" means a **person resident outside India who is a citizen of India or is a person of Indian origin**.

Q.247. What is the meaning of a 'Person of Indian Origin' for purposes of Borrowing and Lending In Rupees Regulations (FEMA 4)?

Ans. "**Person of Indian Origin**" means a citizen of any country **other than Bangladesh or Pakistan**, if

(*a*) he at any time held Indian passport; or

(*b*) he or either of his parents or any of his grand-parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

(*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*).

Q.248. Can resident individuals lend in Rupees to their non-resident NRIs/PIOs close relative (as defined in Section 6 of the Companies Act, 1956) for any personal purpose or business activities other than agricultural/plantation activities or real estate or relending business?

Ans. Yes. A resident individual is permitted to lend to a Non-resident Indian (NRI)/Person of Indian Origin (PIO) close relative [as defined in Section 6 of the Companies Act, 1956] by way of crossed cheque/electronic transfer, subject to the following conditions:

(i) The loan is free of interest and the minimum maturity of the loan is one year;

(ii) The loan amount should be within the overall limit under the Liberalised Remittance Scheme of US$ 200,000 per financial year available for a resident individual. It would be the responsibility of the lender to ensure that the amount of loan is within the Liberalised Remittance Scheme limit of US$ 200,000 during the financial year;

(iii) The loan shall be utilised for meeting the borrower's personal requirements or for his own business purposes in India;

(iv) The loan shall not be utilised, either singly or in association with other person, for any of the activities in which investment by persons resident outside India is prohibited, namely;

(a) The business of chit fund, or

(b) Nidhi Company, or

(c) Agricultural or plantation activities or in real estate business, or construction of farm houses, or

(d) Trading in Transferable Development Rights (TDRs).

Explanation**:** For the purpose of item (c) above, real estate business shall not include development of townships, construction of residential/commercial premises, roads or bridges.

(v) The loan amount should be credited to the NRO a/c of the NRI/PIO. Credit of such loan amount may be treated as an eligible credit to NRO account;

(vi) The loan amount shall not be remitted outside India; and

(vii) Repayment of loan shall be made by way of inward remittances through normal banking channels or by debit to the Non-resident Ordinary (NRO)/Non-resident External (NRE)/ Foreign Currency Non-resident (FCNR) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted.

Q.249. Whether use of Credit Card in India by a person resident outside India deemed as borrowing or lending in rupees?

Ans. Use of **Credit Card in India by a person resident outside India** shall not be deemed as borrowing or lending in rupees.

Borrowing in rupees by persons other than companies in India on non-repatriation basis from a non-resident Indian or a person of Indian origin resident outside India

Q.250. Can a person resident in India, not being a company incorporated in India, borrow in rupees from a non-resident Indian or a person of Indian origin resident outside India?

Ans. A person resident in India, not being a company incorporated in India, **may borrow in rupees on non-repatriation basis** from a **non-resident Indian or a person of Indian origin** resident outside India, subject to the following conditions:

(*i*) the amount of loan shall be received by way of inward remittance from outside India or out of Non-resident External (NRE)/Non-resident Ordinary (NRO)/Foreign Currency Non-resident (FCNR) account of the lender maintained with an authorised dealer or an authorised bank in India;

(*ii*) the **period of loan shall not exceed three years**;

(*iii*) the rate of interest on the loan shall not exceed two percentage points over the Bank rate prevailing on the date of availment of loan;

(*iv*) payment of interest and repayment of loan shall be made by credit to the lender's Non-resident Ordinary (NRO) account; and

(*v*) **the amount borrowed shall not be allowed to be repatriated outside India**.

BORROWING IN RUPEES BY INDIAN COMPANIES ON REPATRIATION OR NON-REPATRIATION BASIS, FROM A NON-RESIDENT INDIAN OR A PERSON OF INDIAN ORIGIN RESIDENT OUTSIDE INDIA BY WAY OF INVESTMENT IN NON-CONVERTIBLE DEBENTURES

Q.251. Can a company incorporated in India borrow in rupees from a non-resident Indian or a person of Indian origin resident outside India by way of investment in Non-convertible Debentures?

Ans. A company incorporated in India may borrow in rupees on **repatriation or non-repatriation basis**, from a **non-resident Indian or a person of Indian origin resident outside India** by way of investment in **Non-convertible Debentures** (NCDs) subject to the following conditions:

(*i*) the issue of Non-convertible Debentures (NCDs) is made by **public offer**;

(*ii*) the rate of interest on such Non-convertible Debentures (NCDs) does not exceed the prime lending rate of the State Bank of India as on the date on which the resolution approving the issue is passed in the borrowing company"s General Body Meeting, *plus* 300 basis points;

(*iii*) the period for redemption of such Non-convertible Debentures (NCDs) is not less than three years;

(*iv*) the borrowing company does not and shall not carry on agricultural/plantation/real estate business/Trading in Transferable Development Rights (TDRs) or does not and shall not act as Nidhi or Chit Fund company;

(*v*) the borrowing company files with the nearest office of the Reserve Bank, not later than 30 days from the date—

(*A*) of receipt of remittance for investment in Non-convertible Debentures (NCDs), full details of the remittances received, namely; (*a*) a list containing names and addresses of **Non-resident Indians (NRIs)** who have remitted funds for investment in Non-convertible Debentures (NCDs) on repatriation and/or non-repatriation basis, (*b*) amount and date of receipt of remittance and its rupee equivalent; and (*c*) names and addresses of authorised dealers through whom the remittance has been received;

(*B*) of issue of Non-convertible Debentures (NCDs), full details of the investment, namely; (*a*) a list containing names and addresses of Non-resident Indians (NRIs) and number of Non-convertible Debentures (NCDs) issued to each of them on repatriation and/or non-repatriation basis and (*b*) a certificate from the Company Secretary of the borrowing company that all provision of the Act, rules and regulations in regard to issue of Non-convertible Debentures (NCDs) have been duly complied with.

Q.252. What are the additional conditions need to be fulfilled in case of borrowing by issue of NCDs on repatriation basis?

Ans. The borrowing by issue of non-convertible debentures on repatriation basis shall be subject to the following additional conditions, namely :

(*a*) the percentage of Non-convertible Debentures (NCDs) issued to Non-resident Indians (NRIs) to the total paid-up value of each series of Non-convertible Debentures (NCDs) issued shall not exceed the ceiling prescribed for issue of equity shares/convertible debentures for foreign direct investment in India as specified by the Reserve Bank from time to time, under the relevant regulations, and

(*b*) the amount of investment is received by remittance from outside India through normal banking channels or by transfer of funds held in the investor's Non-resident External (NRE)/Foreign Currency Non-resident (FCNR) account maintained with an authorised dealer or an authorised bank in India.

Q.253. What are the additional conditions need to be fulfilled in case of borrowing by issue of NCDs on non- repatriation basis?

Ans. The borrowing by issue of non-convertible debentures (NCDs) on non-repatriation basis shall be subject to the following additional conditions, namely:

(*a*) the amount of investment is received either by remittance from outside India through normal banking channels or by transfer of funds held in the investor's Non-resident External (NRE)/ Non-resident Ordinary (NRO)/Foreign Currency Non-resident (FCNR) account maintained with an authorised dealer or an authorised bank in India,

Q.254. Are there any restrictions on the usage of borrowed funds?

Ans. No person resident in India who has borrowed in rupees from a person resident outside India

(1) shall use such borrowed funds for any purpose except in his own business other than—

(i) the business of chit fund, or

(ii) as Nidhi Company, or

(iii) agricultural or plantation activities or real estate business (not include development of townships, construction of residential/commercial premises, roads or bridges); or construction of farm houses, or

(iv) trading in Transferable Development Rights (TDRs),

(2) shall use such borrowed funds for any investment, whether by way of capital or otherwise, in any company or partnership firm or proprietorship concern or any entity, whether incorporated or not, or for relending.

LOANS IN RUPEES TO NON-RESIDENTS INDIAN AGAINST THE SECURITY OF SHARES OR OTHER SECURITIES AND IMMOVABLE PROPERTY (OTHER THAN AGRICULTURAL OR PLANTATION PROPERTY OR FARM HOUSE) BY AN AUTHORISED DEALER IN INDIA

Q.255. Can an AD grant loans in rupees to NRIs? What are the conditions?

Ans. An authorised dealer in India may grant loan to a non-resident Indian,

(*A*) Against the security of shares or other securities held in the name of the borrower, or

(*B*) Against the security of immovable property (other than agricultural or plantation property or farm house), held by him in accordance with the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000:

Provided that—

(*a*) The loan shall be utilised for meeting the borrower's personal requirements or for his own business purposes;

(*b*) The loan shall not be utilised, either singly or in association with other person, for any of the activities in which investment by persons resident outside India is prohibited, namely:

(*i*) the business of chit fund, or

(*ii*) Nidhi Company, or

(*iii*) agricultural or plantation activities or in real estate business, or construction of farm houses, or

(*iv*) trading in Transferable Development Rights (TDRs).

(*c*) The Reserve Bank's directives on advances against shares/securities/immovable property shall be duly complied with;

(*d*) The loan amount shall not be credited to Non-resident External (NRE)/Foreign Currency Non-resident (FCNR) account of the borrower;

(*e*) The loan amount shall not be remitted outside India;

(*f*) Repayment of loan shall be made from out of remittances from outside India through normal banking channels or by debit to the Non-resident Ordinary (NRO)/Non-resident External (NRE)/Foreign Currency Non-resident (FCNR) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted,

(*C*) For any purpose as per the loan policy laid down by the Board of Directors of the Authorised Dealer.

Q.256. Can the loans in Rupees to non-residents Indian against the security of shares or other securities and immovable property (other than agricultural or plantation property or farm house) by an authorised dealer in India be repaid by any close relative of the borrower in India?

Ans. Yes, by resident close relative (relative as defined in Section 6 of the Companies Act, 1956), of the Non-Resident Indian by crediting the borrower's loan account through the bank account of such relative.

Q.257. On what conditions an AD in India can grant Rupee loans to NRI employees of Indian companies for acquiring shares of the companies under the ESOP Scheme?

Ans. An Authorised Dealer in India may grant Rupee loans to NRI employees of Indian companies for acquiring shares of the companies under the Employees Stock Option Plan (ESOP) Scheme subject to the following conditions:

(*i*) The ESOP Scheme should be as per the policy approved by the bank's Board.

(*ii*) The loan amount should not exceed 90% of the purchase price of the shares or Rupees 20 lakhs per NRI employee, whichever is lower.

(*iii*) The rate of interest and margin on such loans may be decided by the banks, subject to directives issued by the Reserve Bank from time to time.

(*iv*) The amount shall be paid directly to the company and should not be credited to the borrowers" non-resident accounts in India.

(*v*) The loan amount would have to be repaid by the borrower by way of inward remittances or by debit to his/her NRO/NRE/FCNR(B) account.

(*vi*) The loans will be included for reckoning capital market exposures and the bank will ensure compliance with prudential limits, prescribed by the Reserve Bank from time to time, for such exposure to capital market.]

Q.258. Can the Rupee loans to NRI employees of Indian companies for acquiring shares of the companies under the ESOP Scheme be repaid by any close relative of the borrower in India?

Ans. Yes, by resident close relative (relative as defined in Section 6 of the Companies Act, 1956), of the Non-Resident Indian by crediting the borrower's loan account through the bank account of such relative.

PROVIDING HOUSING LOAN IN RUPEES TO A NON-RESIDENT INDIAN OR A PERSON OF INDIAN ORIGIN RESIDENT OUTSIDE INDIA BY AN AUTHORISED DEALER OR A HOUSING FINANCE INSTITUTION FOR ACQUISITION OF A RESIDENTIAL ACCOMMODATION IN INDIA

Q.259. On what conditions a housing loan in rupees can be granted to an NRI or PIO resident outside India from an authorised dealer or a housing finance institution?

Ans. An authorised dealer or a housing finance institution in India approved by the National Housing Bank may provide housing loan **to a Non-resident Indian or a person of Indian origin resident outside India**, for acquisition of a residential accommodation in India, subject to the following conditions, namely :

(*a*) the quantum of loans, margin money and the period of repayment shall be at par with those applicable to housing finance provided to a person resident in India;

(*b*) the loan amount shall not be credited to Non-resident External (NRE)/Foreign Currency Non-resident (FCNR) account of the borrower;

(*c*) the loan shall be fully secured by equitable mortgage of the property proposed to be acquired, and if necessary, also by lien on the borrower's other assets in India;

(*d*) the instalment of loan, interest and other charges, if any, shall be paid by the borrower by remittances from outside India through normal banking channels or out of funds in his Non-resident External (NRE)/Foreign Currency Non-resident (FCNR)/Non-resident Ordinary (NRO) account in India, or out of rental income derived from renting out the property acquired by utilisation of the loan **or by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative**.

(*e*) the rate of interest on the loan shall conform to the directives issued by the Reserve Bank or, as the case may be, by the National Housing Bank.

Q.260. Can the housing loan so provided for acquisition of a residential accommodation in India be repaid by any close relative of the borrower in India?

Ans. Yes, by crediting the borrower's loan account through the bank account of such close relative (relative as defined in section 6 of the Companies Act, 1956).

RUPEE LOANS TO NRI/PIO EMPLOYEES OF INDIAN BODY CORPORATE

Q.261. On what conditions Rupee loans can be granted to NRI/PIO employees of Indian body corporate?

Ans. A body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin, subject to the following conditions, namely :

(*i*) the loan shall be granted only for personal purposes including purchase of housing property in India;

(*ii*) the loan shall be granted in accordance with the lender's Staff Welfare Scheme/Staff Housing Loan Scheme and other terms and conditions applicable to its Staff resident in India;

(*iii*) the lender shall ensure that the loan amount is not used for the prohibited purposes;

(*iv*) the lender shall credit the loan amount to the borrower's NRO Account in India or shall ensure credit to such account by specific indication on the payment instrument;

(*v*) it shall be a term of the loan agreement that the repayment of loan shall be made by way of remittance from outside India or from NRE/NRO/FCNR Account of the borrower; and the lender shall not accept repayment made from any other source.]

CONTINUANCE OF RUPEE LOAN/OVERDRAFT TO RESIDENT WHO BECOMES A PERSON RESIDENT OUTSIDE INDIA

Q.262. On what conditions AD can allow continuance of loan/overdraft granted to a person resident in India who subsequently becomes a person resident outside India?

Ans. An authorised dealer or, as the case may be, an authorised bank, may allow continuance of loan/overdraft granted to a person resident in India **who subsequently becomes a person resident outside India**, subject to following terms and conditions :

(*a*) the authorised dealer or the authorised bank is satisfied, according to his/its commercial judgment, about the reasons to continue the loan or overdraft;

(*b*) the period of loan or overdraft shall not exceed the period originally fixed at the time of granting the loan or overdraft;

(*c*) so long as the borrower continues to remain a person resident outside India, the repayment shall be made either by inward remittance from outside India through normal banking channels or from the funds held in Non-resident External (NRE)/Foreign Currency Non-resident (FCNR)/Non-resident Ordinary (NRO) account of the borrower.

CONTINUANCE OF RUPEE LOAN IN THE EVENT OF CHANGE IN THE RESIDENTIAL STATUS OF THE LENDER

Q.263. What is the impact of change in the residential status of the lender?

Ans. In case a **rupee loan was granted by a person resident in India to another person resident in India and the lender subsequently becomes a non-resident**, the repayment of the loan by the resident borrower should be made by credit to the Non-resident Ordinary (NRO) account of the lender maintained with a bank in India, at the option of the lender.

BORROWING OR LENDING IN FOREIGN EXCHANGE BY INDIVIDUAL RESIDENT IN INDIA FROM HIS CLOSE RELATIVES OUTSIDE INDIA

Q.264. Can an individual resident in India borrow foreign exchange from his close relatives outside India? If yes, to what extent?

Ans. Yes. An individual resident in India may borrow a sum not exceeding **US$ 250,000** or its equivalent from **his close relatives** (as defined in section 6 of the Companies Act, 1956) **outside India**, subject to the conditions that—

a. the minimum maturity period of the loan is one year;

b. the loan is free of interest; and

c. the amount of loan is received by inward remittance in free foreign exchange through normal banking channels or by debit to the NRE/FCNR account of the non-resident lender.

CHAPTER 3.6

ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA BY NRIs/PIOs/ FOREIGN NATIONALS OF NON-INDIAN ORIGIN REGULATED IN TERMS OF SUB-SECTIONS (3), (4) AND (5) OF SECTION 6 OF FEMA READ WITH FEMA 21

Q.265. What is the meaning of a 'Non-Resident Indian' for purposes of Immovable property in India Regulations (FEMA 21)?

Ans. Non-Resident Indian (NRI) is a citizen of India resident outside India.

Q.266. What is the meaning of a 'Person of Indian Origin' for purposes of Immovable property in India Regulations (FEMA 21)?

Ans. "A **person of Indian origin**" means an individual (**not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan**), who

(*i*) at any time, held Indian passport; or

(*ii*) who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

Q.267. In what circumstances a person resident outside India can hold, own, transfer or invest in any immovable property situated in India?

Ans. In terms of the provision of Section 6(5) of FEMA, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by such person when he was a resident in India or inherited from a person who was a resident in India.

Q.268. Are there any exceptions to the acquisition of immovable property in India by NRIs/PIO?

Ans. FEMA 21permit a NRI or a PIO to acquire immovable property in India, other than agricultural land or, plantation property or farm house.

Q.269. Whether any approval required by Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan to acquire or transfer immovable property in India?

Ans. Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan cannot acquire or transfer immovable property in India, (other than on lease not exceeding five years) without the prior permission of the Reserve Bank.

Q.270. Whether sale proceeds of assets acquired by way of inheritance or settlement included in the ceiling amount of remittance facility of US$ one million?

Ans. NRIs/PIOs are allowed to repatriate an amount up to US$ one million, per financial year (April-March), out of the balances held in the Non-Resident (Ordinary) Rupee (NRO) account, subject to compliance with applicable tax requirements. This amount includes sale proceeds of assets acquired by way of inheritance or settlement.

ACQUISITION OF IMMOVABLE PROPERTY IN INDIA THROUGH PURCHASE/ GIFT/INHERITANCE

Q.271. Who can purchase immovable property in India?

Ans. Under the general permission available, the following categories can purchase immovable property in India:

i) Non-Resident Indian (NRI), and ii) Person of Indian Origin (PIO).

The general permission, however, covers only purchase of residential and commercial property and is not available for purchase of agricultural land/plantation property/farm house in India.

Q.272. Can NRI/PIO acquire agricultural land/plantation property/farm house in India?

Ans. No.

Q.273. Are any documents required to be filed with the Reserve Bank after the purchase?

Ans. No. An NRI/PIO who has purchased residential/commercial property under general permission, is not required to file any documents/reports with the Reserve Bank.

Q.274. How many residential/commercial properties can NRI/PIO purchase under the general permission?

Ans. There are no restrictions on the number of residential/commercial properties that can be purchased.

Q.275. Can a foreign national of non-Indian origin be a second holder to immovable property purchased by NRI/PIO?

Ans. No.

Q.276. Can a foreign national of non-Indian origin resident outside India purchase immovable property in India?

Ans. No. A foreign national of non-Indian origin, resident outside India cannot purchase any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India. However, he/she can acquire or transfer immovable property in India, on lease, not exceeding five years. In such cases, there is no requirement of taking any permission of/or reporting to the Reserve Bank.

A foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business/vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as he would be a 'person resident in India' as per section 2(v) of FEMA, 1999. To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but **also his purpose of stay as well as the type of Indian visa granted to** him **to clearly indicate the intention to stay in India for an uncertain period.** In **this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa.** It has also been observed that foreign nationals coming to India and staying beyond 182 days on a tourist or other visa meant for a certain period are illegally acquiring immovable property in India in violation of the extant rules and regulations under FEMA.

Q.277. Can a foreign national who is a person resident in India purchase immovable property in India?

Ans. Yes, a foreign national who is a 'person resident in India' within the meaning of Section 2(v) of FEMA, 1999 can purchase immovable property in India,but the person concerned would have to obtain the approvals and fulfill the requirements, if any, prescribed by other authorities, such as, the State Government concerned, etc. The onus to prove his/her residential status is on the individual as per the extant FEMA provision, if required by any authority. **However, a foreign national resident in India who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan would require prior approval of the Reserve Bank.**

A foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business/vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as he would be a 'person resident in India' as per section 2(v) of FEMA, 1999. To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but **also his purpose of stay as well as the type of Indian visa granted to** him **to clearly indicate the intention to stay in India for an uncertain period.** In **this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa.** It has also been observed that foreign nationals coming to

India and staying beyond 182 days on a tourist or other visa meant for a certain period are illegally acquiring immovable property in India in violation of the extant rules and regulations under FEMA.

Q.278. Can a NRI/PIO acquire immovable property in India by way of gift? Can a foreign national acquire immovable property in India by way of gift?

Ans.

(a) Yes, NRIs and PIOs can freely acquire immovable property by way of gift either from i) a person resident in India; or ii) an NRI; or iii) a PIO.

However, the property can only be commercial or residential in nature. Agricultural land/plantation property/farm house in India *cannot* be acquired by way of gift.

(b) A foreign national of non-Indian origin resident outside India cannot acquire any immovable property in India by way of gift.

Q.279. Can a non-resident inherit immovable property in India?

Ans. Yes, a person resident outside India i.e. i) an NRI; ii) a PIO; and iii) a foreign national of non-Indian origin can inherit and hold immovable property in India from a person who was resident in India. However, a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan should seek prior approval of the Reserve Bank for inheriting immovable property in India.

Q.280. From whom can a non-resident person inherit immovable property?

Ans. A person resident outside India (i.e. NRI or PIO or foreign national of non-Indian origin) can inherit immovable property from

(a) a person resident in India or

(b) a person resident outside India.

However, the person from whom the property is inherited should have acquired the same in accordance with the foreign exchange law in force or FEMA regulations, applicable at the time of acquisition of the property.

<u>TRANSFER OF IMMOVABLE PROPERTY IN INDIA</u>

(i) Transfer by way of sale

Q.281. Can an NRI/PIO/foreign national sell his residential/commercial property?

Ans.

(a) NRI can sell property in India to

  i) a person resident in India; or

  ii) an NRI; or

  iii) a PIO.

(b) PIO can sell property in India to

  i) a person resident in India; or

  ii) an NRI; or

  iii) a PIO - ***with the prior approval*** **of the Reserve Bank.**

(c) Foreign national of non-Indian origin including a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan can sell property in India with prior approval of the Reserve Bank to

  i) a person resident in India

  ii) an NRI

  iii) a PIO.

Q.282. Can a non-resident owning/holding an agricultural land/a plantation property/a farm house in India sell the said property?

Ans.

(a) NRI/PIO may sell agricultural land/plantation property/farm house to a person resident in India who is a citizen of India.

(b) Foreign national of non-Indian origin resident outside India would need *prior approval* of the Reserve Bank to sell agricultural land/plantation property/farm house in India.

(ii) Transfer by way of gift

Q.283. Can a non-resident gift his residential/commercial property?

Ans. Yes.

(a) NRI/PIO may gift residential/commercial property to –

(i) person resident in India or

(ii) an NRI or

(iii) PIO.

(b) A foreign national of non-Indian origin requires the prior approval of the Reserve Bank for gifting the residential/commercial property.

Q.284. Can an NRI/PIO/foreign national holding an agricultural land/a plantation property/a farm house in India, gift the same?

Ans.

(a) NRI/PIO can gift **an agricultural land/a plantation property/a farm house in India** only to a person resident in India who is a citizen of India.

(b) A foreign national of non-Indian origin would require the prior approval of the Reserve Bank to gift **an agricultural land/a plantation property/a farm house in India**.

(iii) ***Transfer through mortgage***

Q.285. Can residential/commercial property be mortgaged by NRI/PIO?

Ans.

i) NRI/PIO can mortgage a residential/commercial property to:

(a) an Authorised Dealer/the housing finance institution in India without the approval of Reserve Bank

(b) a bank abroad, with the prior approval of the Reserve Bank.

ii) A foreign national of non-Indian origin can mortgage a residential/commercial property only with prior approval of the Reserve Bank.

iii) A foreign company which has established a Branch Office or other place of business in accordance with FERA/FEMA regulations has general permission to mortgage the property with an Authorised Dealer in India.

MODE OF PAYMENT FOR PURCHASE OF IMMOVABLE PROPERTY IN INDIA

Q.286. How can an NRI/PIO make payment for purchase of residential/commercial property in India?

Ans. Payment can be made by NRI/PIO out of:

(a) funds remitted to India through normal banking channels or

(b) funds held in NRE/FCNR (B)/NRO account maintained in India

No payment can be made either by traveller's cheque or by foreign currency notes or by other mode except those specifically mentioned above.

Q.287. Is repatriation of application money for booking of flat/payment made to the builder by NRI/ PIO allowed when the flat or plot is not allotted or the booking/contract is cancelled?

Ans. The Authorised Dealers can allow NRIs/PIOs to credit refund of application/earnest money/ purchase consideration made by the house building agencies/seller on account of non-allotment of flat/plot/cancellation of bookings/deals for purchase of residential, commercial property, together with interest, if any, net of income tax payable thereon, to NRE/FCNR account, provided, the original payment was made out of NRE/FCNR account of the account holder or remittance from outside India through normal banking channels and the Authorised Dealer is satisfied about the genuineness of the transaction.

Q.288. Can NRI/PIO avail of loan from an authorised dealer for acquiring flat/house in India for his own residential use against the security of funds held in his NRE Fixed Deposit account/ FCNR (B) account? How the loan can be repaid?

Ans. Yes, such loans are permitted subject to the terms and conditions laid down in Schedules 1 and 2 to the Notification No. FEMA 5/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Deposit) Regulations, 2000, as amended from time to time. Banks cannot grant fresh loans or renew existing loans in excess of Rs. 100 lakhs against NRE and FCNR (B) deposits, either to the depositors or to third parties. The banks should also not undertake artificial slicing of the loan amount to circumvent the ceiling of Rs. 100 lakh.

Such loans can be repaid in the following manner:

(a) by way of inward remittance through normal banking channel or

(b) by debit to the NRE/FCNR (B)/NRO account of the NRI/PIO or

(c) out of rental income from such property

(d) by the borrower's close relatives, as defined in section 6 of the Companies Act, 1956, through their account in India by crediting the borrower's loan account.

Q.289. Can NRI/PIO, avail of housing loan in Rupees from an Authorised Dealer or a Housing Finance Institution in India approved by the National Housing Bank for purchase of residential accommodation or for the purpose of repairs/renovation/improvement of residential accommodation ? How can such loan be repaid?

Ans. Yes, NRI/PIO can avail of housing loan in Rupees from an Authorised Dealer or a Housing Finance Institution subject to certain terms and conditions laid down in Regulation 8 of Notification No. FEMA 4/2000-RB dated May 3, 2000 viz. Foreign Exchange Management (Borrowing and lending in rupees) Regulations, 2000, as amended from time to time. Authorised Dealers/Housing Finance Institutions can also lend to the NRIs/PIOs for the purpose of repairs/renovation/improvement of residential accommodation owned by them in India. Such a loan can be repaid (a) by way of inward remittance through normal banking channel or (b) by debit to the NRE/FCNR (B)/NRO account of the NRI/PIO or (c) out of rental income from such property; or (d) by the borrower's close relatives, as defined in section 6 of the Companies Act, 1956, through their account in India by crediting the borrower's loan account.

Q.290. Can NRI/PIO avail of housing loan in Rupees from his employer in India?

Ans. Yes, subject to certain terms and conditions given in Regulation 8A of Notification No. FEMA 4/ 2000-RB dated May 3, 2000 and A.P. (DIR Series) Circular No.27 dated October 10, 2003, i.e.,

(i) The loan shall be granted only for personal purposes including purchase of housing property in India;

(ii) The loan shall be granted in accordance with the lender's Staff Welfare Scheme/Staff Housing Loan Scheme and subject to other terms and conditions applicable to its staff resident in India;

(iii) The lender shall ensure that the loan amount is not used for the purposes specified in sub-clauses (i) to (iv) of clause (1) and in clause (2) of Regulation 6 of FEMA 4.

(iv) The lender shall credit the loan amount to the borrower's NRO account in India or shall ensure credit to such account by specific indication on the payment instrument;

(v) The loan agreement shall specify that the repayment of loan shall be by way of remittance from outside India or by debit to NRE/NRO/FCNR Account of the borrower and the lender shall not accept repayment by any other means.

REPATRIATION OF SALE PROCEEDS OF RESIDENTIAL/COMMERCIAL PROPERTY PURCHASED BY NRI/PIO

Q.291. Can NRI/PIO repatriate outside India the sale proceeds of immovable property held in India?

Ans.

(a) In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a NRI/PIO, the Authorised Dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

(i) the immovable property was acquired by the seller in accordance with the provision of the foreign exchange law in force at the time of acquisition by him or the provision of these Regulations;

(ii) the amount to be repatriated does not exceed:

- the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels, or
- the amount paid out of funds held in Foreign Currency Non-Resident Account, or
- the foreign currency equivalent (as on the date of payment) of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property; and

(iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

For this purpose, **repatriation outside India** means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency.

(b) in case the property is acquired out of Rupee resources and/or the loan is repaid by close relatives in India (as defined in Section 6 of the Companies Act, 1956), the amount can be credited to the NRO account of the NRI/PIO. The amount of capital gains, if any, arising out of sale of the property can also be credited to the NRO account.

NRI/PIO are also allowed by the Authorised Dealers to repatriate an amount up to US$ 1 million per financial year out of the balance in the NRO account/sale proceeds of assets by way of purchase/the assets in India acquired by him by way of inheritance/legacy. This is subject to production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter, and a tax clearance/no objection certificate from the Income Tax Authority for the remittance. Remittances exceeding US $ 1,000,000 (US Dollar One million only) in any financial year requires prior permission of the Reserve Bank.

(c) A person referred to in sub-section (5) of Section 6 of the Foreign Exchange Management Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

Q.292. Can an NRI/PIO repatriate the proceeds in case the sale proceeds were deposited in the NRO account?

Ans. Please refer to the answer at Q.22 above. NRI/PIO may repatriate up to US$ one million per financial year (April-March) from their NRO account which would also include the sale proceeds of immovable property. There is no lock in period for sale of immovable property and repatriation of sale proceeds outside India.

Q.293. If a Rupee loan was taken by the NRI/PIO from an Authorised Dealer or a Housing Finance Institution for purchase of residential property can the NRI/PIO repatriate the sale proceeds of such property?

Ans. Yes, Authorised Dealers have been authorised to allow repatriation of sale proceeds of residential accommodation purchased by NRIs/PIOs out of funds raised by them by way of loans from the authorised dealers/housing finance institutions to the extent such loan/s repaid by them are out of the foreign inward remittances received through normal banking channel or by debit to their NRE/FCNR accounts. The balance amount, if any, can be credited to their NRO account and the NRI/PIO may repatriate up to US$ one million per financial year (April-March) subject to payment of applicable taxes from their NRO account balances which would also include the sale proceeds of the immovable property.

Q.294. If the immovable property was acquired by way of gift by the NRI/PIO, can he repatriate abroad the funds from sale of such property?

Ans. The sale proceeds of immovable property acquired by way of gift should be credited to NRO account only. From the balance in the NRO account, NRI/PIO may remit up to US$ one million, per financial year, subject to the satisfaction of Authorised Dealer and payment of applicable taxes.

Q.295. If the immovable property was received as inheritance by the NRI/PIO can he repatriate the sale proceeds?

Ans. Yes, general permission is available to the NRIs/PIO to repatriate the sale proceeds of the immovable property inherited from a person resident in India subject to the following conditions:

(i) The amount should not exceed US$ one million, per financial year

(ii) This is subject to production of documentary evidence in support of acquisition/inheritance of assets and an undertaking by the remitter and certificate by a Chartered Accountant in the formats prescribed by the Central Board of Direct Taxes vide their Circular No.4/2009 dated June 29, 2009

(iii) In cases of deed of settlement made by either of his parents or a close relative (as defined in section 6 of the Companies Act, 1956) and the settlement taking effect on the death of the settler

(iv) the original deed of settlement and a tax clearance/No Objection Certificate from the Income-Tax Authority should be produced for the remittance

(v) Where the remittance as above is made in more than one installment, the remittance of all such installments shall be made through the same Authorised Dealer

(vi) In case of a foreign national, sale proceeds can be repatriated if the property is inherited from a **person resident outside India** with the prior approval of the Reserve Bank. The foreign national has to approach the Reserve Bank with documentary evidence in support of inheritance of the immovable property and the undertaking and the C.A. Certificate mentioned above.

The general permission for repatriation of sale proceeds of immovable property is not available to a citizen of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan and Iran and he has to seek specific approval of the Reserve Bank.

As FEMA, 1999 specifically permits transactions only in Indian Rupees with citizens of Nepal and Bhutan. Therefore, the question of repatriation of the sale proceeds in foreign exchange to Nepal and Bhutan would not arise.

OTHER ASPECTS

Q.296. Can NRI/PIO rent out the residential/commercial property purchased out of foreign exchange/rupee funds?

Ans. Yes, NRI/PIO can rent out the property without the approval of the Reserve Bank. The rent received can be credited to NRO/NRE account or remitted abroad. Powers have been delegated to the Authorised Dealers to allow repatriation of current income like rent, dividend, pension, interest, etc. of NRIs/PIO who do not maintain an NRO account in India based on an appropriate certification by a Chartered Accountant, certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for.

Q.297. Can a person who had bought immovable property, when he was a resident, continue to hold such property even after becoming an NRI/PIO?

Ans. Yes, a person who had bought the residential/commercial property/agricultural land/plantation property/farm house in India when he was a resident, continue to hold the immovable property without the approval of the Reserve Bank even after becoming an NRI/PIO.

Q.298. In which account can the sale proceeds of such immovable property be credited ?

Ans. The sale proceeds may be credited to NRO account of the NRI/PIO.

Q.299. Can the sale proceeds of the immovable property referred to in Q.No. 28 be remitted abroad ?

Ans. Yes, From the balance in the NRO account, NRI/PIO may remit up to US$ one million, per financial year, subject to the satisfaction of Authorised Dealer and payment of applicable taxes.

Q.300. Can foreign nationals of non-Indian origin resident in India or outside India who had earlier acquired immovable property under FERA with specific approval of the Reserve Bank continue to hold the same? Can they transfer such property?

Ans. Yes, they may continue to hold the immovable property under holding license obtained from the Reserve Bank. However, they can transfer the property only with the prior approval of the Reserve Bank.

Q.301. Is a resident in India governed by the provision of the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000?

Ans. A person resident in India who is a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan is governed by the provision of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000, as amended from time to time, i.e. she/he would require prior approval of the Reserve Bank for acquisition and transfer of immovable property in India even though she/he is resident in India. Such requests are considered by the Reserve Bank in consultation with the Government in India.

The citizens of countries other than those listed above can be PIOs who are covered under the general permission (please refer to Q.No.1). The provision relating to foreign national of non-Indian origin are covered in detail in Q Nos. 6 and 7.

Q.302. What is in nut-shell provision regarding purchase, sale, gift inter-se NRI, PIO, and Resident in India?

Ans. Tabular format for transactions of Immovable Property of NRI/PIO:

In case of Residential/Commercial Property			
	NRI	**PIO**	**Resident**
NRI may:			
Purchase from	Yes	Yes	Yes
Sell to	Yes	Yes	Yes
Receive Gift from	Yes	Yes	Yes
Give Gift to	Yes	Yes	Yes
PIO may:			
Purchase from	Yes	Yes	Yes
Sell to	Yes	Yes*	Yes
Receive Gift from	Yes	Yes	Yes
Give Gift to	Yes	Yes	Yes
In case of Agricultural property/Plantation/Farmhouse			
NRI	**PIO**	**Resident**	
NRI/PIO may:			
Purchase from	No	No	No
Sell to	No	No	Yes
Receive Gift from	No	No	No
Give Gift to	No	No	Yes

* Prior approval of RBI is mandatory.

CHAPTER 3.7

INVESTMENT BY WAY OF CONTRIBUTION TO THE CAPITAL OF A FIRM OR A PROPRIETARY CONCERN IN INDIA UNDER FEMA 24

Q.303. What is the meaning of a 'Non-Resident Indian' for purposes of Investment in firm or a proprietary concern Regulations (FEMA 24)?

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

Q.304. What is the meaning of a 'Person of Indian Origin' for purposes of Investment in firm or a proprietary concern Regulations (FEMA 24)?

Ans. "Person of Indian Origin" means a citizen of any country **other than Bangladesh or Pakistan or Sri Lanka**, if

(*a*) he at any time held Indian passport; or

(*b*) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

(*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*);

FDI IN PARTNERSHIP FIRM/PROPRIETARY CONCERN:

Q.305. Under what conditions an NRI/PIO can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis?

Ans. A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided;

(a) Amount is invested by inward remittance or out of NRE/FCNR(B)/NRO account maintained with Authorized Dealers/Authorized banks.

(b) The firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector.

(c) Amount invested shall not be eligible for repatriation outside India.

Q.306. What is the procedure for above Investments with repatriation option?

Ans. Investments with repatriation option: NRIs/PIO may seek prior permission of Reserve Bank for investment in sole proprietorship concerns/partnership firms with repatriation option. The application will be decided in consultation with the Government of India.

Q.307. Are there any exceptions to the investment in a firm or proprietorship concern in India by NRIs/ PIO?

Ans. An NRI or PIO is not allowed to invest in a firm or proprietorship concern engaged in any agricultural/plantation activity or real estate business or Print Media.

CHAPTER 3.8

REMITTANCE FACILITIES OF ASSETS AND CURRENT INCOME

Q.308. Are there any restrictions on making Investments in India by an NRI?

Ans. No person resident outside India shall make investment in India, in any form, in any **company or partnership firm or proprietary concern** or any entity, whether incorporated or not, which is engaged or proposes to engage—

(*i*) in the business of **chit fund**, or

(*ii*) as **Nidhi Company**, or

(*iii*) in **agricultural or plantation activities**, or

(*iv*) in **real estate business, or construction of farm houses**, or

(*v*) in trading in **Transferable Development Rights** (TDRs). Transferable Development Rights means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole.

'Real estate business' shall not include development of townships, construction of residential/ commercial premises, roads or bridges.

METHOD OF PAYMENT FOR INVESTMENT

Q.309. How can the payment for investment be made?

Ans. The payment for investment shall be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulations made by the Reserve Bank under the Act.

CLASSES OF CAPITAL ACCOUNT TRANSACTIONS OF PERSONS RESIDENT OUTSIDE INDIA

Q.310. What are the different classes of capital account transactions of persons resident outside India?

Ans.

(*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; and

  (*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.

(*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.

FOREIGN EXCHANGE MANAGEMENT (REMITTANCE OF ASSETS) REGULATIONS, 2000 (FEMA 13)

Q.311. What is the meaning of a 'Non-Resident Indian' for purposes of Remittance of Assets Regulations (FEMA 13)?

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

Q.312. What is the meaning of a 'Person of Indian Origin' for purposes of Remittance of Assets Regulations (FEMA 13)?

Ans. "Person of Indian Origin (PIO)" means a citizen of **any country other than Bangladesh or Pakistan**, if

(*a*) he at any time held Indian passport;

or

(*b*) he or either of his parents or any of his grand-parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955);

or

(*c*) the person is a spouse of an Indian citizen or a person referred to in sub-clause (*a*) or (*b*).

Q.313. What is the meaning of Remittance of assets?

Ans. "Remittance of assets" means remittance outside India of funds representing a deposit with a bank or a firm or a company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of Insurance Policy, sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provision of the Act or rules or regulations made thereunder.

Q.314. Is Remittance of assets permitted?

Ans. No person whether resident in India or not, shall make remittance of any asset held in India by him or by any other person.

Q.315. Is a Foreign citizen/PIO eligible to get the remittance facility of US$ 1,000,000 per financial year? What documents need to be furnished to facilitate such remittance? Whether a Certificate from CA also mandatory?

Ans. A citizen of foreign state, not being a citizen of Nepal or Bhutan or **a Person of Indian Origin (PIO)**, who:

(*i*) has **retired from an employment in India**; or

(*ii*) has **inherited the assets** from a person referred to in sub-section (5) of section 6 of the Act i.e. **A person resident outside India** who acquired **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**; or

(*iii*) is a **widow resident outside India and has inherited assets of her deceased husband** who was an Indian citizen resident in India, may remit an amount, not exceeding US $ **1,000,000 per financial year**, on production of,

(*a*) documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter; and

(*b*) an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes, Ministry of Finance, Government of India in their Circular No. 10/2002, dated October 9, 2002.

(*iv*) **had come to India for studies/training and has completed his studies/training**, may remit the balance available in his account, provided such balance represents funds derived out of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/scholarship received from the Government or any Organisation in India.

Q.316. Under what cases remittance abroad can be made with Reserve Bank's prior permission?

Ans. A person, who desires to make a remittance of assets in the following cases, may apply to the Reserve Bank, namely:

(*i*) Remittance exceeding US$ 1,000,000 per financial year (*a*) on account of legacy, bequest or inheritance to a citizen of foreign State, permanently resident outside India; and (*b*) by a Non-Resident Indian (NRI)/Person of Indian Origin (PIO), out of the balances held in NRO accounts/sale proceeds of assets/the assets in India acquired by way of inheritance/legacy;

(*ii*) Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made.

Q.317. Whether funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign State considered while computing amount of US$ 1,000,000?

Ans. For the purpose of arriving at annual ceiling of remittance of US $ **1,000,000**, the funds **representing sale proceeds of shares and immovable property** owned or held by the citizen of foreign State on repatriation basis in accordance with the FEMA 21 and FEMA 20, **shall not be included**.

Q.318. Is it necessary to make the remittance of all installments through the same AD?

Ans. Where the remittance is made in more than one instalment, the remittance of all instalments shall be made through **the same authorised dealer**.

Q.319. How can an NRI/PIO avail the remittance facility of US$ 1,000,000?

Ans. A Non-Resident Indian (**NRI**)/Person of Indian Origin (**PIO**) may remit an amount, not exceeding **US$ 1,000,000** per financial year,

(*i*) Out of the **balances held in NRO accounts/sale proceeds of assets/the assets in India acquired by him by way of inheritance/legacy on production** of:

(*a*) documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter, and

(*b*) an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes, Ministry of Finance, Government of India in their Circular No. 10/2002, dated October 9, 2002.

(*ii*) Under a deed of settlement made by either of his parents or a close relative (as defined in section 6 of the Companies Act, 1956) and the settlement taking effect on the death of the settler, on production of:

(*a*) the original deed of settlement; and

(*b*) an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes, Ministry of Finance, Government of India in their Circular No. 10/2002, dated October 9, 2002 :]

Provided that where the remittance under clauses (*i*) and (*ii*) is made in more than one instalment, the remittance of all instalments shall be made through the **same authorised dealer**.

Q.320. Is there any lock-in-period for remitting sale proceeds of immovable property purchased by NRI/PIO out of Rupee funds?

Ans. NRI/PIO may remit sale proceeds of immovable property purchased by him out of Rupee funds (or as a person resident in India) as above without any lock-in-period.

Q.321. What are the provision regarding remittance of sale proceeds of assets acquired by way of inheritance or legacy or settlement?

Ans. In respect of remittance of sale proceeds of assets acquired **by way of inheritance or legacy or settlement** for which there is no lock-in period, NRI/PIO may submit to the Authorised Dealer documentary evidence in support of inheritance or legacy of assets, an undertaking by the remitter and certificate by a Chartered Accountant in the prescribed formats. Settlement is also a mode of inheritance from the parent, the only difference being that the property under the settlement passes to the beneficiary on the death of the owner/parent without any legal procedures/hassles and helps in avoiding delay and inconvenience in applying for probate, etc. In case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/parent, it would be tantamount to regular transfer by way of gift. Therefore, if the property is received by NRI/PIO by way of settlement without the settler retaining life interest, it may be reckoned as transfer by way of gift and the remittance of sale proceeds of such property would be **guided by the extant instructions on remittance of balance in the NRO account.**

REPATRIATION OF SALE PROCEEDS OF RESIDENTIAL PROPERTY PURCHASED BY NRIS/PIO OUT OF FOREIGN EXCHANGE

Q.322. What are the restrictions to repatriation of sale proceeds of residential property purchased by NRIs/PIO out of foreign exchange?

Ans. Repatriation of sale proceeds of residential property purchased by NRI/PIO is permitted to the extent of the amount paid for acquisition of immovable property in foreign exchange received through banking channels. The facility is restricted to not more than two such properties. The balance amount can be credited to the NRO account and can be remitted under USD one million facility.

Q.323. What are the different kinds of repatriation permitted by AD? What are the conditions?

Ans. Authorised Dealer banks may permit repatriation of amounts representing the refund of application/earnest money/purchase consideration made by the house building agencies/seller on account of non-allotment of flat/plot/cancellation of bookings/deals for purchase of residential/ commercial property, together with interest, if any (net of income tax payable thereon), provided the original payment was made out of NRE/FCNR (B) account of the account holder, or remittance from outside India through normal banking channels and the Authorized Dealer bank is satisfied about the genuineness of the transaction. Such funds may also be credited to the NRE/FCNR (B) account of the NRI/PIO, if they so desire.

Q.324. Is repatriation of sale proceeds of residential accommodation purchased by NRIs/PIO out of funds raised by them by way of loans from the authorized dealer banks/housing finance institutions allowed?

Ans. Authorised Dealer banks may allow repatriation of sale proceeds of residential accommodation purchased by NRIs/PIO out of funds raised by them by way of loans from the authorized dealer banks/ housing finance institutions to the extent of such loan/s repaid by them out of foreign inward remittances received through normal banking channel or by debit to their NRE/FCNR(B) accounts.

REMITTANCE OF CURRENT INCOME

Q.325. What are the provision for remittance of current income outside India?

Ans. Remittance outside India of **current income like rent, dividend, pension, interest, etc.** in India of the account holder is a permissible debit to the NRO account. Authorised Dealer banks may also allow repatriation of current income like rent, dividend, pension, interest, etc. of NRIs who **do not maintain an NRO account** in India based on an appropriate certification by a Chartered Accountant, certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for. While the principal of NRO deposits is non-repatriable, current income and interest earning is repatriable.

Q.326. Can NRIs/PIOs credit the current income to their Non-Resident (External) Rupee account?

Ans. NRIs/PIO have the **option to credit the current income to their Non-Resident (External) Rupee account**, provided the Authorized Dealer bank is satisfied that the credit represents current income of the non-resident account holder and income tax thereon has been deducted/provided for.

INTERNATIONAL CREDIT CARDS

Q.327. Are Authorised Dealer banks permitted to issue International Credit Cards to NRIs/PIO?

Ans. Authorised Dealer banks have been permitted to issue International Credit Cards to NRIs/PIO, without prior approval of the Reserve Bank. Such transactions may be settled by inward remittance or out of balances held in the cardholder's FCNR(B)/NRE/NRO accounts.

CHAPTER 3.9

SHARE & SECURITIES BY NRIS UNDER FEMA 20 OTHER THAN FDI

Q.328. What is the meaning of an NRI under these Regulations?

Ans. NRI shall have the same meaning assigned to him under the Foreign Exchange Management (Deposit) Regulations, 2000.

PERMISSION FOR PURCHASE OF SHARES BY CERTAIN PERSONS RESIDENT OUTSIDE INDIA

Q.329. Can a person resident outside India including foreign citizen purchase shares or convertible debentures/preference shares of an Indian company under FDI Scheme?

Ans. A person resident outside India including foreign citizen (other than a citizen of Bangladesh or Pakistan or an entity incorporated outside India (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures/preference shares of an Indian company under Foreign Direct Investment (FDI) Scheme, subject to the terms and conditions specified in Schedule 3 of FEMA 20.

Q.330. Whether approval of FIPB required in cases where a citizen of Bangladesh or an entity incorporated in Bangladesh purchase shares and convertible debentures of an Indian company?

Ans. A person who is a citizen of Bangladesh or an entity incorporated in Bangladesh may, with the prior approval of the Foreign Investment Promotion Board of the Government of India, purchase shares and convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 3 of FEMA 20.

Q.331. Can an NRI purchase shares or convertible debentures of an Indian Company on a Stock Exchange under Portfolio Investment Scheme?

Ans. A Non-resident Indian (NRI) may purchase shares or convertible debentures of an Indian Company on a Stock Exchange under Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 3 of FEMA 20.

Q.332. Can an NRI purchase shares or convertible debentures of an Indian Company on non-repatriation basis?

Ans. A Non-resident Indian may purchase shares or convertible debentures of an Indian Company **on non-repatriation basis** other than under Portfolio Investment Scheme subject to the terms and conditions specified in Schedule 4 of FEMA 20.

Q.333. Can an NRI purchase securities other than shares or convertible debentures of an Indian company?

Ans. A non-resident Indian may purchase securities, other than shares or convertible debentures of an Indian company, subject to the terms and conditions specified in Schedule 5 of FEMA 20.

Q.334. How can an NRI invest in exchange traded derivative contracts approved by SEBI?

Ans. A Non-Resident Indian (NRI) may invest in exchange traded derivative contracts approved by SEBI from time to time out of INR funds held in India **on non-repatriable basis** subject to the limits prescribed by SEBI. Such investments will not be eligible for repatriation benefits.

PURCHASE/SALE OF SHARES AND/OR CONVERTIBLE DEBENTURES BY AN NRI ON A STOCK EXCHANGE IN INDIA ON REPATRIATION AND/OR NON-REPATRIATION BASIS UNDER PORTFOLIO INVESTMENT SCHEME

Q.335. Under what conditions an NRI can purchase/sell shares/convertible debentures of an Indian company on a recognised stock exchange under the Portfolio Investment Scheme?

Ans. A Non-resident Indian (NRI) may purchase/sell shares and/or convertible debentures of an Indian company, through a registered broker on a recognised stock exchange, subject to the following conditions :—

(*i*) NRIs may purchase and sell shares/convertible debentures under the Portfolio Investment Scheme through a branch designated by an Authorised Dealer for the purpose and duly approved by the Reserve Bank of India;

(*ii*) the paid-up value of shares of an Indian company, purchased by each NRI both on repatriation and on non-repatriation basis, does not exceed 5 per cent of the paid-up value of shares issued by the company concerned;

(*iii*) the paid-up value of each series of convertible debentures purchased by each NRI both on repatriation and non-repatriation basis does not exceed 5 per cent of the paid-up value of each series of convertible debentures issued by the company concerned;

(*iv*) the aggregate paid-up value of shares of any company purchased by all NRIs does not exceed 10 per cent of the paid-up capital of the company and in the case of purchase of convertible debentures the aggregate paid-up value of each series of debentures purchased by all NRIdoes not exceed 10 per cent of the paid-up value of each series of convertible debentures:

Provided that the aggregate ceiling of 10 per cent referred to in this clause may be raised to 24 per cent if a special resolution to that effect is passed by the General Body of the Indian company concerned and subject to prior approval from the Reserve Bank.;

(*v*) the NRI investor takes delivery of the shares purchased and gives delivery of shares sold. Short Selling is not permitted.;

(*vi*) payment for purchase of shares and/or debentures is made by inward remittance in foreign exchange through normal banking channels or out of funds held in NRE/FCNR account maintained in India if the shares are purchased on repatriation basis and by inward remittance or out of funds held in NRE/FCNR/NRO account of the NRI concerned maintained in India where the shares/debentures are purchased on non-repatriation basis.

REMITTANCE/CREDIT OF SALE/MATURITY PROCEEDS OF SHARES AND/OR DEBENTURES

Q.336. What is the position of the net sale/maturity proceeds of shares/debentures of an Indian company purchased by NRI under this scheme?

Ans. The net sale/maturity proceeds (after payment of taxes) of shares and/or debentures of an Indian company purchased by NRI under this scheme, may be allowed by the designated branch of an authorised dealer,

(*a*) to be credited to NRO account of the NRI investor where the payment for purchase of shares and/or debentures sold was made out of funds held in NRO account or where the shares and/or debentures were purchased on non-repatriation basis, or

(*b*) at the NRI investor"s option, to be remitted abroad or credited to his/its NRE/FCNR/NRO account of the NRI, where shares and/or debentures were purchased on repatriation basis.

PURCHASE AND SALE OF SHARES/CONVERTIBLE DEBENTURES BY A NON-RESIDENT INDIAN (NRI), ON NON-REPATRIATION BASIS

Prohibition on purchase of shares/convertible debentures of certain companies

Q.337. Is there any prohibition on purchase of shares/convertible debentures of certain companies?

Ans. No purchase of shares or convertible debentures of an Indian company shall be made under the scheme if the company concerned is a chit fund or a nidhi company or is engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

Explanation - For the purpose of this paragraph, real estate business shall not include development of township, construction of residential/commercial premises, roads, bridges, etc.

PERMISSION TO PURCHASE AND/OR SELL SHARES/CONVERTIBLE DEBENTURES OF AN INDIAN COMPANY

Q.338. Are there any restrictions on purchase/sell of shares/convertible debentures of an Indian company by an NRI?

Ans. A Non-resident Indian may without any limit, purchase on non-repatriation basis, shares or convertible debentures of an Indian company issued whether by public issue or private placement or right issue.

METHOD OF PAYMENT FOR PURCHASE OF SHARES/CONVERTIBLE DEBENTURES

Q.339. What is the method of payment for purchase of shares/convertible debentures? Is there any difference in case payment is made by NRI resident in Nepal and Bhutan?

Ans. The amount of consideration for purchase of shares or convertible debentures of an Indian company on non-repatriation basis, shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO account maintained with an authorised dealer or as the case may be with an authorised bank in India.

Provided that in the case of an NRI resident in Nepal and Bhutan, the amount of consideration for purchase of shares or convertible debentures of an Indian company on non-repatriation basis, shall be paid only by way of inward remittance in foreign exchange through normal banking channels.

SALE/MATURITY PROCEEDS OF SHARES OR CONVERTIBLE DEBENTURES

Q.340. How are sale/maturity proceeds of shares or convertible debentures dealt with?

Ans. The sale/maturity proceeds (net of applicable taxes) of shares or convertible debentures purchased under this Scheme shall be credited only to NRO account where the purchase consideration was paid out of funds held in NRO account, or at the option of the seller credited to NRO account where the purchase consideration was paid out of inward remittance or funds held in NRE/FCNR account.

Q.341. Whether amount invested in shares or convertible debentures under this Scheme and the capital appreciation thereon allowed to be repatriated abroad?

Ans. The amount invested in shares or convertible debentures under this Scheme and the capital appreciation thereon shall not be allowed to be repatriated abroad.

Q.342. Whether any kind of reporting required for issue/allotment and transfer of shares?

Ans. There is no requirement of reporting in the Advance Reporting Form, FC-FPR and FC-TRS for issue/allotment and transfer of shares.

CONVERSION OF NON-REPATRIATION BASIS INTO REPATRIABLE SHARES

Q.343. Can the investment made by NRI on non-repatriation basis be converted into repatriable shares?

Ans. Yes. Conversion of non-repatriable shares by Non-resident Indians (NRI) into repatriable shares is permissible under automatic route in terms of Press Note 4 of 2005 dated August 31, 2005 issued by DIPP in case the original investment by the NRI was made in foreign exchange under the FDI Scheme and the sector/activity in which the investment is proposed to be converted into repatriable equity is on the automatic route for FDI.

PURCHASE AND SALE OF SECURITIES OTHER THAN SHARES OR CONVERTIBLE DEBENTURES OF AN INDIAN COMPANY BY A PERSON RESIDENT OUTSIDE INDIA

Permission to Non-resident Indian for purchase of securities

Q.344. What kinds of securities other than shares or convertible debentures of an indian company an NRI can purchase on repatriation basis?

Ans. A Non-resident Indian may, without limit, purchase on repatriation basis,

(*i*) Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds;

(*ii*) bonds issued by a Public Sector Undertaking (PSU) in India;

(*iii*) shares in Public Sector Enterprises being disinvested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

A Non-resident Indian may purchase on repatriation basis perpetual debt instruments eligible for inclusion as Tier I capital and Debt capital instruments as upper Tier II capital issued by banks in India to augment their capital, as stipulated by Reserve Bank from time to time. The investments by all NRIs in Perpetual Debt Instruments (Tier I) should not exceed an aggregate ceiling of 24 per cent of each issue and investments by a single NRI should not exceed 5 per cent of each issue. Investment by NRIs in Debt Capital Instruments (Tier II) shall be in accordance with the extant policy for investment by NRIs in other debt instruments.]

A Non-resident Indian may, without limit, purchase on non-repatriation basis, dated Government securities (other than bearer securities), treasury bills, units of domestic mutual funds, units of Money Market Mutual Funds in India, or National Plan/Savings Certificates.

METHOD OF PAYMENT OF PURCHASE CONSIDERATION

Q.345. What is the method of payment of purchase consideration where securities are purchased on repatriation basis ?

Ans. A non-resident Indian who purchases securities on repatriation basis, under sub-paragraph (1) of paragraph 2, of the Schedule, shall make payment either by inward remittance through normal banking channels or out of funds held in his/its NRE/FCNR account.

Q.346. What is the method of payment of purchase consideration where securities are purchased on non-repatriation basis ?

Ans. A non-resident Indian who purchases securities on non-repatriation basis, under sub-paragraph (2) of paragraph 2 of the Schedule, shall make payment either by inward remittance through normal banking channels or out of funds held in his/its NRE/FCNR/NRO account.

PERMISSION FOR SALE OF SECURITIES

Q.347. What actions can be taken by an NRI who has purchased securities in accordance with this Schedule?

Ans. A person resident outside India who has purchased securities in accordance with this Schedule may (*a*) sell such securities through a registered stock broker on a recognised stock exchange or (*b*) tender units of mutual funds to the issuer for repurchase or for payment of maturity proceeds or (*c*) tender Government securities/treasury bills to the Reserve Bank for payment of maturity proceeds.

REMITTANCE/CREDIT OF SALE/MATURITY PROCEEDS

Q.348. What is the position of the net sale/maturity proceeds of securities of an Indian company purchased by NRI under this scheme?

Ans. In the case of a Non-resident Indian who has sold securities in accordance with paragraph 4, the net sale/maturity proceeds (after payment of taxes) of such securities, may be:

(*a*) credited, at the NRI investor's option, to his/its NRO where the payment for the purchase of the securities sold was made out of funds held in NRO account, or

(*b*) remitted abroad or at the NRI investor's option, credited to his/its NRE/FCNR/NRO account, where the securities were purchased on repatriation basis in accordance with sub-paragraph (1) of paragraph 2 and the payment for purchase of the securities sold was made by inward remittance through normal banking channels or out of funds held in NRE/FCNR account.

CHAPTER 3.10

OTHER INVESTMENT & OTHER FACILITIES FOR NRIs

Q.349. List out the types of Investments that NRIs can purchase on repatriation basis?

Ans. NRI may, without limit, purchase on repatriation basis:

- Government dated securities/Treasury bills
- Units of domestic mutual funds;
- Bonds issued by a public sector undertaking (PSU) in India.
- Non-convertible debentures of a company incorporated in India.
- Perpetual debt instruments and debt capital instruments issued by banks in India.
- Shares in Public Sector Enterprises being dis-invested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.
- Shares and convertible debentures of Indian companies under the FDI scheme (including automatic route & FIPB), subject to the terms and conditions specified in Schedule 1 to the FEMA Notification No. 20/2000- RB dated May 3, 2000, as amended from time to time.
- Shares and convertible debentures of Indian companies through stock exchange under Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 3 to the FEMA Notification No. 20/2000- RB dated May 3, 2000, as amended from time to time.
- Foreign Investments in Infrastructure Debt Funds by eligible non-resident investors in (i) Rupee and Foreign currency denominated bonds issued by the Infrastructure Debt Funds (IDFs) set up as an Indian company and registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank of India and in (ii) Rupee denominated units issued by IDFs set up as SEBI registered domestic Mutual Funds (MFs) (Circular 49 dated 22.11.2011).

INVESTMENT IN THE UNITS OF DOMESTIC MUTUAL FUNDS

Q.350. Can NRIs invest in rupee denominated units of equity schemes of domestic MFs, and units of domestic MF debt schemes which invest in infrastructure debt of infrastructure companies, on repatriation basis?

Ans. Non-resident investors/'Qualified Foreign Investors' (QFIs) (other than SEBI registered FIIs and SEBI registered FVCIs) are permitted to purchase on repatriation basis rupee denominated units of equity schemes of domestic MFs issued by SEBI registered domestic MFs, under the two routes, namely:

1. Direct Route - SEBI registered Depository Participant (DP) route
2. Indirect Route - Unit Confirmation Receipt (UCR) route

Investments by the QFIs would be subject to a ceiling of US$ 10 billion under both the routes plus up to an additional amount of US$ 3 billion in units of domestic MF debt schemes which invest in infrastructure ("Infrastructure" as defined under the extant ECB guidelines) debt of minimum residual maturity of 5 years, within the existing ceiling of US$ 25 billion for FII investment in corporate bonds issued by infrastructure companies.

The investment under both the routes by the QFIs will be in the units which are directly issued by the domestic MFs and no secondary market purchases would be allowed.

Units and UCRs issued under this scheme to QFIs, would be non-tradable and non-transferable.

Q.351. List out the types of Investments that NRIs can purchase on non- repatriation basis?

Ans. NRI may, without limit, purchase on non-repatriation basis:

- Government dated securities/Treasury bills
- Units of domestic mutual funds
- Units of Money Market Mutual Funds
- National Plan/Savings Certificates
- Non-convertible debentures of a company incorporated in India
- Shares and convertible debentures of Indian companies through stock exchange under Portfolio Investment Scheme, subject to the terms and conditions specified in Schedules 3 and 4 to the FEMA Notification No. 20/2000- RB dated May 3, 2000, as amended from time to time.
- Exchange traded derivative contracts approved by the SEBI, from time to time, out of INR funds held in India on non-repatriable basis, subject to the limits prescribed by the SEBI.

Q.352. Can NRIs invest in small savings or PPF?

Ans. NRIs are not permitted to invest in small savings or Public Provident Fund (PPF).

Q.353. Can a resident individual make a rupee gift to a NRI/PIO who is a close relative in India?

Ans. Yes. A resident individual is permitted to make a rupee gift to a NRI/PIO who is a close relative of the resident individual (as defined in Section 6 of the Companies Act, 1956) by way of crossed cheque/electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) account of the NRI/PIO and credit of such gift amount may be treated as an eligible credit to NRO account. The gift amount would be within the overall limit of US$ 200,000 per financial year as permitted under the Liberalised Remittance Scheme (LRS) for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount being remitted is under the LRS and all the remittances under the LRS during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

CHAPTER 3.11

FACILITIES TO RETURNING NRIS/PIO - CHANGE OF RESIDENT STATUS FROM NON-RESIDENT TO RESIDENT

Q.354. What are the facilities available to returning NRIs/PIO?

Ans. Returning NRIs/PIO may continue to 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 when resident outside India.

RESIDENT FOREIGN CURRENCY ACCOUNT

Q.355. How can RFC Accounts facilitate returning NRIs/PIOs?

Ans. Returning NRIs/PIOs may open, hold and maintain with an authorised dealer in India a Resident Foreign Currency (RFC) Account to transfer balances held in NRE/FCNR(B) accounts.

Proceeds of assets held outside India at the time of return, can be credited to RFC account.

The funds in RFC accounts are free from all restrictions regarding utilisation of foreign currency balances including any restriction on investment in any form outside India.

RFC accounts can be maintained in the form of current or savings or term deposit accounts, where the account holder is an individual and in the form of current or term deposits in all other cases.

NRE account, FCNR(B) account and NRO account

Q.356. What is the impact of change of resident status of the NRE account, FCNR(B) account and NRO account holder?

Ans. NRE accounts:

NRE accounts should be redesignated as resident accounts or the funds held in these accounts may be **transferred to the RFC accounts** (if the account holder is eligible for maintaining RFC account) at the option of the account holder **immediately upon the return of the account holder to India** for taking up employment or for carrying on business or vocation or for any other purpose indicating intention to stay in India for an uncertain period. **Where the account holder is only on a short visit to India, the account may continue to be treated as NRE account even during his stay in India.**

FCNR(B) deposits:

When an account holder becomes a person resident in India, deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by him. However, except the provision relating to rate of interest and reserve requirements as applicable to FCNR(B) deposits, for all other purposes such deposits shall be treated as resident deposits from the date of return of the account holder to India. Authorised dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder and interest on the new deposit (rupee account or RFC account) shall be payable at the relevant rates applicable for such deposits.

NRO accounts;

NRO accounts may be re-designated as resident rupee accounts on the return to the account holder to India for taking up employment, or for carrying on business or vocation or for any other purpose indicating his intention to stay in India for an uncertain period. Where the account holder is only on a temporary visit to India, the account should continue to be treated as non-resident during such visit.

CHAPTER 4

FACILITIES FOR FOREIGN NATIONALS

ENGAGEMENT/EMPLOYMENT OF FOREIGN NATIONALS

Q.357. Can a foreign citizen be hired/appointed as technician/Director/Managing Director/Whole-time Director; and payment of salary, remuneration and fee thereof?

Ans. Remuneration, salary, fees etc. being current account transactions, there are no restrictions from FEMA angle on remittances abroad.

Foreign technicians: Hiring of foreign nationals (technical or non-technical) is permissible without any restrictions. There is no ceiling on salary, which can be paid as per contract. Their salary can be remitted abroad, after applicable withholding tax. Their expenses of to and fro travel and local hospitality can be paid in Indian Rupees by Indian host.

Managing/Whole-Time Director: A foreign national can be appointed as Managing Director/Whole-Time Director. He will require permission from Ministry of Corporate Affairs, Government of India, irrespective of salary.

Appointment as Director: A foreign national/NRI can be appointed as a director in Indian Company without any permission. He can be paid sitting fees in Rupees. His expenses of to and fro travel and local hospitality can be paid in Indian Rupees by Indian company.

REMITTANCE OF SALARY

Q.358. How can a foreign citizen resident in India remit his salary payable to him for the services rendered in India?

Ans. A citizen of a foreign state resident in India, being an employee of a foreign company and on deputation to the office/branch/subsidiary/joint venture in India of such foreign company or being an employee of a company incorporated in India, may open, hold and maintain a foreign currency account with a bank outside India and receive/remit the whole salary payable to him for the services rendered, by credit to such account, provided that income tax chargeable under the Income Tax Act, 1961 is paid on the entire salary as accrued in India.

Q.359. How can an Indian citizen employed by a foreign company outside India remit salary payable to him for the services rendered to the office/branch/subsidiary/joint venture in India of such foreign company?

Ans. A citizen of India, employed by a foreign company outside India and on deputation to the office/branch/subsidiary/joint venture in India of such foreign company, may open, hold and maintain a foreign currency account with a bank outside India and receive the whole salary payable to him for the services rendered to the office/branch/subsidiary/joint venture in India of such foreign company, by credit to such account, provided that income tax chargeable under the Income Tax Act, 1961 is paid on the entire salary as accrued in India.

INVESTMENT IN INDIA UNDER FOREIGN DIRECT INVESTMENT SCHEME

Q.360. Can a foreign citizen Resident outside India purchase shares or convertible debentures/ preference shares of an Indian company under Foreign Direct Investment (FDI) Scheme?

Ans. A person resident outside India **including foreign citizen** Resident outside India (other than a citizen of Bangladesh or Pakistan or an entity incorporated outside India (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures/preference shares of an Indian company under Foreign Direct Investment (FDI) Scheme, subject to the terms and conditions specified in Schedule 3 of FEMA 20.

Q.361. Can a citizen of Bangladesh or Pakistan, or an entity incorporated in Bangladesh or Pakistan purchase shares or convertible debentures/preference shares of an Indian company under Foreign Direct Investment (FDI) Scheme?

Ans. No. However, a person who is a citizen of Bangladesh or an entity incorporated in Bangladesh may, with the prior approval of the Foreign Investment Promotion Board of the Government of India, purchase shares and convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 3 of FEMA 20.

Q.362. Are citizens of Nepal and Bhutan also permitted to invest in the capital of Indian companies, and that too on repatriation basis?

Ans. Citizens of Nepal and Bhutan are permitted to invest in the capital of Indian companies on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in free foreign exchange through normal banking channels.

REMITTANCE FACILITIES OF US $ 1,000,000 PER FINANCIAL YEAR

Q.363. Whether a citizen of foreign state, not being a citizen of Nepal or Bhutan is **eligible for remittance facilities of US $ 1,000,000 per financial year? If yes, then what are those facilities?**

Ans. A citizen of foreign state, not being a citizen of Nepal or Bhutan or a Person of Indian Origin (PIO), who:

(*i*) has **retired from an employment in India**; or

(*ii*) has **inherited the assets** from a person referred to in sub-section (5) of section 6 of the Act i.e. **A person resident outside India** who acquired **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**; or

(*iii*) is a **widow resident outside India and has inherited assets of her deceased husband** who was an Indian citizen resident in India, may remit an amount, not exceeding US $ **1,000,000 per financial year**, on production of,

(*a*) documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter; and

(*b*) an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes, Ministry of Finance, Government of India in their Circular No. 10/2002, dated October 9, 2002.

(*iv*) **had come to India for studies/training and has completed his studies/training**, may remit the balance available in his account, provided such balance represents funds derived out of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/ scholarship received from the Government or any Organisation in India.

Q.364. Under what cases remittance abroad can be made with Reserve Bank's prior permission?

Ans. A person, who desires to make a remittance of assets in the following cases, may apply to the Reserve Bank, namely:

(*i*) Remittance exceeding US$ 1,000,000 per financial year (*a*) on account of legacy, bequest or inheritance to a citizen of foreign State, permanently resident outside India; and (*b*) by a Non-Resident Indian (NRI)/Person of Indian Origin (PIO), out of the balances held in NRO accounts/ sale proceeds of assets/the assets in India acquired by way of inheritance/legacy;

(*ii*) Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made.

Q.365. Whether funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign State considered while computing amount of US $ 1,000,000?

Ans. For the purpose of arriving at annual ceiling of remittance of US $ **1,000,000**, the funds **representing sale proceeds of shares and immovable property** owned or held by the citizen of foreign State on repatriation basis in accordance with the FEMA 21 and FEMA 20 **shall not be included**.

Q.366. Is it necessary to make the remittance of all installments through the same AD?

Ans. Where the remittance is made in more than one instalment, the remittance of all installments shall be made through **the same authorised dealer**.

Q.367. Are these remittance facilities also available to citizens of Nepal and Bhutan?

Ans. These remittance facilities are not available to citizens of Nepal and Bhutan.

Q.368. Are there any exceptions to the remittance facility in respect of sale proceeds of immovable property?

Ans. The remittance facility in respect of sale **proceeds of immovable property** is **not available** to citizens of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan, Iran, Nepal and Bhutan.

Q.369. Are there any exceptions to the remittance facility in respect of sale proceeds of other financial assets?

Ans. The facility of remittance of **sale proceeds of other financial assets is not available** to citizens of Pakistan, Bangladesh, Nepal and Bhutan.

IMMOVABLE PROPERTY IN INDIA - PROVISION FOR FOREIGN NATIONAL OF NON-INDIAN ORIGIN RESIDENT OUTSIDE INDIA/FOREIGN EMBASSIES/DIPLOMATS/ CONSULATES GENERAL

Q.370. Can a foreign national of non-Indian origin be a second holder to immovable property purchased by NRI/PIO?

Ans. No.

Q.371. Can a foreign national of non-Indian origin resident outside India purchase immovable property in India?

Ans. No. A foreign national of non-Indian origin, resident outside India cannot purchase any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India. However, he/she can acquire or transfer immovable property in India, on lease, not exceeding five years. In such cases, there is no requirement of taking any permission of/or reporting to the Reserve Bank.

Q.372. Can a foreign national who is a person resident in India purchase immovable property in India?

Ans. Yes, a foreign national who is a 'person resident in India' within the meaning of Section 2(v) of FEMA, 1999 can purchase immovable property in India, but the person concerned would have to obtain the approvals and fulfill the requirements, if any, prescribed by other authorities, such as, the State Government concerned, etc. The onus to prove his/her residential status is on the individual as per the extant FEMA provision, if required by any authority. **However, a foreign national resident in India who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan would require prior approval of the Reserve Bank.**

Q.373. Is purpose of stay as well as the type of Indian visa granted important considerations to establish residential status in India?

Ans. Yes, a foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business/vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as he would be a 'person resident in India' as per section 2(v) of FEMA, 1999. To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but **also his purpose of stay as well as the type of Indian visa granted to** him **to clearly indicate the intention to stay in India for an uncertain period.** In **this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa.** It has also been observed that foreign nationals coming to India and staying beyond 182 days on a tourist or other visa meant for a certain period are illegally acquiring immovable property in India in violation of the extant rules and regulations under FEMA.

Q.374. Can Foreign nationals of non-Indian origin who have acquired immovable property in India transfer such property?

Ans. Foreign nationals of non-Indian origin who have acquired immovable property in India by way of inheritance with the specific approval of the Reserve Bank or have purchased the immovable property with the specific approval of the Reserve Bank cannot transfer such property without the prior permission of the Reserve Bank.

Foreign national of non-Indian origin including a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan can sell property in India with prior approval of the Reserve Bank to i) a person resident in India ii) an NRI iii) a PIO.

Q.375. In which cases Foreign national of non-Indian origin resident outside India would require prior approval of Reserve bank?

Ans.

(i) Foreign national of non-Indian origin resident outside India would need *prior approval* of the Reserve Bank **to sell** agricultural land/plantation property/farm house in India.

(ii) A foreign national of non-Indian origin would require the prior approval of the Reserve Bank **to gift an agricultural land/a plantation property/a farm house in India**.

(iii) A foreign national of non-Indian origin requires the prior approval of the Reserve Bank for **gifting the residential/commercial property**.

(iv) A foreign national of non-Indian origin can **mortgage a residential/commercial property** only with prior approval of the Reserve Bank.

(v) In case of a foreign national, sale proceeds can be repatriated if the **property is inherited from a person resident outside India** with the prior approval of the Reserve Bank.

Q.376. Can Foreign Embassies/Diplomats/Consulates General purchase/sell immovable property in India?

Ans. In terms of Regulation 5A of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations 2000, Foreign Embassies/Diplomats/Consulates General, may purchase/sell immovable property (other than agricultural land/plantation property/farm house) in India provided –

(i) Clearance from the Government of India, Ministry of External Affairs has been obtained for such purchase/sale; and

(ii) The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through the normal banking channels.

ACCOUNT OPENED BY FOREIGN NATIONALS AND FOREIGN TOURISTS

Q.377. Can foreign tourists open a bank account in India during their short visit?

Ans. Yes. Foreign tourists during their short visit to India can open a Non-Resident (Ordinary) Rupee (NRO) account (Current/Savings) with any Authorised Dealer bank dealing in foreign exchange. Such account can be opened up to a maximum period of 6 months.

Q.378. What are the documents required for opening such accounts?

Ans. Passports and other valid identification proofs are required for opening the accounts. Authorised Dealer banks are also required to follow the Know Your Customer norms while opening of the accounts.

Q.379. What credits can be made to such accounts?

Ans. Funds remitted from outside India through banking channel or those obtained by sale of foreign exchange brought by the tourists to India can be credited to the NRO account.

Q.380. Can the NRO account be used for making local payments?

Ans. Yes. Tourists can freely make local payments through the NRO account. All payments to residents exceeding INR 50,000 can be made only by means of cheques/pay orders/demand drafts.

Q.381. Can foreign tourists repatriate the balance held in their NRO account at the time of departure from India?

Ans. Yes. Allowed to convert the balance into foreign currency, provided the account has been maintained for a period not exceeding six months and the account has not been credited with any local funds, other than interest accrued thereon.

Q.382. What can be done to repatriate the proceeds of an account that has been maintained for more than six months?

Ans. In such cases, applications for repatriation of balance may be made on plain paper to the Foreign Exchange Department of the Regional Office concerned of the Reserve Bank through the Authorised Dealer bank maintaining the account.

Q.383. Can foreign nationals Resident in India open resident account?

Ans. Yes. Foreign nationals Resident in India can open and maintain a resident Rupee account in India. Foreign nationals who come to India on employment and become residents in terms of section 2 (v) of FEMA, 1999, and are eligible to open/hold a resident savings bank account, are permitted to re-designate their resident account maintained in India as NRO account on leaving the country after their employment to enable them to receive their legitimate dues subject to certain conditions.

A foreign national who has opened such account in India may leave the country and go out of India for business, employment of vocation for uncertain period. However, he may have to collect his pending dues. In such case, his resident account can be converted to NRO account after the foreign national leaves India to other country (except Nepal and Bhutan). The account can continue till his bona fide dues are received. He can remit funds from this account outside India. Remittance upto US$ one million per financial year are allowed. The account should be closed after dues are received.

Q.384. Can AD Category-I banks remit proceeds of such accounts on closure?

Ans. Yes. But AD Category-I banks should ensure that the funds to be repatriated outside India were either received from abroad or they are repatriable in nature or permissible in terms of FEMA 13/2000.

DEPOSITS IN INDIA

Q.385. What are the different types of Accounts that foreign diplomatic missions and diplomatic personnel can maintain to hold their Deposits? What are the permissible debits and credits to such accounts?

Ans.

(1) Deposits held in rupee accounts maintained by foreign diplomatic missions and diplomatic personnel and their family members in India with an authorised dealer.

(2) Deposits held by diplomatic missions and diplomatic personnel in special rupee accounts namely Diplomatic Bond Stores Account to facilitate purchases of bonded stocks from firms and companies who have been granted special facilities by customs authorities for import of stores into bond, subject to following conditions :

(*a*) Credits to the account shall be only by way of proceeds of inward remittances received from outside India through normal banking channels or by a transfer from a foreign currency account in India of the account holder maintained with an authorised dealer in accordance with clause 3 of this Regulation;

(*b*) All cheque leaves issued to the account holder shall be superscribed as 'Diplomatic Bond Stores Account No.';

(*c*) Debits to the account shall be for local disbursements, or for payments for purchases of bonded stocks to firms and companies who have been granted special facilities by customs authorities for import of stores into bond;

(*d*) The funds in the account may be repatriated outside India without the approval of Reserve Bank.

(3) Deposits held in accounts maintained in foreign currency by diplomatic missions, diplomatic personnel and non-diplomatic staff, who are the nationals of the concerned foreign countries and hold official passport of foreign embassies in India subject to the following conditions:

(*a*) Credits to the account shall be only by way of:

(*i*) Proceeds of inward remittances received from outside India through normal banking channels; and

(*ii*) transfer of funds, from the rupee account of the diplomatic mission in India, which are collected in India as visa fees and credited to such account;

(*b*) Funds held in such account if converted in rupees shall not be converted back into foreign currency;

(*c*) The account may be held in the form of current or term deposit account, and in the case of diplomatic personnel and non-diplomatic staff, may also be held in the form of savings account;

(*d*) The rate of interest on savings or term deposits shall be such as may be determined by the authorised dealer maintaining the account;

(*e*) The funds in the account may be repatriated outside India without the approval of Reserve Bank.

NON-RESIDENT CLOSE RELATIVE(S) (INCLUDING FOREIGN NATIONALS) PERMITTED TO BE A JOINT HOLDER(S) IN RESIDENT BANK ACCOUNTS MAINTAINED BY RESIDENTS IN INDIA

Q.386. Are non-resident close relative(s) permitted to be a joint holder(s) in resident bank accounts maintained by residents in India?

Ans. Yes. Individuals resident in India are permitted to include non-resident close relative(s) (relatives as defined in Section 6 of the Companies Act, 1956) as a joint holder(s) in their resident bank accounts on ‘former or survivor’ basis. However, such non- resident Indian close relatives shall not be eligible to operate the account during the life time of the resident account holder.

INVESTMENT IN THE UNITS OF DOMESTIC MUTUAL FUNDS

Q.387. Can foreign nationals resident outside India invest in rupee denominated units of equity schemes of domestic MFs, and units of domestic MF debt schemes which invest in infrastructure debt of infrastructure companies, on repatriation basis?

Ans. Non-resident investors/‘Qualified Foreign Investors’ (QFIs) (other than SEBI registered FIIs and SEBI registered FVCIs) are permitted to purchase on repatriation basis rupee denominated units of equity schemes of domestic MFs issued by SEBI registered domestic MFs, under the two routes, namely:

1. Direct Route - SEBI registered Depository Participant (DP) route
2. Indirect Route - Unit Confirmation Receipt (UCR) route

Investments by the QFIs would be subject to a ceiling of US$ 10 billion under both the routes plus up to an additional amount of US$ 3 billion in units of domestic MF debt schemes which invest in infrastructure (“Infrastructure” as defined under the extant ECB guidelines) debt of minimum residual maturity of 5 years, within the existing ceiling of US$ 25 billion for FII investment in corporate bonds issued by infrastructure companies.

The investment under both the routes by the QFIs will be in the units which are directly issued by the domestic MFs and no secondary market purchases would be allowed.

Units and UCRs issued under this scheme to QFIs, would be non-tradable and non-transferable.

ANNEXURE

(*Refer Q. 183A*)

SECTOR-SPECIFIC POLICY FOR FDI

In sectors/activities not listed under FDI Policy: FDI is permitted upto 100% on the automatic route e.g. Services: IT/ITeS/KPO; Business Services; Engineering, Technical Support and R&D; Healthcare and Medical Services; Logistics, Supply Chain Management; Advertising and Films, Hotels.

Sector/Activity	% of FDI Cap/Equity	Entry Route
Agriculture & Animal Husbandry a) Floriculture, Horticulture, Apiculture and Cultivation of Vegetables & Mushrooms under controlled conditions. b) Development and production of Seeds and planting material; c) Animal Husbandry(including of breeding of dogs), Pisciculture, Aquaculture under controlled conditions; and d) services related to agro and allied sectors. Note: Besides the above, FDI is not allowed in any other agricultural sector/activity.	100%	Automatic
Tea Plantation		
Tea sector including tea plantations Note: Besides the above, FDI is not allowed in any other plantation sector/activity	100%	Government
Mining		
Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores; **subject to** the Mines and Minerals(Development & Regulation) Act, 1957.	100%	Automatic
Coal and Lignite		
(1) Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the provision of Coal Mines (Nationalization) Act, 1973. (2) setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.	100% 100%	Automatic Automatic
Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities.		
Mining and mineral separation of titanium bearing minerals & ores, its value addition and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation Act 1957)	100%	Government

Sector/Activity	% of FDI Cap/Equity	Entry Route
Manufacturing		
Manufacture of items reserved for production in Micro and Small Enterprises (MSEs)		
FDI in MSEs will be subject to the sectoral caps, entry routes and other relevant sectoral regulations. Any industrial undertaking which is not a Micro or Small Scale Enterprise, but manufactures items reserved for the MSE sector would require Government route where foreign investment is more than 24% in the capital. Such an undertaking would also require an Industrial License under the Industries (Development & Regulation) Act 1951, for such manufacture. The issue of Industrial License is subject to a few general conditions and the specific condition that the Industrial Undertaking shall undertake to export a minimum of 50% of the new or additional annual production of the MSE reserved items to be achieved within a maximum period of three years. The export obligation would be applicable from the date of commencement of commercial production and in accordance with the provision of section 11 of the Industries (Development & Regulation) Act 1951		
Defence		
Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act 1951	26%	Government
Service Sector		
Civil Aviation		
Airports		
(a) Greenfield projects	100%	Automatic
(b) Existing projects	100%	Automatic up to 74% Government route beyond 74%
Air Transport Services		
(a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non- Scheduled Air Transport Services, helicopter and seaplane services. (b) No foreign airlines would be allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in operating Scheduled, Non-Scheduled Air Transport Services except Cargo airlines. (c) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services.		
(1) Scheduled Air Transport Service/Domestic Scheduled Passenger Airline	49% FDI (100% for NRIs)	Automatic
(2) Non-Scheduled Air Transport Service	74% FDI (100% for NRIs)	Automatic up to 49% Government route beyond 49% and upto 74%.
(3) Helicopter services/seaplane services requiring DGCA approval	100%	Automatic
Other services under Civil Aviation Sector		
(1) Ground Handling Services subject to sectoral regulations and security clearance	74% FDI (100% for NRI)s)	Automatic up to 49%

Sector/Activity	% of FDI Cap/Equity	Entry Route
		Government route beyond 49% and up to 74%
(2) Maintenance and Repair organizations; flying training institutes; and technical training institutions	100%	Automatic
Information Services		
Broadcasting		
Terrestrial Broadcasting FM (FM Radio) subject to such terms and conditions as specified from time to time by Ministry of Information and Broadcasting for grant of permission for setting up of FM Radio Stations.	20% (FDI, NRI & PIO Investment and portfolio investment)	Government
Cable Network subject to Cable Television Network Rules, 1994 and other conditions as specified from time to time by Ministry of Information and Broadcasting.	49% (FDI, NRI & PIO investment and portfolio investment)	Government
Direct -to-Home subject to such guidelines/terms and conditions as specified from time to time by Ministry of Information and Broadcasting.	49% (FDI, NRI & PIO investment and portfolio investment) **Within this limit, FDI component not to exceed 20%**	Government
Headend-in-the-Sky (HITS) Broadcasting Service refers to the multichannel downlinking and distribution of television programme in C-Band or Ku Band wherein all the pay channels are downlinked at a central facility (Hub/teleport) and again uplinked to a satellite after encryption of channel. At the cable headend these encrypted pay channels are downlinked using a single satellite antenna, transmodulated and sent to the subscribers by using a land based transmission system comprising of infrastructure of cable/optical fibres network.		
FDI limit in (HITS) Broadcasting Service is subject to such guidelines terms and conditions as specified from time to time by Ministry of Information and Broadcasting.	74% (total direct and indirect foreign investment including portfolio and FDI)	Automatic up to 49% Government route beyond 49% and up to 74%
Setting up hardware facilities such as up-linking, HUB etc.		
(1) Setting up of Up-linking HUB/Teleports	49% (FDI & FII)	Government
(2) Up-linking a Non-News & Current Affairs TV Channel	100%	Government
(3) Up-linking a News & Current Affairs TV Channel **subject to** the conditions that the portfolio investment from FII/NRI shall not be "persons acting in concert" with FDI investors, as defined in the SEBI (Substantial Acqusition of Shares and Takeovers) Regulations, 1997	26% (FDI & FII)	Government
Financial Services Foreign investment in other financial services, other than those indicated below, would require prior approval of the Government:		

Sector/Activity	% of FDI Cap/Equity	Entry Route
Asset Reconstruction Companies		
'Asset Reconstruction Company' (ARC) means a company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).	49% of paid-up capital of ARC	Government
Banking -Private sector		
Banking -Private sector	74 % including investment by FIIs	Automatic up to 49% Government route beyond 49% and up to 74%
Banking- Public Sector		
Banking- Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Acts 1970/80. This ceiling (20%) is also applicable to the State Bank of India and its associate Banks.	20% (FDI and Portfolio Investment)	Government
Commodity Exchange		
Policy for FDI in Commodity Exchanges	49% (FDI & FII) [Investment by Registered FII under Portfolio Investment Scheme (PIS) will be limited to 23% and Investment under FDI Scheme limited to 26%]	Government
Construction Development: Townships, Housing, Built-up infrastructure		
Townships, housing, built-up infrastructure and construction- development projects (which would include, but not be restricted to, housing, commercial premises, hotels, resorts, hospitals, educational Institutions, recreational facilities, city and regional level infrastructure)	100%	Automatic
Credit Information Companies (CIC)		
Credit Information Companies	49% (FDI & FII)	Government
Industrial Parks - new and existing	100%	Automatic
Insurance		
Insurance	26%	Automatic
Infrastructure Company in the Securities Market:		
Infrastructure companies in Securities Markets, namely, stock exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49% (FDI & FII) [FDI limit of 26 per cent and an FII limit of 23 per cent of the paid-up capital]	Government (For FDI)

Sector/Activity	% of FDI Cap/Equity	Entry Route
Non-Banking Finance Companies (NBFC)		
Foreign investment in NBFC is allowed under the automatic route in only the following activities: (i) Merchant Banking (ii) Under Writing (iii) Portfolio Management Services (iv) Investment Advisory Services (v) Financial Consultancy (vi) Stock Broking (vii) Asset Management (viii) Venture Capital (ix) Custodian Services (x) Factoring (xi) Credit Rating Agencies (xii) Leasing & Finance (xiii) Housing Finance (xiv) Forex Broking (xv) Credit Card Business (xvi) Money Changing Business (xvii) Micro Credit (xviii) Rural Credit	100%	Automatic
Pharmaceuticals		
Greenfield	100%	Automatic
Existing companies	100%	Government
Petroleum & Natural Gas Sector		
Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector, subject to the existing sectoral policy and regulatory framework in the oil marketing sector and the policy of the Government on private participation in exploration of oil and the discovered fields of national oil companies.	100%	Automatic
Petroleum refining by the Public Sector Undertakings (PSU), without any divestment or dilution of domestic equity in the existing PSUs.	49%	Government
Print Media		
Publishing of Newspaper and periodicals dealing with news and current affairs.	26% (FDI and investment by NRIs/PIOs/FII)	Government
Publication of Indian editions of foreign magazines dealing with news and current affairs:	26% (FDI and investment by NRIs/PIOs/FII)	Government

Sector/Activity	% of FDI Cap/Equity	Entry Route
Publishing/printing of Scientific and Technical Magazines/specialty journals/periodicals, subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting.	100%	Government
Publication of facsimile edition of foreign newspapers:	100%	Government
Private Security Agencies	49%	Government
Satellites - Establishment and operation:		
Satellites - Establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO.	74%	Government
Telecom Services Investment caps and other conditions for specified services are given below.		
However, licensing and security requirements notified by the Department of Telecommunications, will need to be complied with for all services.		
(i) **Telecom services**	74%	Automatic up to 49% Government route beyond 49% and up to 74%
(a) ISP with gateways (b) ISP's not providing gateways i.e. without gate-ways (both for satellite and marine cables) Note: The new guidelines of August 24, 2007 Department of Telecommunications provide for new ISP licenses with FDI upto 74%.	74%	Automatic up to 49% Government route beyond 49% and up to 74%
(c) Radio paging (d) End-to-End bandwidth		
(a) Infrastructure provider providing dark fibre, right of way, duct space, tower (IP Category I) (b) Electronic Mail (c) Voice Mail Note: Investment in all the above activities is subject to the condition that such companies will divest 26% of their equity in favour of Indian public in 5 years, if these companies are listed in other parts of the world.	100%	Automatic up to 49% Government route beyond 49%
Trading		
Cash & Carry trading Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100%	Automatic
E-commerce activities	100%	Automatic
E-commerce activities refer to the activity of buying and selling by a company through the e-commerce platform. Such companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter-alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well.		
Test marketing of such items for which a company has approval for manufacture, provided such test marketing facility will be for a period	100%	Government

Sector/Activity	% of FDI Cap/Equity	Entry Route
of two years, and investment in setting up manufacturing facility commences simultaneously with test marketing.		
Single Brand product trading	51%	Government
Courier service for carrying packages, parcels and other items which do not come within the ambit of the Indian Post Office Act, 1898 and excluding the activity realting to the distribution of letters.	100%	Government

For detailed conditions etc. on specific sector/activity, please refer latest Consolidated FDI Policy released by DIPP on March 30, and September 30 every year.

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Q.363. Whether a citizen of foreign state, not being a citizen of Nepal or Bhutan is eligible for remittance facilities of US $ 1,000,000 per financial year? If yes, then what are those facilities?
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Q.365.	Whether funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign State considered while computing amount of US $ 1,000,000?
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WTO REGIME AND INDIA

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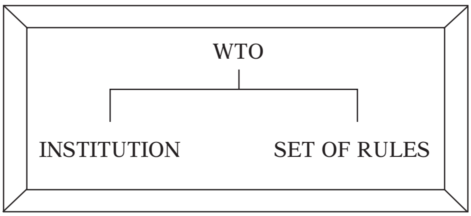
PART 1

WTO REGIME

Origin of WTO

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations offering a forum for governments to negotiate trade agreements. It is an organisation that regulates International Trade. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other.

The WTO is both an institution and a set of rules, called the "WTO law". The World Trade Organization (WTO) deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.



The WTO is the successor to a previous trade agreement called the General Agreement on Tariffs and Trade (GATT), which was created in 1948.

From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) provided the rules for much of world trade and presided over periods that saw some of the highest growth rates in international commerce. It seemed well-established, but throughout those 47 years, it was a provisional agreement and organization.

For almost half a century, the GATT's basic legal principles remained much as they were in 1948. There were additions in the form of a section on development added in the 1960s and "plurilateral" agreements (i.e. with voluntary membership) in the 1970s, and efforts to reduce tariffs further continued. Much of this was achieved through a series of multilateral negotiations known as "trade rounds" — the biggest leaps forward in international trade liberalization have come through these rounds which were held under GATT's auspices.

In the early years, the GATT trade rounds concentrated on further reducing tariffs. Then, the Kennedy Round in the mid-sixties brought about a GATT Anti-Dumping Agreement and a section on development. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system. The eighth, the Uruguay Round of 1986-94, was the last and most extensive of all. It led to the WTO and a new set of agreements.

The WTO has a larger membership than GATT, and covers more subjects. Each of the almost 153 WTO members are required to implement these rules, and to provide other members with the specific trade benefits to which they have committed themselves.

A brief history of the WTO

1946-47 Negotiations among 50 countries, sponsored by the United Nations, to establish an International Trade Organization (ITO) alongside the World Bank and International Monetary Fund. A draft ITO Charter is drawn up.

In parallel, 23 countries decide to negotiate a set of tariff reductions among themselves and to adopt some of the draft ITO trade rules. The tariff concessions and rules together are called the General Agreement on Tariffs and Trade (GATT).

1948 January 1: GATT enters into effect on a provisional basis. Of the 23 original members, 11 are developing countries.

March: the UN Conference on Trade and Employment, in Havana Cuba, adopts the ITO Charter, but it remains subject to ratification by national legislatures.

1950 United States government announces that it will not seek ratification of the ITO Charter because of opposition in Congress. The ITO is therefore dead. GATT remains in place as a "provisional" agreement.

1951-1961 Three trade rounds under GATT were completed on tariffs.

1964-67 "Part IV" of the GATT is added in 1964 to provide more favourable treatment for developing countries, in particular, that could receive tariff benefits in trade negotiations without necessarily making a reciprocal offer. Geneva (Kenndy Round) is completed.

1973 The "enabling clause" is added in 1973 to the GATT to make legal preference schemes for developing countries. These schemes, like the GSP, would otherwise be contrary to the MFN rule. Geneva (Tokyo Round) is completed.

1986 The Uruguay Round is launched in Punta del Este, Uruguay. Its mandate is the biggest ever, covering tariffs and non-tariff rules, but also extending the trading system into the new areas of services trade and intellectual property rights. In addition, it was to completely re-design the dispute settlement system and establish a new trade organization to replace the "provisional" GATT.

1993 December 20: agreement is reached on all Uruguay Round dossiers. Approximately 23,000 pages of legal texts and national commitments on goods and services.

1995 The "Marrakesh Agreement" establishing the World Trade Organization comes into effect.

1997 Additional agreements are reached covering financial services and basic telecommunications services.

2001 WTO ministerial conference launches the Doha Round.

1995-2005 Implementation of most Uruguay Round agreements, including those on agriculture, textiles,intellectual property, customs valuation and other non-tariff barriers.

DOHA ROUND

The Doha Round is the latest round of trade negotiations among the WTO membership commenced in November 2001. Its objective is to lower trade barriers around the world, which will help facilitate the increase of global trade. As of 2008, talks have stalled over a divide on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies. The most significant differences are between developed nations led by the European Union (EU), the United States (USA), and Japan and the major developing countries led and represented mainly by Brazil, China, India, South Korea, and South Africa. There is also considerable contention against and between the EU and the USA over their maintenance of agricultural subsidies—seen to operate effectively as trade barriers. The Round is also known semi-officially as the **Doha Development Agenda** as a fundamental objective is to improve the trading prospects of developing countries.

Doha Round talks are overseen by the Trade Negotiations Committee (TNC), whose chair is the WTO's director-general, currently Pascal Lamy. The negotiations are being held in five working groups and in other existing bodies of the WTO. Selected topics under negotiation are discussed below in five groups: market access, development issues, WTO rules, trade facilitation and other issues.

All countries participating in the negotiations believe that there is some economic benefit in adopting the agreement. A study by the University of Michigan found that if all trade barriers in agriculture, services, and manufactures were reduced by 33% as a result of the Doha Development Agenda, there would be an increase in global welfare of $574.0 billion. A 2008 study by World Bank Lead Economist Kym Anderson found that global income could increase by more than $3000 billion per year, $2500 billion of which would go to the developing world Pascal Lamy has conservatively estimated that the deal will bring an increase of $130 billion.

Marrakesh Agreement in 1995 established WTO

Brief outline of the Agreement

S.NO	AGREEMENT CONTENTS	PURPOSE
1	**Objective**	THAT trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.
2	*Article I*	*Establishment of the Organization*
3	*Article II*	***Scope of the WTO*** The WTO shall provide the common institutional framework for the conduct of trade relations among its Members
4	*Article III*	***Functions of the WTO*** ◆ WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements. ◆ WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" ◆ The WTO shall administer the Trade Policy Review Mechanism
5	*Article IV*	*Structure of the WTO -DISCUSSED SEPARATELY*
6	*Article V*	*Relations with Other Organizations*
7	*Article VI*	***The Secretariat*** There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

S.NO	AGREEMENT CONTENTS	PURPOSE
8	*Article VII*	***Budget and Contributions*** The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.
9	*Article VIII*	***Status of the WTO*** The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions
10	*Article IX*	***Decision-Making*** The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting
11	*Article X*	***Amendments*** Any Member of the WTO may initiate a proposal to amend the provision of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils may also submit to the Ministerial Conference proposals to amend the provision of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee.
12	*Article XI*	***Original Membership*** The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.
13	*Article XII*	***Accession*** Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.

S.NO	AGREEMENT CONTENTS	PURPOSE
14	*Article XIII*	***Non-Application of Multilateral Trade Agreements between Particular Members*** This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
15	*Article XIV*	***Acceptance, Entry into Force and Deposit*** This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of theWTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto.
16	*Article XV*	***Withdrawal*** Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.
17	*Article XVI*	*Miscellaneous Provision*
18	**LIST OF ANNEXES** ANNEX 1	ANNEX 1A: Multilateral Agreements on Trade in Goods General Agreement on Tariffs and Trade 1994 ◆ Agreement on Agriculture ◆ Agreement on the Application of Sanitary and Phytosanitary Measures ◆ Agreement on Textiles and Clothing ◆ Agreement on Technical Barriers to Trade ◆ Agreement on Trade-Related Investment Measures ◆ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ◆ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ◆ Agreement on Preshipment Inspection ◆ Agreement on Rules of Origin ◆ Agreement on Import Licensing Procedures ◆ Agreement on Subsidies and Countervailing Measures ◆ Agreement on Safeguards

S.NO	AGREEMENT CONTENTS	PURPOSE
		ANNEX 1B: General Agreement on Trade in Services and Annexes ◆ Movement of natural persons ◆ Air transport ◆ Financial services ◆ Shipping ◆ Telecommunication ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights ◆ Copyrights and related rights ◆ Trade marks ◆ Geographical indications ◆ Industrial designs ◆ Patents ◆ Layout designs of Ics ◆ Protection of undisclosed information ◆ Control of anti-compitition practices in contracted licenses
	ANNEX 2	Understanding on Rules and Procedures Governing the Settlement of Disputes
	ANNEX 3	Trade Policy Review Mechanism
	ANNEX 4	Plurilateral Trade Agreements v Agreement on Trade in Civil Aircraft v Agreement on Government Procurement v International Dairy Agreement v International Bovine Meat Agreement

Basic Principles of WTO

The following principles are the foundation of the multilateral trading system and the foundations of the working of the WTO :

I. Trade without discrimination
II. Freer trade: gradually, through negotiation
III. Predictability: through binding and transparency
IV. Promoting fair competition
V. Encouraging development and economic reform

I.Trade without discrimination

Most-favoured-nation (MFN): Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

National treatment: Treating foreigners and locals equally Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of "national treatment" (giving others the same treatment as one's own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.

Why 'most-favoured'?

This sounds like a contradiction. It suggests special treatment, but in the WTO it actually means non-discrimination — treating virtually everyone equally.

This is what happens. Each member treats all the other members equally as "most-favoured" trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same "best" treatment to all the other WTO members so that they all remain "most-favoured".

Most-favoured nation (MFN) status did not always mean equal treatment. The first bilateral MFN treaties set up exclusive clubs among a country's "most-favoured" trading partners. Under GATT and now the WTO, the MFN club is no longer exclusive. The MFN principle ensures that each country treats its over-140 fellow-members equally.

But there are some exceptions ...

National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

II. Freer trade: gradually, through negotiation

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT's creation in 1947-48 there have been eight rounds of trade negotiations. A ninth round, under the Doha Development Agenda, is now underway. At first these focused on lowering tariffs (customs duties) on imported goods. As a result of the negotiations, by the mid-1990s industrial countries' tariff rates on industrial goods had fallen steadily to less than 4%.

But by the 1980s, the negotiations had expanded to cover non-tariff barriers on goods, and to the new areas such as services and intellectual property.

Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through "progressive liberalization". Developing countries are usually given longer to fulfil their obligations.

III. Predictability: through binding and transparency

Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition — choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

In the WTO, when countries agree to open their markets for goods or services, they "bind" their commitments. For goods, these bindings amount to ceilings on customs tariff rates. A country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade.

The system tries to improve predictability and stability in other ways as well. One way is to discourage the use of quotas and other measures used to set limits on quantities of imports. Another is to make countries' trade rules as clear and public ("transparent") as possible. Many WTO agreements require governments to disclose their policies and practices publicly within the country or by notifying the WTO. The regular surveillance of national trade policies through the Trade Policy Review Mechanism provides a further means of encouraging transparency both domestically and at the multilateral level.

IV.Promoting fair competition

The WTO is sometimes described as a "free trade" institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.

The rules on non-discrimination — MFN and national treatment — are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

V.Encouraging development and economic reform

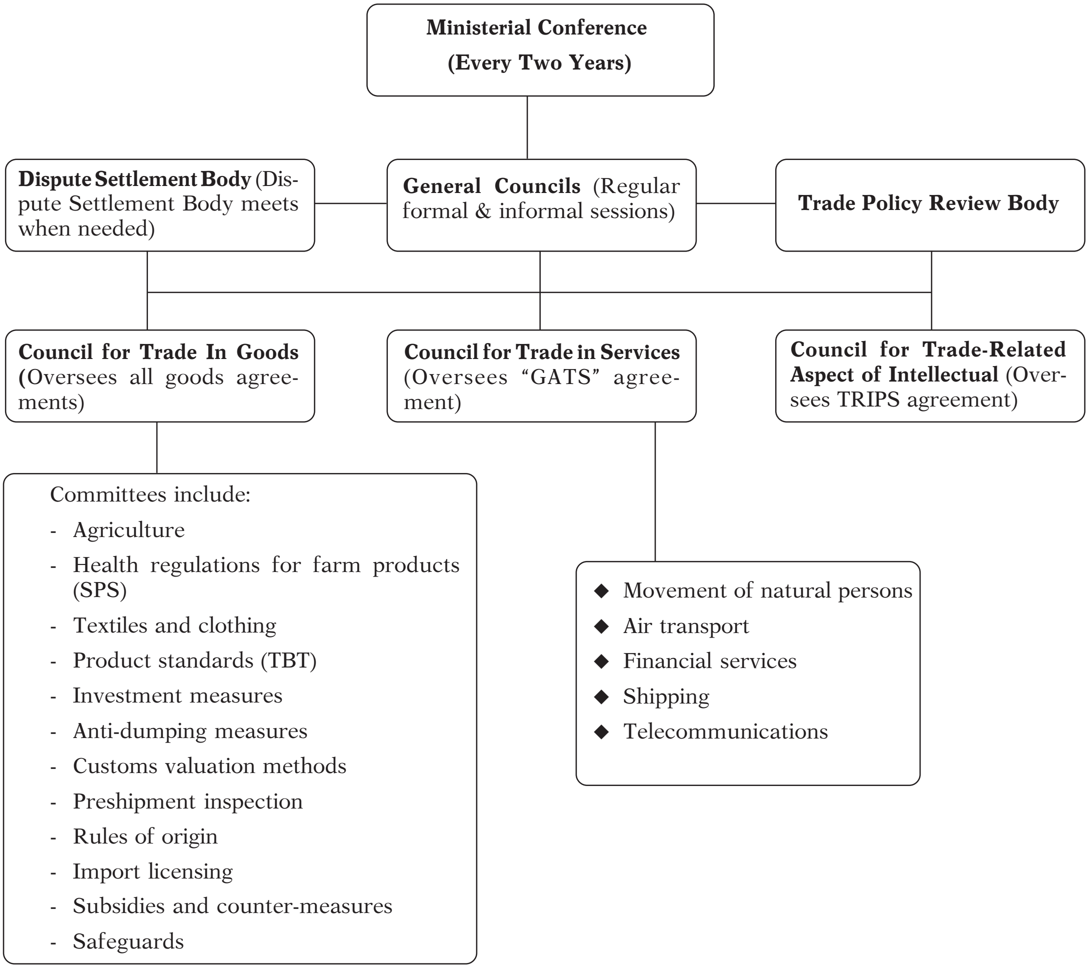
The WTO system contributes to development. On the other hand, developing countries need flexibility in the time they take to implement the system's agreements. And the agreements themselves inherit the earlier provision of GATT that allow for special assistance and trade concessions for developing countries.

Over three quarters of WTO members are developing countries and countries in transition to market economies. During the seven and a half years of the Uruguay Round, over 60 of these countries implemented trade liberalization programmes autonomously. At the same time, developing countries and transition economies were much more active and influential in the Uruguay Round negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.

WTO - Fact File

Location	GENEVAGEN Geneva, Switzerland
Established:	1 January 1995
Created by:	Uruguay Round negotiations (1986-94)
Members	153 members on 23 July 2008
Budget	196 million Swiss francs for 2011
Secretariat staff:	640
Head:	Pascal Lamy (Director-General)
Functions:	◆ Administering WTO trade agreements ◆ Forum for trade negotiations ◆ Handling trade disputes ◆ Monitoring national trade policies ◆ Technical assistance and training for developing countries ◆ Cooperation with other international organizations

STRUCTURE OF WTO



I. Highest authority: the Ministerial Conference

The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.

II. Second level: General Council in three guises

Day-to-day work in between the ministerial conferences is handled by three bodies:

The General Council

The Dispute Settlement Body

The Trade Policy Review Body

All three are in fact the same — the Agreement Establishing the WTO states they are all the General Council, although they meet under different terms of reference. Again, all three consist of all WTO members. They report to the Ministerial Conference.

The General Council acts on behalf of the Ministerial Conference on all WTO affairs. It meets as the Dispute Settlement Body and the Trade Policy Review Body to oversee procedures for settling disputes between members and to analyse members' trade policies.

III. Third level: councils for each broad area of trade; and more

Three more councils, each handling a different broad area of trade, report to the General Council:

General Council		
The Council for Trade in Goods (Goods Council	The Council for Trade in Services (Services Council)	The Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council)

As their names indicate, the three are responsible for the workings of the WTO agreements dealing with their respective areas of trade. Again they consist of all WTO members. The three also have subsidiary bodies

Six other bodies report to the General Council. The scope of their coverage is smaller, so they are "committees". But they still consist of all WTO members. They cover issues such as trade and development, the environment, regional trading arrangements, and administrative issues. The Singapore Ministerial Conference in December 1996 decided to create new working groups to look at investment and competition policy, transparency in government procurement, and trade facilitation.

Two more subsidiary bodies dealing with the plurilateral agreements (which are not signed by all WTO members) keep the General Council informed of their activities regularly.

IV. Fourth level: Committees dealing with specific subjects

Each of the higher level councils has subsidiary bodies. The **Goods Council** has 11 committees dealing with specific subjects (such as agriculture, market access, subsidies, anti-dumping measures and so on). Again, these consist of all member countries. Also reporting to the Goods Council is the Textiles Monitoring Body, which consists of a chairman and 10 members acting in their personal capacities, and groups dealing with notifications (governments informing the WTO about current and new policies or measures) and state trading enterprises.

The **Services Council's** subsidiary bodies deal with financial services, domestic regulations, GATS rules and specific commitments.

At the General Council level, the **Dispute Settlement Body** also has two subsidiaries: the dispute settlement "panels" of experts appointed to adjudicate on unresolved disputes, and the Appellate Body that deals with appeals.

V. 'HODs' and other bods: the need for informality

One step away from the formal meetings are informal meetings that still include the full membership, such as those of the Heads of Delegations (HOD). More difficult issues have to be thrashed out in smaller groups. A common recent practice is for the chairperson of a negotiating group to attempt to forge a compromise by holding consultations with delegations individually, in twos or threes, or in groups of 20-30 of the most interested delegations.

Secretariat

The WTO Secretariat, with offices only in Geneva, has 640 regular staff and is headed by a Director-General. Since decisions are taken by Members only, the Secretariat has no decision-making powers. Its main duties are to supply technical and professional support for the various councils and committees, to provide technical assistance for developing countries, to monitor and analyze developments in world trade, to provide information to the public and the media and to organize the ministerial conferences. The Secretariat also provides some forms of legal assistance in the dispute settlement process and advises governments wishing to become Members of the WTO.

The Secretariat staff of includes individuals representing about 70 nationalities. The working languages of the WTO are English, French and Spanish.

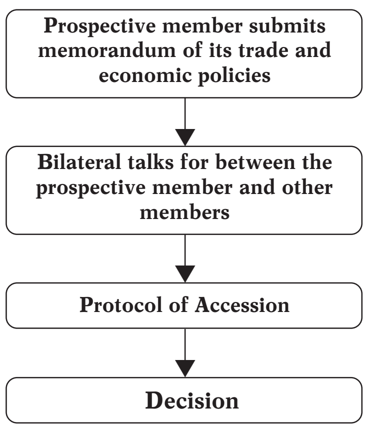
The **Director-General of the World Trade Organization** is responsible for supervising the administrative functions of the World Trade Organization (WTO). Because World Trade Organizations' decisions are made by member states (through either a Ministerial Conference or through the General Council), the Director-General has little power over matters of policy - the role is primarily advisory and managerial. Director-General supervises the WTO secretariat. WTO Director-General is appointed by WTO members for a term of four years.

There are four Deputy DG's at present.

Membership of WTO

The accession process

Any state or customs territory having full autonomy in the conduct of its trade policies may join ("accede to") the WTO, but WTO members must agree on the terms. Broadly speaking the application goes through four stages:



First, "tell us about yourself". The government applying for membership has to describe all aspects of its trade and economic policies that have a bearing on WTO agreements. This is submitted to the WTO in a memorandum which is examined by the working party dealing with the country's application. These working parties are open to all WTO members.

Second, "work out with us individually what you have to offer". When the working party has made sufficient progress on principles and policies, parallel bilateral talks begin between the prospective new member and individual countries. They are bilateral because different countries have different trading interests. These talks cover tariff rates and specific market access commitments, and other policies in goods and services. The new member's commitments are to apply equally to all WTO members under normal non-discrimination rules, even though they are negotiated bilaterally. In other words, the talks determine the benefits (in the form of export opportunities and guarantees) other WTO members can expect when the new member joins. (The talks can be highly complicated. It has been said that in some cases the negotiations are almost as large as an entire round of multilateral trade negotiations.)

Third, "let's draft membership terms". Once the working party has completed its examination of the applicant's trade regime, and the parallel bilateral market access negotiations are complete, the working party finalizes the terms of accession. These appear in a report, a draft membership treaty ("protocol of accession") and lists ("schedules") of the member-to-be's commitments.

Finally, "the decision". The final package, consisting of the report, protocol and lists of commitments, is presented to the WTO General Council or the Ministerial Conference. If a two-thirds majority of WTO members vote in favour, the applicant is free to sign the protocol and to accede to the organization. In many cases, the country's own parliament or legislature has to ratify the agreement before membership is complete.

Current Membership

WTO has 153 members and 31 observers. India is one of the founding members of GATT. Cape Verde became 153rd member to join on 23rd July 2008.

Observer status

The purpose of observer status for international intergovernmental organizations in the WTO is to enable these organizations to follow discussions therein on matters of direct interest to them. The guidelines on observer status for international organizations provide that requests for observer status from organizations shall not be considered for meetings of the Committee on Budget, Finance and Administration or the Dispute Settlement Body, therefore these bodies are not included in this list. Also not included are the Textiles Monitoring Body, which has no international intergovernmental organization observers, and Accession Working Parties.

The International Trade Centre UNCTAD/WTO, as a joint subsidiary organ of the WTO and UNCTAD, is not required to formally submit a request for observer status in the WTO bodies and is invited as appropriate to attend meetings of those WTO bodies it wishes to attend.

The IMF and World Bank have observer status in WTO bodies as provided for in their respective Agreements with the WTO .

Brief notes on the agreements under WTO

The WTO is 'rules-based'; its rules are negotiated agreements. The WTO agreements cover goods, services and intellectual property. They spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries.

The main body of WTO law is composed of over sixty individual agreements and decisions.

In fact, the agreements fall into a simple structure with six main parts:

- an umbrella agreement (the Agreement Establishing the WTO);

- agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property);
- dispute settlement; and
- reviews of governments' trade policies.

UMBRELLA	AGREEMENT ESTABLISHING THE WTO		
	GOODS	**SERVICES**	**INTELLECTUAL PROPERTY**
Basic principles	**GATT**	**GATS**	**TRIPS**
Additional details	**Other goods agreements and annexes**	**Services annexes**	
Market access commitments	**Countries' schedules of commitments**	**Countries' schedules of commitments (and MFN exemptions)**	
Dispute settlement	**DISPUTE SETTLEMENT**		
Transparency	**TRADE POLICY REVIEWS**		

I. ANNEX 1A : Multilateral Agreements on Trade in Goods

IA (a) Agriculture

The objective of the **Agriculture Agreement** is to reform trade in the sector and to make policies more market-oriented. This would improve predictability and security for importing and exporting countries alike.

The new rules and commitments apply to:

- **market access** — various trade restrictions confronting imports
- **domestic support** — subsidies and other programmes, including those that raise or guarantee farm gate prices and farmers' incomes

What is 'distortion'?

This a key issue. Trade is distorted if prices are higher or lower than normal, and if quantities produced, bought, and sold are also higher or lower than normal — i.e. than the levels that would usually exist in a competitive market.

For example, import barriers and domestic subsidies can make crops more expensive on a country's internal market. The higher prices can encourage over-production. If the surplus is to be sold on world markets, where prices are lower, then export subsidies are needed. As a result, the subsidizing countries can be producing and exporting considerably more than they normally would.

Governments usually give three reasons for supporting and protecting their farmers, even if this distorts agricultural trade:

- to make sure that enough food is produced to meet the country's needs
- to shield farmers from the effects of the weather and swings in world prices
- to preserve rural society.

  But the policies have often been expensive, and they have created gluts leading to export subsidy wars. Countries with less money for subsidies have suffered. The debate in the negotiations is whether these objectives can be met without distorting trade.

- **export subsidies** and other methods used to make exports artificially competitive.

The new rule for **market access** in agricultural products is "tariffs only". Before the Uruguay Round, some agricultural imports were restricted by quotas and other non-tariff measures. These have been replaced by tariffs that provide more-or-less equivalent levels of protection . Tariffs resulting from this "tariffication" process, as well as other tariffs on agricultural products, are to be reduced by an average 36 per cent in the case of developed countries and 24 per cent in the case of developing countries, with minimum reductions for each tariff line being required.

The main complaint about policies which **support domestic** prices, or subsidize production in some other way, is that they encourage over-production. This squeezes out imports or leads to export subsidies and low-priced dumping on world markets. The Agriculture Agreement distinguishes between support programmes that stimulate production directly, and those that are considered to have no direct effect.

Domestic policies that do have a direct effect on production and trade have to be cut back. WTO members calculated how much support of this kind they were providing per year for the agricultural sector (using calculations known as "total aggregate measurement of support" or "Total AMS") in the base years of 1986-88. Developed countries agreed to reduce these figures by 20% over six years starting in 1995. Developing countries agreed to make 13% cuts over 10 years. Least-developed countries do not need to make any cuts. (This category of domestic support is sometimes called the "amber box", a reference to the amber colour of traffic lights, which means "slow down".)

Measures with minimal impact on trade can be used freely — they are in a "green box" ("green" as in traffic lights). They include government services such as research, disease control, infrastructure and food security. They also include payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes.

Also permitted, are certain direct payments to farmers where the farmers are required to limit production (sometimes called "blue box" measures), certain government assistance programmes to encourage agricultural and rural development in developing countries, and other support on a small scale ("de minimis") when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10% or less for developing countries).

The Agriculture Agreement prohibits **export subsidies** on agricultural products unless the subsidies are specified in a member's lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies. Taking averages for 1986-90 as the base level, developed countries agreed to cut the value of export subsidies by 36% over the six years starting in 1995 (24% over 10 years for developing countries). Developed countries also agreed to reduce the quantities of subsidized exports by 21% over the six years (14% over 10 years for developing countries). Least-developed countries do not need to make any cuts.

During the six-year implementation period, developing countries are allowed under certain conditions to use subsidies to reduce the costs of marketing and transporting exports.

IA(b) Sanitary and Phyto-Sanitary Measures

This agreement concerns the application of sanitary and phytosanitary measures — in other words food safety and animal and plant health regulations. The agreement recognises that governments have the right to take sanitary and phytosanitary measures but that they should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.

It is expected that Members would accept the sanitary and phytosanitary measures of others as equivalent if the exporting country demonstrates to the importing country that its measures achieve the importing country's appropriate level of health protection. The agreement includes provision on control, inspection and approval procedures.

IA(c) Agreement on Textiles and Clothing

The object of this negotiation has been to secure the eventual integration of the textiles and clothing sector — where much of the trade is currently subject to bilateral quotas negotiated under the

Multifibre Arrangement (MFA) — into the GATT on the basis of strengthened GATT rules and disciplines.

Note: this Agreement was terminated on 1 January 2005.

IA(d)Technical Barriers to Trade

This agreement extend and clarify the Agreement on Technical Barriers to Trade reached in the Tokyo Round. It seeks to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade. However, it recognizes that countries have the right to establish protection, at levels they consider appropriate, for example for human, animal or plant life or health or the environment, and should not be prevented from taking measures necessary to ensure those levels of protection are met. The agreement therefore encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result of standardization.

IA(e) Trade Related Investment Measures

The agreement recognizes that certain investment measures restrict and distort trade. It provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

The agreement requires mandatory notification of all non-conforming TRIMs and their elimination within two years for developed countries, within five years for developing countries and within seven years for least-developed countries. It establishes a Committee on TRIMs which will, among other things, monitor the implementation of these commitments. The agreement also provides for consideration, at a later date, of whether it should be complemented with provision on investment and competition policy more broadly.

IA(f) Anti Dumping Measures

Article VI of the GATT provides for the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party.

On the methodology for determining that a product is exported at a dumped price, the new Agreement adds relatively specific provision on such issues as criteria for allocating costs when the export price is compared with a "constructed" normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.

The agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The agreement confirms the existing interpretation of the term "domestic industry". Subject to a few exceptions, "domestic industry" refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 per cent, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).

IA(g)Customs Valuation Methods

The Decision on Customs Valuation would give customs administrations the right to request further information of importers where they have reason to doubt the accuracy of the declared value of imported goods. If the administration maintains a reasonable doubt, despite any additional information, it may be deemed that the customs value of the imported goods cannot be determined on the basis of the declared value, and customs would need to establish the value taking into account the provision of the Agreement. In addition, two accompanying texts further clarify certain of the Agreement's provision relevant to developing countries and relating to minimum values and importations by sole agents, sole distributors and sole concessionaires.

IA(h) Preshipment Inspection

Preshipment inspection (PSI) is the practice of employing specialized private companies to check shipment details — essentially price, quantity, quality — of goods ordered overseas. Used by governments of developing countries, the purpose is to safeguard national financial interests (prevention of capital flight and commercial fraud as well as customs duty evasion, for instance) and to compensate for inadequacies in administrative infrastructures.

The agreement recognizes that GATT principles and obligations apply to the activities of preshipment inspection agencies mandated by governments. The obligations placed on PSI-user governments include non-discrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification and the avoidance of conflicts of interest by the PSI agencies.

The obligations of exporting contracting parties towards PSI users include non-discrimination in the application of domestic laws and regulations, prompt publication of such laws and regulations and the provision of technical assistance where requested.

IA(i) Rules of origin

The agreement aims at long-term harmonization of rules of origin, other than rules of origin relating to the granting of tariff preferences, and to ensure that such rules do not themselves create unnecessary obstacles to trade.

Until the completion of the harmonization programme, contracting parties would be expected to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner, and that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not).

An annex to the agreement sets out a "common declaration" with respect to the operation of rules of origin on goods which qualify for preferential treatment.

IA(j) Import Licensing Procedures

The revised agreement strengthens the disciplines on the users of import licensing systems which, in any event, are much less widely used now than in the past — and increases transparency and predictability. For example, the agreement requires parties to publish sufficient information for traders to know the basis on which licences are granted. It contains strengthened rules for the notification of the institution of import licensing procedures or changes therein. It also offers guidance on the assessment of applications.

With respect to automatic licensing procedures, the revised agreement sets out criteria under which they are assumed not to have trade restrictive effects. With respect to non-automatic licensing procedures, their administrative burden for importers and exporters should be limited to what is absolutely necessary to administer the measures to which they apply. The revised agreement also sets a maximum of 60 days for applications to be considered.

A(k) Agreement of Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII which was negotiated in the Tokyo Round.

Unlike its predecessor, the agreement contains a definition of subsidy and introduces the concept of a "specific" subsidy — for the most part, a subsidy available only to an enterprise or industry or group of enterprises or industries within the jurisdiction of the authority granting the subsidy. Only specific subsidies would be subject to the disciplines set out in the agreement.

The agreement establishes three categories of subsidies. First, it deems the following subsidies to be **"prohibited"**: those contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance; and those contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Prohibited subsidies are subject to new dispute settlement procedures. The main features include an expedited timetable for action by the Dispute Settlement body, and if it is found that the subsidy is indeed prohibited, it must be immediately withdrawn. If this is not done within the specified time period, the complaining member is authorized to take countermeasures.

The second category is **"actionable"** subsidies. The agreement stipulates that no member should cause, through the use of subsidies, adverse effects to the interests of other signatories, i.e. injury to domestic industry of another signatory, nullification or impairment of benefits accruing directly or indirectly to other signatories under the General Agreement (in particular the benefits of bound tariff concessions), and serious prejudice to the interests of another member. "Serious prejudice" shall be presumed to exist for certain subsidies including when the total *ad valorem* subsidization of a product exceeds 5 per cent. In such a situation, the burden of proof is on the subsidizing member to show that the subsidies in question do not cause serious prejudice to the complaining member. Members affected by actionable subsidies may refer the matter to the Dispute Settlement body. In the event that it is determined that such adverse effects exist, the subsidizing member must withdraw the subsidy or remove the adverse effects.

The third category involves **non-actionable subsidies**, which could either be non-specific subsidies, or specific subsidies involving assistance to industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain type of assistance for adapting existing facilities to new environmental requirements imposed by law and/or regulations. Where another member believes that an otherwise non-actionable subsidy is resulting in serious adverse effects to a domestic industry, it may seek a determination and recommendation on the matter.

Countervailing investigations shall be terminated immediately in cases where the amount of a subsidy is *de minimis* (the subsidy is less than 1 per cent *advalorem)* or where the volume of subsidized imports, actual or potential, or the injury is negligible. Except under exceptional circumstances, investigations shall be concluded within one year after their initiation and in no case more than 18 months. All countervailing duties have to be terminated within 5 years of their imposition unless the authorities determine on the basis of a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

IA(l) Agreement on Safeguards

Article XIX of the General Agreement allows a GATT member to take a "safeguard" action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry. The agreement breaks major ground in establishing a prohibition against so-called "grey area" measures, and in setting a "sunset clause" on all safeguard actions. The agreement stipulates that a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. Any such measure in effect at the time of entry into force of the agreement would be brought into conformity with this agreement, or would have to be phased out within four years after the entry into force of the agreement establishing the WTO. An exception could be made for one specific measure for each importing member, subject to mutual agreement with the directly concerned member, where the phase-out date would be 31 December 1999.

All existing safeguard measures taken under Article XIX of the General Agreement 1947 shall be terminated not later than eight years after the date on which they were first applied or five years after the date of entry into force of the agreement establishing the WTO, whichever comes later.

The agreement sets out requirements for safeguard investigation which include public notice for hearings and other appropriate means for interested parties to present evidence, including on whether a measure would be in the public interest. In the event of critical circumstances, a provisional safeguard measure may be imposed based upon a preliminary determination of serious injury. The duration of such a provisional measure would not exceed 200 days.

The agreement sets out the criteria for "serious injury" and the factors which must be considered in determining the impact of imports. The safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Where quantitative restrictions are imposed, they normally should not reduce the quantities of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

ANNEX 1B : General Agreement on Trade in Services and Annexes

The General Agreement on Trade in Services (GATS) mandates WTO member governments to progressively liberalize trade in services through successive rounds of negotiations.

There are four major areas of services negotiations:

- market access
- domestic regulation
- GATS rules on emergency safeguard measures, government procurement and subsidies
- implementation of LDC modalities (i.e. special treatment for least-developed countries under GATS Article IV.3).

IB(a)ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service. (Member here denotes the country).

The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis

IB(b)ANNEX ON AIR TRANSPORT SERVICES

This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement

The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

(a) traffic rights, however granted; or

(b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.

The Agreement shall apply to measures affecting:

(a) aircraft repair and maintenance services;

(b) the selling and marketing of air transport services;

(c) computer reservation system (CRS) services.

IB(c) ANNEX ON FINANCIAL SERVICES

This Annex applies to measures affecting the supply of financial services.

For the purposes of this Annex:

A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance).

IB(d) ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

- the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,
- should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision

IB(e) ANNEX ON TELECOMMUNICATIONS

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provision of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provision to the Agreement.

This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services

For the purposes of this Annex:

(a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

(b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally.

Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

ANNEX 1C : Agreement on Trade-Related Aspects of Intellectual Property Rights

The objective of this agreement protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

IC (a) SECTION 1: COPYRIGHT AND RELATED RIGHTS

Article 9 Relation to the Berne Convention

Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such

IC (a)(i) Article 10 Computer Programs and Compilations of Data

Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

Article 11 Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.

IC (a)(ii) Article 14 Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provision of the Berne Convention (1971).

C (b) SECTION 2: TRADEMARKS

Article 15 Protectable Subject Matter

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

Aforesaid paragraph shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provision of the Paris Convention (1967).

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.

IC(c) SECTION 3: GEOGRAPHICAL INDICATIONS

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

IC(c) (i) *Article 23 Additional Protection for Geographical Indications for Wines and Spirits*

Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like.

In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

IC(d) SECTION 4: INDUSTRIAL DESIGNS

Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

The owner of a protected industrial design shall have the right to prevent third parties not having the owner’s consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. The duration of protection available shall amount to at least 10 years.

IC(e) SECTION 5: PATENTS

Article 27 Patentable Subject Matter

Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application

Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provision of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

IC(f) SECTION 6: LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.
2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.
3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.

ANNEX 2 : Understanding on Rules and Procedures Governing the Settlement of Disputes

The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.

A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. The authors of these agreements are the member governments themselves — the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body.

The DSU emphasizes the importance of consultations in securing dispute resolution, requiring a Member to enter into consultations within 30 days of a request for consultations from another Member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel. The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration.

It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months. Panel reports may be considered by the DSB for adoption 20 days after they are issued to Members. Within 60 days of their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal.

The concept of appellate review is an important new feature of the DSU. An Appellate Body will be established, composed of seven members, three of whom will serve on any one case. An appeal will be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings shall not exceed 60 days from the date a party formally notifies its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

ANNEX 3 : Trade Policy Review Mechanism

Surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the centre of this work is the Trade Policy Review Mechanism (TPRM). All WTO members are reviewed, the frequency of each country's review varying according to its share of world trade.

Individuals and companies involved in trade have to know as much as possible about the conditions of trade. It is therefore fundamentally important that regulations and policies are transparent. In the WTO, this is achieved in two ways: governments have to inform the WTO and fellow-members of specific measures, policies or laws through regular "notifications"; and the WTO conducts regular reviews of individual countries' trade policies — the trade policy reviews. These reviews are part of the Uruguay Round agreement, but they began several years before the round ended — they were an early result of the negotiations. Participants agreed to set up the reviews at the December 1988 ministerial meeting that was intended to be the midway assessment of the Uruguay Round. The first review took place the following year. Initially they operated under GATT and, like GATT, they focused on goods trade. With the creation of the WTO in 1995, their scope was extended, like the WTO, to include services and intellectual property.

The objectives are:

- to increase the transparency and understanding of countries' trade policies and practices, through regular monitoring
- to improve the quality of public and intergovernmental debate on the issues
- to enable a multilateral assessment of the effects of policies on the world trading system.

Over a period of time, all WTO members are to come under scrutiny. The frequency of the reviews depends on the country's size:

- The four biggest traders — the European Union, the United States, Japan and China (the "Quad") — are examined approximately once every two years.
- The next 16 countries (in terms of their share of world trade) are reviewed every four years.
- The remaining countries are reviewed every six years, with the possibility of a longer interim period for the least-developed countries.

For each review, two documents are prepared: a policy statement by the government under review, and a detailed report written independently by the WTO Secretariat. These two reports, together with the proceedings of the Trade Policy Review Body's meetings are published shortly afterwards.

ANNEX 4 : Plurilateral Trade Agreements

For the most part, all WTO members subscribe to all WTO agreements. After the Uruguay Round, however, there remained four agreements, originally negotiated in the Tokyo Round, which had a narrower group of signatories and are known as "plurilateral agreements". The four were:

- trade in civil aircraft
- government procurement
- dairy products
- bovine meat.

(a) Fair trade in civil aircraft

The Agreement on Trade in Civil Aircraft entered into force on 1 January 1980. It now has 30 signatories. The agreement eliminates import duties on all aircraft, other than military aircraft, as well as on all other products covered by the agreement — civil aircraft engines and their parts and components, all components and sub-assemblies of civil aircraft, and flight simulators and their parts and components. It contains disciplines on government-directed procurement of civil aircraft and inducements to purchase, as well as on government financial support for the civil aircraft sector.

(b) Government procurement: opening up for competition

In most countries the government, and the agencies it controls, are together the biggest purchasers of goods of all kinds, ranging from basic commodities to high-technology equipment. At the same time, the political pressure to favour domestic suppliers over their foreign competitors can be very strong.

An Agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much of this business as possible to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

The agreement has 28 members. It has two elements — general rules and obligations, and schedules of national entities in each member country whose procurement is subject to the agreement. A large part of the general rules and obligations concern tendering procedures.

Regional Trade Agreements and WTO

Most-favoured nation (MFN) treatment is a key principle underlying the multilateral trading system. In practice, MFN treatment means that a lower customs duty offered by one member of the World Trade Organization (WTO) to another country must be extended to all other members of the WTO. However, a country may enter into a free trade agreement or customs union granting more favourable treatment to the participating states than to the other WTO members if it observes certain conditions stipulated in the relevant provision of the WTO agreements, to ensure the complementarity of the FTA with the WTO system (notably Article XXIV of the GATT, for trade in goods, and Article V of the GATS, for trade in services).

In December 2006, the WTO General Council established a new transparency mechanism for such agreements. This mechanism provides for the early announcement and notification of any agreement to the WTO as well as notification of any subsequent changes affecting the implementation or the operation of an agreement. In addition, the WTO maintains an electronic database including relevant tariff and trade-related information on all notified FTAs. The EFTA Member States are committed to the rules and the implementation of this mechanism, in line with their overall priority given to the multilateral trading system.

In allowing for regional trade agreements, GATT, and then the WTO, set some conditions.

For example, the agreements should apply to substantially all trade among the parties, and should not lead to increased trade barriers to other WTO members. Most regional trade agreements involve reduction of most tariffs to zero, over time. Some, however, involve only one side opening its market to goods or services from a developing country. These are preferential agreements. Both the United States and the European Union offer preferential access through GSP (Generalized System of Preferences) schemes

Examples of regional trade agreements

Among the best known are

- The European Union,
- The European Free Trade Association (EFTA),
- The North American Free Trade Agreement (NAFTA),

- The Southern Common Market (MERCOSUR),
- The Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA), and
- The Common Market of Eastern and Southern Africa (COMESA).

I. EUROPEAN UNION

The European Union is an union of 27 member states located in Europe. Committed to regional economic and political integration, the EU was established by the Treaty of Maastricht in 1993 upon the foundations of the European Communities. There are standardised system of laws which apply in all member states and ensures the free movement of people, goods, services, and capital which has turned the EU in to single market. The European Union is based on the rule of law. This means that everything that it does is derived from treaties, which are agreed on voluntarily and democratically by all Member States. Previously signed treaties have been changed and updated to keep up with developments in society.

All 27 EU member states are individually members of the WTO, but the EU negotiates and acts within the WTO as a single body.The WTO and the multilateral trading system are the core focus for EU trade policy. The EU believes that a system of global rules is the best way to ensure that trade between countries is fair and open.

II. The European Free Trade Association (EFTA)

The European Free Trade Association (EFTA) is an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States.

EFTA was founded by the following seven countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland joined in 1961, Iceland in 1970 and Liechtenstein in 1991. In 1973, the United Kingdom and Denmark left EFTA to join the EC. They were followed by Portugal in 1986 and by Austria, Finland and Sweden in 1995. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

EFTA was founded by the Stockholm Convention in 1960. The immediate aim of the Association was to provide a framework for the liberalisation of trade in goods amongst its Member States. At the same time, EFTA was established as an economic counterbalance to the more politically driven European Economic Community (EEC). Relations with the EEC, later the European Community (EC) and the European Union (EU), have been at the core of EFTA activities from the beginning. In the 1970s, the EFTA States concluded free trade agreements with the EC; in 1994 the EEA Agreement entered into force. Since the beginning of the 1990s, EFTA has actively pursued trade relations with third countries in and beyond Europe. The first partners were the Central and Eastern European countries, followed by the countries in the Mediterranean area. In recent years, EFTA's network of free trade agreements has reached across the Atlantic as well as into Asia.

III. North American Free Trade Agreement

On January 1, 1994, the North American Free Trade Agreement between the United States, Canada, and Mexico (NAFTA) entered into force. It superseded the Canada-United States Free Trade Agreement between the U.S. and Canada. NAFTA created the world's largest free trade area, which now links 444 million people producing $17 trillion worth of goods and services. It created a free trade area among developed and developing economies. It is one of the first agreements to include agriculture as well as other industries.

The North American Free Trade Agreement is an example of a free trade area in which barriers to trade among member countries are eliminated, but allows each country to establish its own external trade barriers. The current members of NAFTA are Canada, the United States of America and Mexico.

IV. The Southern Common Market (MERCOSUR)

MERCOSUR is a trading bloc in Latin America comprising Brazil, Argentina, Uruguay and Paraguay. It has Chile and Bolivia as its associate members. MERCOSUR was formed in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto with the objective of facilitating the free movement of goods, services, capital and people among the four member countries. MERCOSUR has become a successful market of about 200 million people, representing about 1 trillion dollars of GDP and 190 billion dollars of trade. It is the fourth largest integrated market after the European Union (EU), North American Free Trade Agreement (NAFTA) and ASEAN.

V. ASEAN Free Trade Area (AFTA)

The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand.

Brunei Darussalam then joined on 8 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN.

As set out in the ASEAN Declaration, the aims and purposes of ASEAN, inter alia,are:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations;
2. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
3. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
4. To collaborate more effectively for the greater utilisation of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples and;
5. To maintain close and beneficial cooperation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.

VI. The Common Market of Eastern and Southern Africa (COMESA)

The **Common Market for Eastern and Southern Africa**, the PTA was initially established to take advantage of a larger market size, to share the region's common heritage and destiny and to allow greater social and economic co-operation, with the ultimate objective being to create an economic community. The PTA Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing the Common Market for Eastern and Southern Africa, COMESA, was signed on 5th November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8th December 1994.

COMESA formed in December 1994, replacing a Preferential Trade Area which had existed since 1981. Nine of the member states formed a free trade area in 2000 (Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe), with Rwanda and Burundi joining the FTA in 2004 and the Comoros and Libya in 2006.

COMESA is one of the pillars of the African Economic Community.

VII. **Asia Pacific Trade Agreement (APTA)**

The Asia-Pacific Trade Agreement (APTA), formerly known as the Bangkok Agreement, the trade was signed on 31st of July 1975 as a proposal of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) which is the provincial expansion arm of the United Nations for the Asia-Pacific region. It emphasize on issues that are most successfully addressed through regional cooperation.

VIII. South Asian Association for Rgional Cooperation (SAARC)

SAARC has BANGLADESH, BHUTAN, INDIA, MALDIVES, NEPAL, PAKISTAN and SRI LANKA as its member countries.

The objectives of SAARC inter alia, include:

a) To accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials;

b) To promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields;

c) To strengthen cooperation with other developing countries;

d) To strengthen cooperation among themselves in international forums on matters of common interests; and

e) To cooperate with international and regional organisations with similar aims and purposes.

PART 2

INDIA AND WTO

Trade Profile of India

INDIA'S FOREIGN TRADE: OCTOBER, 2011

A. EXPORTS (including re-exports)

Exports during October, 2011 were valued at US$ 19869.97 million (Rs.97875.32 crore) which was 10.82 per cent higher in Dollar terms (22.92 per cent higher in Rupee terms) than the level of US$ 17929.64 million (Rs. 79626.77) during October, 2010. Cumulative value of exports for the period April-October 2011 -12 was US$ 179777.23 million (Rs 820679.43 crore) as against US$ 123170.46 million (Rs.564313.87 crore) registering a growth of 45.96 per cent in Dollar terms and 45.43 per cent in Rupee terms over the same period last year.

B. IMPORTS

Imports during October, 2011 were valued at US$ 39513.73 million (Rs.194636.35 crore) representing a growth of 21.72 per cent in Dollar terms (35.01 per cent in Rupee terms) over the level of imports valued at US$ 32461.70 million (Rs. 144164.69 crore) in October, 2010. Cumulative value of imports for the period April-October, 2011-12 was US$ 273467.77 million (Rs.1251948.19 crore) as against US$ 208821.75 million (Rs. 955937.28 crore) registering a growth of 30.96 per cent in Dollar terms and 30.97 per cent in Rupee terms over the same period last year.

C. CRUDE OIL AND NON-OIL IMPORTS:

Oil imports during October, 2011 were valued at US$ 10076.48 million which was 20.73 per cent higher than oil imports valued at US$ 8346.44 million in the corresponding period last year. Oil imports during April-October, 2011-12 were valued at US$ 81921.93 million which was 40.82 per cent higher than the oil imports of US$ 58175.62 million in the corresponding period last year.

Non-oil imports during October, 2011 were estimated at US$ 29437.25 million which was 22.07 per cent higher than non-oil imports of US$ 24115.26 million in October, 2010. Non-oil imports during April - October, 2011-12 were valued at US$ 191545.84 million which was 27.15 per cent higher than the level of such imports valued at US$ 150646.14 million in April - October, 2010-11.

D. TRADE BALANCE

The trade deficit for April-October, 2011-12 was estimated at US$ 93690.54 million which was higher than the deficit of US$ 85651.29 million during April-October, 2010-11.

EXPORTS & IMPORTS : (US $ Million)

(PROVISIONAL)

	OCTOBER	APRIL-OCTOBER
EXPORTS(including re-exports)		
2010-11	17929.64	123170.46
2011-12	19869.97	179777.23
%Growth2011-12/2010-2011	10.82	45.96

	OCTOBER	APRIL-OCTOBER
IMPORTS		
2010-11	32461.70	208821.75
2011-12	39513.73	273467.77
%Growth 2011-12/2010-2011	21.72	30.96
TRADE BALANCE		
2010-11	-14532.06	-85651.29
2011-12	-19643.76	-93690.54
EXPORTS & IMPORTS : (Rs. Crore)		
(PROVISIONAL)	**OCTOBER**	**APRIL-OCTOBER**
EXPORTS (including re-exports)		
2010-11	79626.77	564313.87
2011-12	97875.32	820679.43
%Growth 2011-12/2010-2011	22.92	45.43
IMPORTS		
2010-11	144164.69	955937.28
2011-12	194636.35	1251948.19
%Growth2011-12/2010-2011	35.01	30.97
TRADE BALANCE		
2010-11	-64537.92	-391623.41
2011-12	-96761.03	-431268.76

India's Perspective to WTO

India has always stood for an open, equitable, predictable, non-discriminatory and rules-based multilateral trade regime. India believes that such a regime best serves the needs of developing countries. The Doha Round of trade negotiations in the WTO provides a historic opportunity to correct distortions in global trade and to improve and strengthen the rules to enable developing countries to play a greater role in world trade.

With development at the heart of the Doha Development Agenda, it is important to ensure that the demands on developing Members are commensurate with their economic capacities, development levels and needs. The requirements of developing countries in terms of financial and technical assistance for capacity building have to be addressed on priority, in order to achieve truly meaningful results from further trade liberalization efforts.

Agriculture continues to be a means of livelihood for large sections of the population in many developing countries. With about 58% of the population still dependent on agriculture for their livelihood, India has a substantial stake in the Agriculture negotiations. India's priority in the Agriculture negotiations has been to safeguard the interests of low income and resource poor agricultural producers, in terms of their food and livelihood security and rural development needs. A substantial and effective reduction in trade-distorting domestic support, the elimination of all forms of agricultural export subsidies and improvements in the transparency and predictability of agricultural trade would be important benchmarks of this Round. This would level the playing field for farmers in the developing world and enable them to access global markets.

In this Round it is important for India and other developing countries to be able to protect the interests of their nascent and vulnerable industries. These include the micro, small and medium enterprises, employment intensive sectors, industries employing socially and economically vulnerable sections such as women, traditional artisans and fishermen, as well as industries in the rural, semi urban, economically disadvantaged and geographically inaccessible regions of the country. The development interests of industries cannot be sacrificed for mercantilist considerations.

India is an original Member of the WTO and provides at least MFN treatment to all Members and other trading partners. India accepted the Fourth and Fifth Protocols and is a Member of the Information Technology Agreement. India is a strong advocate of the multilateral trading system and has historically been party to few regional agreements. However, despite India's reservations, regionalism has increasingly become an element of its overall trade policy objective of enhanced market access for exports. This is evidenced by the seven preferential agreements it signed during the period under review and the negotiation of other agreements.

India's trade policy objectives are stipulated in its Foreign Trade Policy (FTP), which is issued every five years, but revised periodically, through the issuance of notifications, to take into account internal and external factors. India's short-term objective, in accordance with the latest FTP, is to achieve annual export growth of 15%; the long-term objective is to accelerate export growth to 25% per annum and double India's share in global trade by 2020. In order to meet these objectives, India implements a mix of policies including tax incentives, export promotion, and credit facilitation schemes, to "neutralize" the cost of imported inputs used in exports; however, such schemes may contribute to the complexity of India's trade regime. In its attempt to increase exports, the Government is also aiming to improve infrastructure. In the latest Budget, the authorities have further expressed the need to promote market and product diversification.

Measures to attract foreign direct investment (FDI) have included gradually increasing the number of sectors in which FDI is permitted and reducing sectoral restrictions. Therefore, most sectors are currently at least partially open to FDI, subject to a cap and specific conditions. However, FDI is prohibited in a number of sectors/activities, such as retail trading, some real estate activities, manufacture of tobacco and tobacco substitute, and some agriculture activities. A recent consolidation of all prior regulations on FDI is aimed at clarifying India's FDI policy and provides for better understanding and predictability of the foreign investment rules among foreign investors and sectoral regulators.

India's WTO bound tariff levels are much higher than the applied rates, especially for many agricultural products. These gaps allow the Indian Government to modify tariff rates in response to domestic and international market conditions.

India is one of the most active users of anti-dumping measures among WTO Members. It initiated **209 anti-dumping investigations against 34 trading partners during the review period**, compared with 176 in the period covered in its last Review, and it imposed 207 anti-dumping measures, compared with 177. The products involved included chemicals and products thereof, plastics and rubber and products thereof, base metals, and textiles and clothing. India did not take any countervailing actions during this period. Since its last Review in 2007, India has also imposed several safeguard measures. As a result of an amendment of the legislation, since 2010 safeguard measures may also take the form of quantitative restrictions.

SPS matters continue to be governed and enforced through a number of laws and agencies. In 2006, India passed the Food Safety and Standards Act to consolidate separate laws, and to establish an institution to deal with SPS issues. However, the rules and regulations to operationalize this Act have not been notified yet and the Act is therefore not in force.

India grants direct and indirect assistance to various sectors. Most central government subsidies are destined for agriculture. Other key subsidies include those for diesel and fertilizers. The states also provide additional subsidies, especially for basic services such as education and health, electricity, and water. Price controls, which apply to some commodities, are aimed at providing subsidies to farmers and a population under the poverty line, and to ensure “reasonable price” of quality drugs.

India became an observer to the WTO Agreement on Government Procurement in February 2010. Its procurement system continues to be decentralized, comprising a multiplicity of entities at different levels of Government (including numerous central public-sector enterprises), and no common legislation governing procurement. Public procurement is considered an important government policy instrument and is used to obtain certain socio-economic objectives. As a result, the Central Government maintains reservations and price preferences as part of the procurement system. However, competition from foreign suppliers is ordinarily allowed.

India, since its last review, has taken several initiatives to modernize its IPR administration and continue its efforts to enforce IPRs. However, enforcement, except at the international borders, remains under the purview of the state governments rendering it difficult to collect data on the application of IPRs.

Agriculture has been characterized by low productivity and modest growth rates. Its contribution to GDP declined from 18.1% to 16.6% in 2006/07-2009/10. However, despite this decline in its relative share, agriculture continues to be the mainstay of the majority of the population, occupying some 52% of the total workforce (including non-organized labour)

Average tariff protection for agriculture (33.2%) remains, therefore, substantially higher than for manufactured goods (8.9%). India has also retained the price support system for basic commodities and implements other agricultural support programmes at the central and state level.

The services sector, which accounts for 56% of GDP, is the main driver of economic growth, expanding by an average 10% between 2006/07 and 2009/10. Growth in services continued to be led by the financial services subsector, and the trade, hotel, transport and communications subsectors. FDI up to 100% is allowed for most services activities, except for financial services, where limits apply to foreign ownership. However, specific market-access conditions or permits may apply, which in some cases may be more restrictive than an explicit investment cap.

Inadequate infrastructure has become a critical constraint to India’s economic development. To address this concern, the 11th Five-Year Plan outlined a comprehensive strategy to improve both rural and urban infrastructure, including electric power, roads, railways, ports, airports, telecommunications, irrigation, drinking water, sanitation, storage, and warehousing. However, public investment alone would probably be insufficient to address India’s infrastructure needs, particularly considering India’s quest for fiscal consolidation. Hence, an increase in private investment in infrastructure would be necessary to attain India’s goal. Further private sector investment, including foreign investment, may play an important role not only in developing infrastructure but also in providing an opportunity for foreign investors. This would result in more stable, less volatile, capital inflows.

India became the first developing country to extend duty free quota free (DFQF) access to all least developed countries (LDCs) in line with the WTO’s Hong Kong Ministerial mandate. India’s Duty Free Tariff Preference (DFTP) Scheme for LDCs came into effect in April 2008 with tariff reductions spread over five years. This Scheme covers about 92.5% of global exports of all LDCs and provides duty free and preferential tariff access on 94% of India’s tariff lines; 27 countries (19 of which are from Africa) are already availing of the market access and the rest are in the process of completing their documentation for joining the scheme.

BENEFITS TO INDIA BEING MEMBER OF WTO

WTO membership means that the nation automatically receives Most Favoured Nation status. Basically, all 153 WTO members are “most favoured”, which means they must all treat each other the same, and give no preferential trade preference to any one partner without giving that preference to all.

WTO members trade with lower trade barriers, including tariffs, import quotas and excessive regulations. This allows them a larger market for their goods, leading to greater sales, more jobs and faster economic growth. All these benefits have also come to India on becoming a WTO member.

Over 75% of WTO members are developing countries. WTO membership allows them access to developed markets at the lower tariffs, while taking time to remove reciprocal tariffs in their own markets. This gives these countries an opportunity to "catch up" to sophisticated multinational corporations and their mature industries before opening the developing countries' markets to overwhelming competitive pressure.

The successful conclusion of the Doha Round of talks will benefit India and other developing countries. While exports had come back to the positive territory in 2010, a more open global market through a multilateral agreement under the WTO would be in the country's interest.

As per WTO calculations, the Doha round could result in increased world trade worth $150 billion through reduced tariffs on industrial and farm goods.

The question of agricultural subsidies in developed countries has prompted some people to suggest that India should step out of the WTO. Such a step would be self-defeating. The fact is that while agricultural subsidies were supported by most of the leading nations, their number has dwindled." This implies that over the next four to five years subsidies would definitely be on their way out,"and India with high labour power would be able to "excel" in global competition once the agricultural subsidies are done away with.

List of notified India's RTAs in force

I. India & ASEAN

Since its start about a decade ago, the partnership between India and the Association of South East Asian Nations (ASEAN) comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam has been developing at quite a fast pace.

India became a sectoral dialogue partner of ASEAN in 1992. Mutual interest led ASEAN to invite India to become its full dialogue partner during the fifth ASEAN Summit in Bangkok in 1995. India also became a member of the ASEAN Regional Forum (ARF) in 1996. India and ASEAN have been holding summit-level meetings on an annual basis since 2002.

In August 2009, India signed a Free Trade Agreement (FTA) with the ASEAN members in Thailand. Under the ASEAN-India FTA, ASEAN member countries and India will lift import tariffs on more than 80 per cent of traded products between 2013 and 2016, according to a release by the Ministry of Commerce and Industry.

In January 2010, Singapore, Malaysia and Thailand accepted the FTA on goods. The other seven ASEAN countries are expected to operationalise the FTA by August 2010.

India and ASEAN are currently negotiating agreements on trade in services and investment. The services negotiations are taking place on a request-offer basis, wherein both sides make requests for the openings they seek and offers are made by the receiving country based on the requests.

India has made requests in a number of areas including teaching, nursing, architecture, **chartered accountancy** and medicine as it has a large number of English speaking professionals in these areas who can gain from job opportunities in the ASEAN region. India is also keen on expanding its telecom, IT, tourism and banking network in ASEAN countries.

During April - September 2009-10, India's trade with ASEAN was US$ 20.19 billion, according to data released by the Ministry of Commerce and Industry. In 2008-09, India's exports to ASEAN totalled US$ 19.14 billion. During April-December 2009-10, India exported goods worth US$ 12.8 billion to ASEAN, according to data released by the Ministry of Commerce and Industry.

India imported goods worth US$ 26.3 billion in 2008-09 from ASEAN. During the period April-December 2009-10, India's imports from ASEAN totalled US$ 18.09 billion, according to data released by the Ministry of Commerce and Industry.

Singapore continues to be the single largest investor in India amongst the ASEAN countries and the second largest amongst all countries with foreign direct investment (FDI) inflows into India, totalling US$ 2.4 billion in 2009-10.

II. MERCOSUR - India

A Framework Agreement was signed between India and MERCOSUR on 17 th June 2003 . The aim of this Framework Agreement is to generate conditions and methods for negotiations in the first stage, by granting reciprocal tariff inclinations and in the second stage, to negotiate a free trade area between the two parties in conventionality with the rules of the World Trade Organization. As a follow up to the Framework Agreement, a Preferential Trade Agreement (PTA) was signed in New Delhi on January 25, 2004.

The aim of this Preferential Trade Agreement is to enlarge and reinforce the existing relations between MERCOSUR and India and endorse the extension of trade by granting reciprocal fixed tariff preferences with the ultimate objective of creating a free trade area between the parties. MERCOSUR is a trading bloc in Latin America formed in 1991 and comprising Brazil, Argentina, Uruguay and Paraguay. It was formed with the objective of making possible the free movement of goods, services, capital and people among the four member countries.

III. Agreement on South Asia Free Trade Area (SAFTA)

The Agreement on South Asian Free Trade Area (SAFTA) was signed by all the member States of the South Asian Association for Regional Cooperation (SAARC) during the twelfth 'SAARC Summit' held in Islamabad on 4-6th January, 2004. As a result, SAFTA came into force from 1st January, 2006.

SAARC was recognized in Dhaka on December 7-8, 1985 with the intentions of:- promoting the profit of people of South Asia; hastening economic growth and social progress; promoting active collaboration in the economic, social, cultural, technical and scientific fields; increasing cooperation in international forums on matters of common interest; and cooperating with international and regional organizations with similar goals and principles.

Its members include Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The objectives of SAFTA are to endorse and augment mutual trade and economic cooperation among the 'Contracting States' by inter-alia:-

- Eradicating barriers to trade in, and assisting the cross-border progress of goods between the territories of the Contracting States;
- Encouraging conditions of fair competition in the free trade area, and ensuring equitable benefits to all Contracting States, taking into account their respective levels and pattern of economic development;
- Creating successful methods for the execution and application of this Agreement, for its joint administration and for the resolution of disputes; and
- Creating a framework for additional regional cooperation to develop and enhance the common benefits of this Agreement

IV South Asian Preferential Trade Arrangement (SAPTA)

The launching of South Asian Preferential Trade Arrangement (SAPTA) in 1995 was the first major political breakthrough for the SAARC since it was the first regional agreement on economic cooperation. Regional integration, often preceded by free trade agreements, can result in greater regional output and resource utilisation, although depending on the policy structure existing in the member countries the expansion in trade could be termed welfare-enhancing (in case of trade-creation) or welfare-reducing (trade-diversion).

V. Global System of Trade Preferences among Developing Countries (GSTP)

The Agreement on Global System of Trade Preferences among developing countries (GSTP) was negotiated in the year 1988 by 48 developing countries that were member of Group of 77 as a framework for the exchange of trade preferences among developing countries in order to promote intra-developing-country trade..

The declared objectives of the GSTP are: To promote and sustain mutual trade, and

To develop economic co-operation among developing countries (members of Group of 77).The objective of these rules is to determine the origin of products eligible for preferential concessions under GSTP. Products, which have achieved the status 'originating in India', are eligible for preferential tariff treatment upon imports into participant countries.

VI. India - Chile

India and Chile have signed a Framework Agreement on Economic Cooperation The agreement is meant to promote expansion of trade by providing limited preferential access to each other initially. The Minister has said that the signing of the Framework Agreement is part of the strategy to boost India's exports and improve its share of world trade, which at present is less than 1%. India, of late, has been engaging itself with various regions/countries for preferential trading arrangements (PTA).

VII. India - Afghanistan

A Preferential Trade Agreement was signed between India and Afghanistan on March 6, 2003 in New Delhi which provides for, among others, establishing a Preferential Trading Arrangement between the two countries to promote harmonious development of the economic relations and free movement of goods through reduction of tariffs between the two countries.

The Agreement would remain in force till either party gives to the other a notice for the Agreement's termination. By this Agreement, preferential tariff is granted by the Government of Afghanistan to 8 items from India including tea, antisera and medicines, refined sugar, cement clinkers and white cement. India has granted preferential tariff to 38 products from Afghanistan including raisins, dry fruit, fresh fruits and spices.

Rules of Origin: The products to exported to each other have to satisfy the Rules of Origin attached to the Agreement. As per the cumulative rules of origin prescribed therein, in respect of a product which complies with the origin requirements is exported by any Contracting Party and which has used material, parts or products originating in the territory of the other Contracting Party, the value addition in the territory of the exporting Contracting shall be not less than 30 per cent of the f.o.b. value of the product under export subject to the condition that the aggregate value addition in the territories of the Contracting Parties is not less than 40 per cent of the f.o.b. value of the product under export.

VIII. India - Bhutan

The Agreement on Trade and Commerce between India and Bhutan was concluded in **17.1.1972.** It has been renewed periodically, with mutually agreed modifications. The current Agreement between the two countries on Trade, Commerce and Transit was renewed on 28th July 2006 and operational from 29 July 2006 for a period of 10 years.

SALIENT FEATURES OF THE AGREEMENT

- No restrictions by India on Bhutan's trade with third countries; Under the Agreement India provides for 16 exit/entry points for this purpose.
- Both sides may impose non-tariff restrictions on import of third country goods from each other's territory;
- Trade transactions in Indian rupees or Bhutanese Ngultrums. With effect from 3.3.1994, India has also allowed export of goods to Bhutan, under bond, against payment in free foreign exchange, with duty exemptions as for third country exports;
- Mutual refund annually of the excise duties on goods exported to each other;

The new agreement also provides for movement of Bhutanese goods from one part of Bhutan to another part of Bhutan through India.

IX. India - Japan

Aimed at doubling the bilateral trade to USD 25 billion in three years, the Comprehensive Economic Partnership Agreement (CEPA) signed in August in 2011 will result in 94 percent of the bilateral tariffs being eliminated within 10 years. But duties have been removed or slashed on the bulk of items right away, according to the pact, India's first with a developed country.

India has made commitments for liberalisation of its market in telecom, financial and distribution sectors.

While the automobile sector has largely been protected from the cheap Japanese imports, New Delhi has "shown flexibility to the demand of Japanese side for parity with South Korea for items such as diesel engine and gear boxes".

X. India - Malaysia

The free trade agreement between India and Malaysia came into force in June 2011 giving Indian professionals like accountants, engineers and doctors access to the key South-East Asian nation.

In addition, exports of items of considerable interest to India, like basmati rice, mangoes, eggs, trucks, motorcycles and cotton garments, will attract lower or no duty in Malaysia with the implementation of the Comprehensive Economic Cooperation Agreement (CECA).

It said sensitive sectors like agriculture, fisheries, textiles, chemicals and automobiles have been given protection from imports without duty or with significant cuts.

The CCEA will facilitate temporary movement of business people, including contractual service suppliers and independent professionals in accounting, architecture, engineering services, medical and dental, nursing and pharmacy, computer services and management consulting.

XI. India - Nepal

The bilateral trade between India and Nepal is regulated by the Treaty of Trade. Both sides are also engaged in mutual consultation process to amend the treaty of trade and once this process is over, the amended Treaty of Trade shall replace the existing Treaty, after necessary approval. Pending completion of the process for its renewal with certain amendments proposed, the validity of the Agreement would continue till a new Treaty comes into force. Under this Treaty, there is free trade on mutually agreed to primary products from each other as indicated in Protocol to Article IV of the Treaty. In the case of industrial goods produced in Nepal, Article V of the Treaty provides for India to give, on a non-reciprocal basis, duty-free access to Nepalese goods without any quantity restriction. This is subject to fulfilling the twin criterion of four-digit tariff head change and value addition of 30% at ex-factory price in Nepal. This duty-free access is, however, restricted to annual quotas on four sensitive items in the interest of the domestic industries in these sectors. These are vanaspati (one lakh metric tonnes), Copper products and Acrylic Yarn (Ten thousand metric tones each) and Zinc Oxide (2500 metric tonnes). The routes for bilateral trade can be mutually decided; in the present Treaty, twenty two mutually agreed routes are prescribed for bilateral trade. The Treaty provides for setting up Joint Committee in the event the imports under the Treaty result in injury to the domestic industry in each country.

Treaty of Transit: India provides transit facilities to the landlocked Nepal under the Treaty of Transit. The current Treaty which was renewed in January 2006 would be in force for a period of seven years up to 5.1.2013. This Treaty provides for free movement of traffic-in-transit across territories of each other through mutually agreed routes for trade with third countries subject to taking measures to ensure that this does not infringe legitimate interests/security interests of each other. Traffic in transit is exempted from customs/all transit duties.

Agreement of Cooperation to Control Unauthorized Trade: India and Nepal have also signed an Agreement of Cooperation to Control Unauthorized Trade between the two countries. This Agreement was last renewed for five years with effect from 6.3.2002. The objective of this Agreement is to check illegal trade (smuggling) between the two countries. This Agreement has also been renewed w.e.f. 6.3.2007 in its present form.

XII. India - Singapore

During the visit of Prime Minister to Singapore in April 2002 to India, a Joint Study Group (JSG) for establishing a Comprehensive Economic Cooperation Agreement (CECA) between the two countries was set up on 8th April 2002. The JSG submitted its report to the two Prime Ministers on 8th April 2003. The JSG identified areas of increased economic engagement between the two countries and also recommended measures to be taken. The JSG recommended the early launching of negotiations for a CECA to be structured as an integrated package of agreement between India and Singapore including :-

a) A Free Trade Agreement, which would include, inter-alia, trade in goods and services and investment.

b) A bilateral agreement on investment promotion, protection and cooperation;

c) An improved Double Taxation Avoidance Agreement;

d) A more liberal Air Services Agreement and Open Skies for Charter Flights; and

e) A work programme of cooperation in a number of areas including health care, education, media, tourism and the creation.

'Declaration of Intent' was signed between the two countries on 8th April 2003. Negotiations on CECA were launched in New Delhi on 27-28 May 2003. Commerce Secretary headed the team of Indian negotiators while Singapore was led by their Permanent Secretary, Ministry of Trade & Industry, Singapore. Twelve Rounds of negotiations were held alternatively in India and Singapore.

The Comprehensive Economic Cooperation Agreement (CECA) between India and Singapore was signed on 29th June, 2005 by the Prime Minister Mr. Manmohan Singh and H.E. Mr. Lee Hsien Loong, Prime Minister of Singapore. The CECA has become operational with effect from 1-8-2005.

The implementation of CECA was reviewed recently at the level of Secretaries.

XIII. India - Sri Lanka

There is a bilateral Free Trade Agreement (ISLFTA) with Sri Lanka which has been signed on 28.12.98. Under this Agreement, both countries are committed to the elimination of tariffs in a phased manner. ISLFTA became operational from March 2000.

Under the FTA, tariff on a large number of items are phased out within an agreed time frame except in the Negative List. As per the provision of the ISLFTA, India has already completed its tariff liberalisation programme on 18th March, 2003 whereas Sri Lanka's tariff liberalisation programme would be completed in the year 2008. The two sides also maintain Negative Lists of items on which TLP are not applicable. India has 429 tariff lines in its Negative List, whereas Sri Lanka has kept 1180 items in the Negative List.

Now, both Government of India and Sri Lanka are negotiating on a Comprehensive Economic Partnership Agreement (CEPA) to build upon the ISLFTA by deepening and widening the coverage by including Trade in Services, Investment Economic Cooperation etc.

XIV. India - Korea

H.E. Mr. Manmohan Singh, Prime Minister of the Republic of India and H.E. Mr. Roh Moo-hyun, President of the Republic of Korea met in New Delhi on 6 October 2004 and agreed to establish a Joint Study Group to take a comprehensive view of bilateral economic linkages between Korea and India, covering, among others, trade in goods and services, investment flows, and other areas of economic cooperation. In particular, the Joint Study Group was mandated with the task of, *inter alia*, examining the feasibility of a comprehensive economic partnership agreement (CEPA) between the two countries.

Taking into account the long-term economic relationship to be developed between the two countries, the Joint Study Group recommended that the Korea-India CEPA cover, among other things:

- Trade in goods;

- Trade in services;
- Measures for trade facilitations;
- Promotion, facilitation and liberalization of investment flows;
- Measures for promoting bilateral economic cooperation in identified sectors; and
- Other areas to be explored for furthering bilateral partnership.

In pursuance to the recommendation of the JSG, a Joint Task Force composed of Government officials has been constituted. The first meeting of India-Korea JTF was held on 23rd and 24th March, 2006. The second and fourth meetings were held in Seoul in the month of May and October 2006. The third and fifth meeting were held in New Delhi and Jaipur respectively in the month of July 2006 and January 10-12, 2007.

List of RTAs for which an early announcement has been made

I.Bay of Bengal Initiative on Multi-Sectoral Technical and Economic Cooperation (BIMSTEC)

BIMSTEC (Bangladesh India Myanmar Sri Lanka and Thailand Technical and Economic Cooperation), a sub-regional economic collaboration consortium was formed in Bangkok in June 1997. Myanmar connected to the alliance later in December 1997. Bhutan and Nepal too united with the alliance in February 2004. Its membership involves 5 members of SAARC (India, Bangladesh, Bhutan, Nepal & Sri Lanka) and 2 members of ASEAN (Thailand, Myanmar). Thus, it is pictured as a 'bridging link' between the two major regional groupings i.e. ASEAN and SAARC. Its chairmanship of BIMSTEC revolves amongst the member countries in alphabetical array. The immediate priority of the grouping is combining of its activities and making it striking for economic cooperation.

- At its first summit held in Bangkok on July 31, 2004, the acronym BIMSTEC was renamed as "Bay of Bengal Initiative for Multi Sectoral Technical and Economic Cooperation."
- In the beginning, cooperation was planned into 6 sectors. But, throughout the 11th Senior Official Meeting in New Delhi in August 2006, it was decided that the areas of cooperation should be prolonged to 13 sectors and each sector will be lead by members in a deliberate manner.
- The India trade agreements as discussed above follow a very concretive approach making the trade rules and regulations on their place along with the fulfillments of the requirement of the trade.

II. India - EU

India is an important trade partner for the EU and a growing global economic power. It combines a sizable and growing market of more than 1 billion people with a growth rate of between 8 and 10 % - one of the fastest growing economies in the world. Although it is far from the closed market that it was twenty years ago, India still also maintains substantial tariff and non-tariff barriers that hinder trade with the EU. The EU and India hope to increase their trade in both goods and services and investment through the Free Trade Agreement (FTA) negotiations that they launched in 2007. Negotiations are expected to be concluded in early 2012.

The EU-India FTA

With its combination of rapid growth and relatively high market protection India was an obvious partner for one of the new generation of EU FTAs launched as part of the Global Europe strategy in 2006.

The parameters for an ambitious FTA were set out in the report of the EU-India High Level Trade Group in October 2006, which was tasked with assessing the viability of an FTA between the EU and India. Other studies have reinforced the economic potential of an FTA between the EU and India.

Negotiations for such FTA were launched in June 2007 and, so far, eleven negotiating rounds have been held. The last EU-India Summit took place on 10 December 2010 in Brussels.

EU technical and financial trade assistance to India

To assist India in continuing its efforts to better integrate into the world economy with a view to further enhancing bilateral trade and investment ties, the EU is providing trade related technical assistance to India. •13.4million were allocated through the Trade and Investment Development Programme (TIDP) funded from the Country Strategy Paper (CSP) 2002-2006. At present, the follow-up programme to the TIDP is being designed and will be funded by the Country Strategy Paper 2007-2013.

III. India - EFTA

The European Free Trade Association (EFTA) is an intergovernmental organisation for the promotion and intensification of free trade. EFTA was founded as an alternative for states that did not wish to join the European Community (EC). Its objectives were to promote free trade among its members and establish a broader economic union with the rest of Western Europe. The EFTA countries wished to give an impetus to the expansion of free trade.

Regarding trade in goods between India and EFTA, Switzerland is India's largest trading partner among the EFTA States. Exports from Switzerland to India are predominantly of precious metals and precious stones. Trade in services is an area of great potential between the EFTA States and

India. It is an important sector of the economy for both sides. The services entities in both EFTA and India have already started making use of the complementarities and have started providing services through various modes of services supply. India's growing pharmaceutical and textile industry would create opportunities for exports of capital goods as well as high end inputs by EFTA countries. Norway's expertise in shipping vessels complements the growing shipping and marine products sectors in India. A major oil exploration program is under way in India. Norway has expertise in this

sector. A major role for Norwegian companies in India could be visualised in this sector.

IV. India-SACU (Southern African Customs Union) Framework Agreement

The level of bilateral trade between India and South Africa is quite low at present. South Africa is not a major export destination for India; neither is the latter figuring in the list of principal trading partners of South Africa. The market share enjoyed by either of them in each other's market is quite insignificant. Less than one per cent of India's exports go to South Africa. However, in the last few years bilateral trade between the countries has recorded a double-digit growth rate. During 1998-1999 to 2002-2003, India's imports from South Africa increased by more than 54% per cent, while exports increased by more than 22 per cent.

Following a bilateral meeting held between Indian and South African delegations in New Delhi in July, 2002, a principle decision was taken to enter into the negotiation of a Preferential Trading Arrangement (PTA) with a view to deepen the mutual trade and investment flows, between the two countries.

Later on, South Africa sought confirmation whether they can include other partners of SACU for negotiating a Comprehensive Trade Agreement. This suggestion was examined in consultation with the Ministry of External Affairs and the mandate was given to negotiate with SACU as a group and not South Africa individually.

PART 3

OPPORTUNITIES FOR CAs UNDER WTO REGIME

1. Accountancy Sector in India

In independent India, the Chartered Accountant Act of 1949 led to the formation of the Institute of Chartered Accountants of India (ICAI) and this law, with some modification, governs the profession of chartered accountancy in India. Likewise, the Cost and Works Accounts Act, 1959 governs the profession of cost accountancy. The ICAI has a three-pronged role in the accounting sector in India. It is the institution which grants chartered accountancy qualifications, sets accounting and auditing standards in India, and acts as the watchdog for the industry by maintaining discipline and standards among its members.ICAI is one of the founding members of IFAC and among IFAC's 2.5 million registered accountants, ICAI accounts for around 123,500 professionally-trained accountants. The ICAI website suggests that about 4,000 of its members reside and practice abroad. Other professional bodies in this sector are the Institute of Costs and Work Accountants of India (ICWAI), whose membership was 19,335 in 2005 and the Institute of Company Secretaries of India (ICSI).

The Institute, which functions under the administrative control of Ministry of Corporate Affairs, Government of India, has five Regional Councils and 118 branches covering the length and breadth of the country. In addition, it has also set up 21 chapters outside India. The following is the membership details of the ICAI :

FELLOW	IN FULL TIME PRACTICE	54997
	IN PART TIME PRACTICE	3164
	NOT IN PRACTICE	10813
		68974
ASSOCIATE	IN FULL TIME PRACTICE	21456
	IN PART TIME PRACTICE	5001
	NOT IN PRACTICE	75179
		101636
	TOTAL MEMBERSHIP	170610

Source : www.icai.org

The Indian accounting and auditing standards are developed on the basis of international accountancy standards. Along with improving the quality of financial reporting and corporate governance in the country, this has also helped Indian accountants to provide international standard services to prospective clients. Another factor which has helped the image of Indian accountants is that to date there has not been any large-scale litigation against audit practitioners in India.

Unlike the global accounting scenario where a few firms dominate the industry, the Indian accounting sector is characterized by small- and medium-sized firms. Small firms typically have 2-3 Chartered Accountants with a few Article Clerks; the medium-sized firms employ around 5-6 Chartered Accountants. According to the ICAI website, there are more than 53,000 such audit firms in India. Some of these firms are associates of the global big players. Compared to the global accountancy sector, market concentration in India is much lower. According to a World Bank study, about 1,000 firms audit at least one economically significant unit while 15 of the largest firms audit more than 70 per cent of the top 100 listed firms.

1A. Domestic regulations in India for accountancy profession

The difference in structure of the Indian accountancy sector stems from the Chartered Accountants Act and certain regulations imposed by the ICAI. According to the Chartered Accountants Act an accountant is prohibited from soliciting customers, and paying commission, brokerage or share of profits to anybody other than another accountant. They are also not allowed to publish advertisements about their products and services. Due to these restrictions, in India there is a dearth of big accountancy firms. Most of the bigger Indian firms are associates of the global big players.

However, it seems that even the surrogate presence of the Big Four is leading to a change in the structure of the domestic accountancy sector. Recent reports indicate that foreign firms operating in India prefer the Big Four firms for their auditing work and this is forcing smaller CA firms down the value chain. These reports also indicate that something similar is happening in joint venture firms where there are pressures from the foreign partner to use one of the Big Four firms as a statutory auditor. This is forcing some Indian Chartered Accountants to do low value added works for foreign firms in India. It is also worth mentioning here that, on the grounds of reciprocity, ICAI at present does not recognize any foreign qualifications.

Anant and Zutshi (1999) have pointed out that under the framework of GATS and WTO reciprocity is no longer an admissible basis to justify policy. They suggest that ICAI should take more initiative to adopt Mutual Recognition Agreements with other countries. ICAI, on the other hand, is of the opinion that ICAI rules are not discriminatory because, according to their rules, a citizen of any country can acquire Indian chartered accountancy qualification by taking the required tests, which is not the case in many countries where residency is an essential criterion.

1B. Accounting services under GATS

Because the legal and regulatory framework for accountancy services widely differs across countries, it is not even easy to define accountancy services in the international context. The Provisional Central Product Classification (CPC) of the United Nations has “accounting, auditing, and book keeping services [CPC 862]” under the category of “business services.” The category CPC 862 is further subdivided as follows:

Accounting and auditing services (CPC 8621)	Financial auditing services (CPC 86211) Accounting review services (CPC 86212) Compilation of financial statements services (CPC 86213) Other accounting services (CPC 86219)
Bookkeeping services, except tax returns (CPC 8622)	Bookkeeping services, except tax returns (CPC 86220)

However, the range of services provided by accountants or accounting firms has substantially expanded beyond the traditional definition. In addition to accounting, auditing, and bookkeeping services, they often provide merger audits, insolvency services, tax advice, investment services, and management consulting. Differences in the regulatory environment result in different definitions from country to country.

1C. Modes for the supply of services under GATS :

There are four modes for supply of services under GATS. These are :

(1) Cross-border supply (2) Consumption supply (3) Commercial presence and (4) Presence of natural persons.

Mode of Supply according to GATS	GATS Definition	Examples
Mode 1 Cross-border supply	The supply of a service" from the territory of one Member into the territory of any other Member." The service travels, but both the provider and the consumer stay home. **Comparable to the export of a good**.	Rendering consultancy services by a CA firm from India to overseas countries. Only consultancy travels and not the CA.
Mode 2 Consumption abroad	The supply of a service "in the territory of one Member to the service consumer of any otherMember." Comparable to **tourism or business travel by the consumer.**	Where client visits India and takes consultancy services from Indian CA firm
Mode 3 Commercial presence	The supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member." GATS-speak for **foreign direct investment.**	Opening up offices abroad for rendering services
Mode 4 Movement of natural persons	The supply of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." **Comparable to temporary emigration or business travel by the service provider**.	Movement of CA professionals under skilled migration programs

For Mode 1, 'Outsourced Accounting Engagements' can provide a significant market for Indian BPOs and KPOs. These services include work related to a) Statutory books and records, b) Management books and records, c) IT implementation, d) Preparation and compilation of accounting documents (financial statements/annual report), e) Preparation of periodic financial statements, and f) Organization of accounting systems and related internal control. So far in the accountancy sector Indian BPOs and KPOs mostly deal with the US market and business with the European market is only gradually increasing. But Indian BPOs and KPOs are extremely keen on the European market as well as for their business expansion.

There are a few concerns about the laws of different EU countries regarding Mode 1 service provision. Commercial presence is sometimes required to provide services in this sector. Removal of this requirement is one of India's requests in the multilateral forum. Issues regarding data protection and privacy have not yet created much problem for service providers in this sector but these are potential problem areas which should be taken care of.

India has not committed to open Mode 3 in this sector in the WTO negotiations. It is almost certain that EU countries will request India to open Mode 3. In that case, India should ask for similar and reciprocal treatment for Indian firms in the EU and other markets. Especially for countries with a lower rank than India in the Doing Business Database, negotiators could ask for at least equivalent treatment for Indian firms. Further issues that also affect Mode 3 (and Mode 4) in this particular sector are the restrictions on deployment of foreign staff and use of foreign temporary workers in many of the EU countries. A study by Copenhagen Economics 2005 shows that in the accountancy sector, the entry of executives, senior managers or specialists is restricted in Spain, Greece and Italy. In Germany, Denmark, Finland and Sweden there are restrictions on their duration of stay while in Belgium, France and Poland prior declaration is required for such deployment of staff. Similarly for the use of foreign temporary workers in this sector, there are restrictions in Germany, Spain and Finland. In most other countries including Belgium, Denmark, France, the UK, Greece, Hungary, Ireland, Italy, the Netherlands, Portugal and Sweden there are rules regarding prior authorization and establishment for such workers. India should push for more liberal treatment of foreign workers in these countries. Another important form of legal barrier, which can potentially act as a serious market access barrier for Indian accountants, is the 'nationality requirement' for this sector. A study by Copenhagen Economics (2005) has listed the countries with various levels of nationality and residence requirements for the sector.

For **Mode 3,** apart from the professional licensing issues discussed above, commercial

presence involves handling the domestic rules and regulations of starting up and operating a business in a foreign country.

1D. Nationality of residence requirements in Accountancy Sector

Restriction Category Countries	Countries
Citizenship/Nationality required to practise + Permanent or prior residence (more than 12 months)	Austria, Spain, Finland, Italy, Greece
Citizenship/Nationality required to practise + less than 12 months of prior residence	None
No Nationality requirements + Permanent or prior residence (more than 12 months)	Germany, Denmark, UK, Hungary, Portugal, Sweden
No Nationality requirements + Domicile or representative office only	France, Belgium
No restrictions	Netherlands, Poland

Source: Copenhagen Economics .

The table shows that in some countries nationality requirements are quite stringent. For foreign professionals, this can act as a major market access barrier in the accountancy sector. Moreover, many of the EU countries have stringent requirements regarding qualification and training of accountants. Table 9 summarizes the country positions. From the table it can be seen that for Finland, France, Hungary, Poland and Portugal there is no set and standard rule for all foreign professionals; they are allowed on a case-by-case basis. Not surprisingly, this leads to a high level of opacity in the system and makes it difficult for professionals to access these markets.

1E. Professional Qualifications for foreign service providers in Accountancy Sector

Restriction Category	Countries
Local examination and training required for a licence	Austria, Germany, Spain, UK, Netherlands and Sweden
Local examination required	Denmark, Italy
Case-by-case assessment of foreign licence and qualifications	Finland, France, Hungary, Poland and Portugal
Foreign licence and qualifications sufficient for practice	Lithuania

Source: Copenhagen Economics .

Even more important from the Indian perspective is that many of the major EU markets (Germany, Spain, the UK, the Netherlands and Sweden) require foreign professionals to both pass the local examination (which for accountants includes local tax and company law variations) and go through local training (or articleship) in order to practise. This implies that a Chartered Accountant from India will not only have to pass the examination but also they will have to undergo a period of articleship in that country. Since CAs get only a stipend during their period of articleship, it becomes difficult for the person to sustain himself in a foreign country. This provision acts as a major barrier and efforts should be made to remove this particular requirement. There are some strong reasons to argue for its removal. First, with increasing standardization of accountancy rules across the globe, it is difficult to understand why a trained and experienced CA from another country has to go through the basic local training again. There is considerable duplication because the EU is increasingly adopting international accounting practices and accounting standards in India are currently well aligned with international accountancy standards. Second, Indian company and tax laws are closely based on the corresponding rules of many European countries, especially the United Kingdom. Historical proximity and similarity of tax and accounting laws should provide Indian negotiators with strong grounds to argue for the removal of the local training requirement for Indian CAs. It must be kept in mind that the requirement to undergo local training acts as a major disincentive for a trained and experienced CA to access the market in one of these countries. This point was repeatedly mentioned by several CAs during our interviews. Our negotiators should try to get this requirement waived for Indian CAs. In this context, the role of Mutual Recognition Agreements or MRAs becomes paramount. India currently does not have MRAs with any of the EU countries.

Along with the sector-specific issues mentioned here, there are two horizontal factors which may restrict market access of Indian professionals in the EU market. First is the problem of visas. Though this problem is not documented as a major barrier for Indian professionals, almost all the accountants and business managers interviewed during this study identified it as one of the major hassles of doing business with EU countries. According to them, streamlining the visa procedure should be an important target for Indian negotiators. This issue is not specific to this sector but is a 'horizontal' issue which the negotiators should try to address. Another barrier which acts as a quantitative restriction for the services market is the Economic Needs Test (ENT) that is required in certain countries.The ENT should be abolished as it goes against the basic premise of trade and competitiveness. In the revised offer, the EU has proposed removing the ENT for many sectors, including professional services. Also, India has asked for the removal of the ENT in the GATS negotiations and this stance should be maintained.

There are significant business opportunities for accounting professionals and Indian firms beyond the few audit services which are heavily regulated. There are non-statutory audit services which are less regulated and there are tax, accounting and consultancy services. In fact these services account for more than 60 per cent of the revenues of big accounting firms in Europe. Mode 1, Mode 3 and Mode 4 are the possible modes for delivering these services. Indian accountancy service providers are more likely to gain market access in these services.

Due to the above reasons, ICAI has signed up the following Memorandum of Understanding/Mutual Recognition Agreements so that Indian CA's gain market access abroad :

1. Mutual Recognition Agreement with The Canadian Institute of Chartered Accountants (CICA)
2. MOU with HCT, Ministry of higher education and scientific research,
3. Mutual Recognition Agreement between ICAI and CPA Ireland
4. ICAI Signs Joint Declaration with The Bahrain Institute of Banking and Finance
5. Memorandum of Understanding (MoU) with The Institute of Chartered Accountants in Australia
6. MRA With CPA Australia
7. Memorandum of Understanding between ICAI and University of Djbouti
8. Announcement on License Agreement with ISACA - (30-01-2009)
9. MoU with ICAEW

2. PROFESSIONAL OPPORTUNITIES FOR CHARTERED ACCOUNTANTS IN INTERNATIONAL TRADE AND WTO

2.A There are immense opportunities existing at various levels for Chartered Accountants in international trade and WTO regime, we can explore at the following levels depending upon our expertise and capacity :

- National and State Governments - Technical Advisory to Government bodies and Policy makers on Policy Formulation
- Government Departments at national and state level
- Export Promotion Councils
- Different Industry Associations
- Exporters and Importers
- Domestic Industry
- NGO's

Chartered Accountants can work primarily in International Trade Law, WTO Issues - Anti Dumping, Counter-Veiling Duty, Uniform Customs and Practice - Letter of Credit - Standby, Arbitration including International Commercial Arbitration and Maritime Arbitration, Corporate Law, Company Law-Formation of Company in India and Abroad, Opening of Branch and Liaison Offices etc., Joint Venture, Franchising, Agency & Distributorship Agreements, International Commercial Practices, Intellectual Property Rights - Trade Marks, Copy Rights, Patents, Domain Disputes, Insurance, Maritime, Shipping Law, Energy Law, Electricity, Mining Law, Telecommunication, TRAI, Environmental Cases, Excise, Custom, Sales Tax, VAT, etc.

2.B CAs can play significant role of providing professional services in various facets in WTO regime. The important areas amongst them are as under:

1.**Anti Dumping** - This involves assisting Indian Producers wishing to request imposition of anti dumping duties, Foreign Producers wishing to respond to the Investigating Authorities and consumers wishing to protect their legitimate business interests.

2. **Safeguards** - Safeguard measures are targeted against increased imports as against Anti-Dumping, which is a measure against unfair practices of dumping. It provides a short-term relief as against anti-dumping, which provides long-term relief. This involves assisting the industry and investigating authorities.

3. **Subsidies** - Subsidization of goods results from the Governmental Practices, in which Government confers an advantage to domestic producers or exporters involving a financial contribution by the Government is another area where CA's can be part of investigation.

4. **Generalised System Of preferences** - GSP is a formal system of exemption from the more general rules of the World Trade Organization. It is a benefit where the exports may be made duty-free in the country granting GSP. CA's can assist industries in filing applications in GSP for waiver of competitive need limitations.

The Generalized System of Preferences (GSP) is a program designed to promote economic growth in the developing world by providing preferential duty-free entry for various eligible products from designated beneficiary countries and territories.

Currently the GSP is available from Japan, United States of America and Europe. GSP is not available if the exports from the beneficiary country to the country granting GSP exceed the prescribed limits (Competition Need Limitation). Beneficiary country may apply for a waiver of Competition Need Limitation anytime before the export exceeds the prescribed limits. CA's can file Application for including a product in the list of eligible products and Application for waiver of Competition Need Limitation.

5. **Intellectual property rights** - The Law on the subject is covered by the Copyright Act; the Trade and Merchandise Marks Act; Patents Act and the Designs Act. The law is amended from time to time for fundamental changes to meet the international commitment of the Indian Government under

the TRIPS/WTO Agreement.

(a) **Copyright** Copyright protection in India is available for any literary, dramatic, musical, sound recording and artistic work. The Copyright Act 1957 provides for registration of such works. Although an author's copyright in a work is recognised even without registration, it is advisable to get the same registered since it furnishes prima facie evidence of copyright in a court of law. Infringement of copyright entitles the owner to remedies of injunction, damages and accounts. With the issuance of the International Copyright Order, 1999,the provision of Copyright Act have been extended to nationals of all World Trade Organization (WTO) Member countries. This involves work related to **:**

1) Registration, assignment, infringement of a copyright
2) Software programs copyright
3) Drafting deeds for transfer of copyright and royalty, etc.

(b) **Trade Marks** The law relating to trade marks is governed by the Trade Marks Act, 1999. The Trade Mark Act of 1999, inter alia, permits registration of a service mark and also facilitates filing of multi-class applications, i.e. registration of the same mark in several classes by means of a single application. In case of infringement of registered trademarks, the statutory remedies of injunction, damages, accounts and delivery up of infringing labels and marks are available. An action for "passing-off" would lie in relation to an unregistered mark under certain circumstances.**The following work is required under trade mark registration:**

(a) Trademark Search
(b) Filing of applications including multiclass registrations, registration procedure
(c) Renewal, opposition, rectification
(d) Action of infringement and passing off
(e) Assignment, licenses and transmission, drafting deed form, consequent registration of assignment

(c) **Patents** The subject is covered by the Patents Act, 1970. India recognises product patent protection for a period of 14 years. However, in three areas: food, chemicals and pharmaceuticals, it recognises only a process patent for a period of 7 years. With the signing of the GATT Agreement, the Patents Act, 1970 has been amended by the Patents (Amendment) Act, 1999 to bring it in line with the Trade TRIPS Agreement. The amended law would allow the filing of all product patents with a regulatory authority. It also contains provision for granting Exclusive Marketing Rights (EMRs) for five years or till the patent is granted or rejected whichever is earlier. To keep pace with the global trends and meet India's obligations under the TRIPS Agreement, the **Patents (Amendment) Ordinance, 2004**, effective **January 1, 2005**, has been promulgated. On 23rd March, 2005, Parliament has ratified the ordinance and enacted The Patents (Amendment) Act, 2005, which has been given retrospective effect from January 1, 2005. Introduction of Product patents in all fields of technology would facilitate chemicals, food and pharmaceuticals sectors to process patents invention to have product patent protection. Post-grant opposition procedure is introduced in lieu of Pre-grant opposition. The period of opposition would be for 1 year from the date of publication of grant of

- Patentability Search
- Infringement Analysis
- Informative Search
- Regular patent applications

- Handling Office Actions from various jurisdictions
- Compulsory licensing for export of medicines to countries which have lack of infrastructural/ production capacity for meeting public health emergencies has been introduced.
- Filing claim for damages in an infringement action

(d) **Industrial Design** The Designs Act, 2000 protects certain designs. The features of shape, configuration, pattern, ornament or composition of lines or colours applied to any 'article' whether in two or three dimensional forms (or both), by an industrial process which appeals to the eye can be registered under the said Act. The Designs Act 2000 brought into force in May 2001 entitles an applicant to apply for registration in more than one class. However, registration is granted for only one class. The following work is required :

1) Registration, assignment, infringement of a copyright
2) Software programs copyright
3) Drafting deeds for transfer of copyright and royalty, etc.

(e) Geographical Indication The Geographical Indication of Goods (Registration and Protection) Act, 1999, was enacted to register and protect geographical indicia of goods that originate from or are manufactured in a particular territory, region or even locality. These goods include agricultural, natural or manufactured goods that are distinct from similar products due to quality, reputation or any other characteristic that is essentially attributable to their geographical origin.

Registration would entitle a registered proprietor, or a duly authorized user, to the exclusive right of usage of that particular geographical indication with respect to the goods for which it is registered and to obtain relief for any infringement thereof. It may be pointed out however, that non-registration does not mean non-protection of a rightful user. Registration affords better protection in an action for infringement. The validity of bona fide registration of a geographical indication as a trade mark prior to the coming into force of the Act will not be affected by this enactment and will be treated as valid under the laws relating to trade marks.

2.C Corporate and Commercial Laws

The clientele under this include the local and international clients :

1. Structuring and Restructuring of commercial arrangements;

- Formation of legal entities in India & overseas through a liaison, branch or project office or subsidiary company or joint venture or an unit in a special zone;
- Technology transfer, licensing and franchise arrangements;
- Corporate transactional matters including commercial arrangements and contracts, contractual matters and documentation, due diligence reviews;
- Intellectual property rights protection;
- Formation of Foreign companies

2. Foreign Trade Policy and Procedures

- IEC Registration
- Consultancy on Foreign Trade Policy and Procedures
- Various Compliances on Foreign Trade Procedures
- Setting up Export Houses
- Setting up 100% EOU/STP/EHTP/BTP/SEZ units
- Application and Issuance of DEPB, DFRC, Advance License, EPCG License, Duty Drawback, Deemed Export Benefits
- Application under Focus Product Schemes and Focus Market Schemes

- Certification for DGFT under various schemes of incentives and licenses
- Representing the clients in DRI cases

3. Excise and Customs Law and Procedures

- Fixation of Brand rates for duty drawback industrywise where rates are not available
- Rebate/Refund of Central Excise duties and custom duties
- Consultancy for imports and exports with duty structure, advising clients to derive maximum profits with zero duty or 3% EPCG schemes available .
- Representing the corporate and non-corporate clients before customs and subsequent statutory authorities
- Representation of cases before Central Excise Appellate Authorities, Customs Authorities
- Helping the Customs Department in correct assessment the valuation aspects of Imported goods

4. SEZ/EOU/STP/BTP/EHTP/FT&WZ

1. Assistance in preparation of project report
2. A project report outlining the economic and commercial viability of the project needs to be attached along with Form A i.e. Application for setting up a unit in Special Economic Zone.
3. Assistance in Necessary applications, compliances etc. with the Board of Approval, State Government, Development Commissioner, Approval Committee, etc.
4. Consultancy services for setting up units in Special Economic Zones,
5. Representation before Board of Approval on behalf of any person aggrieved by the order passed by the Approval Committee.
6. Rule 55 of Special Economic Zones Rules, 2006 states that any person aggrieved by an order passed by the Approval Committee under section 15 of the Special Economic Zones Act, 2005 or against cancellation of Letter of Permission under section 16, may prefer an appeal to the Board in the Form J.
7. Rule 61 of the Special Economic Zones Rules, 2006 states every appellant may appear before the Board in person or authorize one or more chartered accountants or company secretaries or cost accounts or legal practitioners or any of his or its officers to present his or its case before the Board.
8. Certification of reports - Form I (Annual performance reports for Units)
9. There is a requirement under Rule 22 of the Special Economic Zones Rules, 2006 that the grant of exemptions, drawbacks and concession to the entrepreneur or developer of a Special economic zone will be subject to the condition that the Unit submits an Annual Performance Report in Form I to the Development Commissioner who in turn will submit it to the Approval committee for his consideration. The information given in the form should be authenticated by the authorized signatory of the unit and certified by a Chartered Accountant.
10. Audit report under section 80-I(7)/80-IA(7)/80-IB/80-IC of the Income-tax Act, 1961 in Form 10CCB
11. Report under section 10A (5) and Section 10 B (5) of the Income-tax Act, 1961in FORM NO. 56F and Form No. 56 G respectively certifying that the deduction has been made in accordance with the corresponding section
12. Report under section 80LA(3) of the Income-tax Act, 1961 in Form No. 10CCF
13. Report on Annual performance of units -The information given in the formats for APRs should be authenticated by the authorized signatory of the unit and should be certified for its

correctness by a Chartered Accountant with reference to the account records and registers maintained by the unit (Appendix 14 -I-F Handbook of procedures of Foreign Trade Policy)

14. Certificate on production and exports- DTA sale of Gem & Jewellery items will be permitted on annual basis by the Development Commissioners up to 10% of FOB value of exports during the preceding year subject to certain conditions. One such condition is that The application by an EOU has be submitted to DC concerned on yearly basis (licensing-year) giving the details of production and exports made during the preceding licensing year duly certified by a Chartered Accountant and endorsed by the jurisdictional Custom Authority.(Appendix 14- I-H Handbook of procedures of Foreign Trade Policy)
15. Certificate for CST reimbursements certifying receipt of the goods(Appendix 14- I-I Handbook of procedures of Foreign Trade Policy)- The Export Oriented Units (EOUs) and units in Electronic Hardware Technology Park (EHTP) and Software Technology Park (STP) will be entitled to full reimbursement of Central Sales Tax (CST) paid by them on purchases made from the Domestic Tariff Area (DTA), for production of goods and services as per EOU Scheme subject to certain conditions. The unit has to present its claim for reimbursement of CST in the prescribed form (Annexure - I) to the Development Commissioner of the SEZ concerned or the designated officer of the EHTP/STP.
16. Assistance in registration with Software Technology Parks of India.
17. Certification of Statement of Exports made in the preceding licensing year in the format given in Appendix 26 for Annual Advance License purposes (Handbook of Procedures Vol I)[Advance licence can be applied for annual requirement for a particular product group by status holders and by the other exporters having at least past two years export performance. For the completion of the export obligation as stipulated in the condition of the licence, the exporters are required to submit proof of export obligation fulfillment]

2.D Opportunities under competition law

Competition Commission of India is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and M&A), which causes or likely to cause an appreciable adverse effect on competition within India.

The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009 (No.1 of 2009) lists the professionals who are eligible to work with CCI

The Commission may engage such number of experts and professionals in the fields of economics, law, business or such other disciplines related to competition, as it may deem fit.

As per Schedule I (regulation 5) the following is required for being eligible for engagement as professional by CCI

Class of Expert and professional	Qualifications	Experience
Chartered Accountant	Essential – Chartered Accountant in terms of the Chartered Accountants Act, 1949 (38 of 1949). Desirable – Chartered Accountants having qualified the Post qualification course in International Trade Laws and WTO with competition law as a subject	Must have worked as a Chartered Accountant in reputed organization handling financial ventures of large enterprises or undertakings. Desirable – Experience of handling acquisitions, mergers& amalgamations etc. under competition law.

WITHHOLDING TAX OBLIGATIONS
ON
PAYMENTS TO NON RESIDENTS
AND
FOREIGN COMPANIES

CHAPTER 1

WHAT IS WITHHOLDING TAX OR TDS?

After liberalization of Indian economy in 1992, cross border transactions have increased many folds with the participation of multinational groups in economic activities. It has given rise to new and complex issues on taxation front also. Every Country has a right to get its legitimate tax. But it should also be ensured that taxes should not hamper the progress.

Withholding tax is an amount of money deducted from payments, most often by employers, and paid to credit of Government on behalf of payee. In India it is called as Tax Deducted at Source ("TDS") (hereinafter TDS and Withholding Tax are used interchangeably). It is one of the modes of collection of taxes by the government. The direct tax collection for 2009-10 was Rs 3,78,350 crore out of which TDS collection was Rs 1,39,529 crore (approx. 36.91% of total collection). Hence it is one of the primary modes of tax collection apart from advance tax collection. The Government has made stringent provision to enforce these provision and even a *bona fide* default results into multiple penal consequences.

Simplicity is one of the basic principles of taxation, but it is becoming a part of history. Collection of taxes is the duty of the Government which is, nowadays, a thankless job for citizen. Withholding tax on payments to non residents is becoming burdensome affair for the Indian corporate and other assessee. Even a bona fide mistake can be dangerous. One of the consequences of default results in disallowance of payment, even if the foreign payee pays the Indian taxes directly.

In this write-up TDS provision as applicable when payments are made to non-resident and foreign companies are discussed in brief.

CHAPTER 2

TDS IN CASE OF NON RESIDENT AND FOREIGN COMPANIES

2.1 Introduction

In the case of non-resident and foreign companies the scheme of tax deduction at source applies not only to the amount paid which wholly bears 'income character such as salaries, dividends, interest on securities etc., but also to gross sums', the whole of which may not be income or profits of the recipient, such as payments to contractors and sub-contractors and the payment of insurance commission. This is not the case when payments have to be made to resident persons. The scheme of tax deduction in the case of non-resident and foreign companies is given below:

Section	Remark
Section 192	U/s 192, TDS has to be deducted on all salary payments. This provision is applicable even when the payment is made to non-resident employee.
Section 194E	U/s 194E, TDS has to be deducted on certain payments to a non-resident sportsman (including an athlete) who is not a citizen of India or a non-resident sports association or institution.
Sections 196A to 196D	Under these provision TDS have to deducted from certain payment for specified units, foreign currency bonds, shares of Indian company, Income of Foreign Institutional Investors from securities etc.
Section 195	This is the residuary and most important section. Any payment which is taxable in India and which is not covered under the preceding sections discussed above, TDS have to be deducted under this section. Here, it is important to note that not all payments to residents are liable for TDS under other provision of the Act. There is no residuary provision in case of payments to residents.

Out of these provision, section 192 and 195 are very important. These are discussed in the succeeding paragraphs. Other sections pose no difficulty and also have limited scope, hence not discussed.

2.2 Scope of Section 192

Any person responsible for paying any income chargeable under the head "Salaries" have to deduct income-tax on the amount payable, at the average rate of income-tax computed on the basis of the rates in force, at the time of payment. This provision is applicable even when the payment is made to non-resident employee. Few questions, which are important to understand the scope of this section in relation to non resident employee, are discussed below.

The Gujarat High Court in a judgment dated February 25, 1980 in *CIT v. S.G. Pgnatale* [1980] 124 ITR 391 has held that if the liability to pay salary arises outside India and the salary is also payable outside India, the same cannot be deemed to accrue or arise in India even if the services are rendered in India. To overcome this decision, the Finance Act, 1983 has inserted an Explanation in section 9, which declares, for the removal of doubts, that income chargeable under the head "Salaries" payable for service rendered in India will be regarded as income earned in India. This amendment took retrospectively effect from April 1, 1979. Finance Act, 1999 with effect from 1st April, 2000, had again expanded the scope. The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India. Hence place of rendering of services became the main criteria for taxing salaries in India.

Supreme Court in the *CIT v. Eli Lilly & Co. (India) (P.) Ltd.* [2009] 178 Taxman 505 held that; whether question as to whether home salary payment made to expatriate employees by foreign company in foreign currency abroad can be held to be 'deemed to accrue or arise in India', would depend upon in-depth examination of facts in each case. Where home salary/special allowance payment made by foreign company abroad is for rendition of services in India and no work is found to have been performed for foreign company, such payment would certainly come under section 192(1), read with section 9(1)(ii). Delhi Tribunal in the case of *Babcock Power (Overseas Projects) Ltd. v. Asstt. CIT* [2002] 81 ITD 29 (Delhi) held that where services were rendered in India, in view of provision of section 9(1)(ii), read with Explanation thereto, salary paid to foreign technicians was chargeable to tax in India and consequently provision of section 192 were applicable and the facts that employees as well as employer were non-resident, that payment was made outside India and that contract of employment was also out of India, were not relevant. Hence where the services are rendered in India then, in every case except where DTAA provision are applicable, TDS have to be deducted u/s 192.

Authority for Advance Ruling in the case of *Hindustan Powerplus Ltd., In re* [2004] 141 Taxman 658/ 271 ITR 433 (AAR) held that a plain reading of the provision of section 9(1)(ii) shows that income which falls under the head 'Salaries', if it is earned in India, shall be deemed to accrue or arise in India. It, therefore, follows that 'salaries' of the non-resident technicians paid in USA for the period they worked in India shall be deemed to arise in India and shall be taxable. Delhi tribunal in the case of *HCL Infosystems Ltd. v. Dy. CIT* [2002] 76 TTJ (Delhi) 505 held that where assessee reimbursed actual amount of salaries incurred by its foreign collaborator in deputing foreign technicians to India with assessee, tax was deductible at source under section 192 and not section 195.

Hence, in all cases, where the services are rendered in India including leave period salary, which is both preceded and succeeded by service in India, is taxable in India except where specific exemption is provided under the relevant DTAA.

2.3 Scope of Section 195

This is the residuary and most important section in relation to payments to non residents and foreign companies. Any payment which is taxable in India and which is not covered under other sections, TDS have to be deducted under this section. Two questions are very important to know the scope of this section.

1. Whether the TDS have to be deducted when the income is not taxable in India either under the Act or under the relevant DTAA provision?
2. Whether TDS have to be deducted on trading and other receipts even the whole amount does not comprise income element?

It is the settled position of law that TDS should not be deducted if the payment is not taxable in India. It is also the settled position of law that TDS have to be deducted on trading and other receipts even the whole amount does not comprise income element. This position of law is based on the decisions of Supreme Court in the cases of *Transmission Corporation of A.P. Ltd. v. CIT* [1999] 105 Taxman 742/ 239 ITR 587 (SC) and *GE India Technology Cen. (P.) Ltd. v. CIT* [2010] 193 TAXMAN 234 (SC).

Supreme Court in the case of *Transmission Corporation of A. P. Ltd. v. CIT* [1999] 239 ITR 587, observed: "The scheme of Sub-sections (1), (2) and (3) of Section 195 and Section 197 leaves no doubt that the expression "any other sum chargeable under the provision of this Act" would mean 'sum' on which income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act. Consideration would be - whether payment of sum to non-resident is chargeable to tax under the provision of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum." Again, the Supreme Court recently in the case of *GE India Technology Cen. (P.) Ltd. v. CIT* [2010] 193 TAXMAN 234 (SC) reiterate the same position. The apex court held that the moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9. Section 195(2) is not a mere provision to provide information to ITO(TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable.

CHAPTER 3

SECTION 195 DOES NOT MAKE ANY DISTINCTION BETWEEN PAYMENT WITHIN INDIA AND PAYMENT OUTSIDE INDIA

A plain reading of law provided in section 195 makes it clear that said section does not make any distinction between payment within India and payment outside India. Situs of payment or source of payment is not a relevant consideration while applying provision of section 195. The expression used in section 195 is 'any person responsible for paying to a non-resident...'. The expression has qualified the character of the receipt/payee as 'non-resident'. But the expression has not qualified, in any manner, the character of the payer. Payer means any person responsible for paying. No other fetters are added to the above expression of law. If the payment is made to a non-resident, whether it is in India or outside India or in any manner, the person making the payment is liable for deducting the tax at source. Further, the provision contained in section 191 do not in any way dilute the rigours of the liability cast under section 195 on the person who makes the payment. In the case of *Satellite Television Asian Region Ltd. v. Dy. CIT* [2006] 99 ITD 91/99 TTJ 1025 (Mum.), the assessee, a non-resident company incorporated in Hongkong, was carrying on business of selling airtime to various Indian advertisers through its advertising sales agent, namely, Star India Pvt. Ltd., a company incorporated in India. The assessee acquired airtime meant for advertisement from television channel companies which were also non-resident companies. The assessee did not deduct tax at source while making payments to channel companies by way of cost of ad airtime on the ground that agreements between the assessee and channel companies were on the basis of principal to principal; and that amounts paid by it to channel companies against cost of airtime were not amounts chargeable to tax in India in the hands of channel companies, and, therefore, it was under no statutory obligation to deduct tax at source in the course of making those payments to channel companies. The Assessing Officer, however, held that the assessee was bound to make deduction of tax at source while making payment to channel companies and as the assessee had failed to do so, the Assessing Officer, invoking provision of section 40(*a*)(*i*), disallowed the said payment. The assessee contended that the payments for bulk purchase of the ad air time were made by it outside India; both the assessee as well as the channel companies were non-residents; the relevant contracts had been executed outside India and in such circumstances, the provision of section 195 would not apply. The Mumbai tribunal held that in view of the legal position stated above, the assessee's contention that it was not responsible for deducting tax for the reason that all the ingredients of the payments were made in a foreign country, had no merit. Hence TDS provision is applicable even the payment is made outside India if the payment is otherwise liable for tax in India.

CHAPTER 4

NON RESIDENTS ARE ALSO REQUIRED TO DEDUCT TAX AT SOURCE

Under section 195 of the Act, any person responsible for paying to a non-resident, not being a company, or to a foreign company, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof deduct income-tax thereon at the rates in force. Responsible person, payer, can be resident or even non-resident but the payee should be non-resident, not being a company, or to a foreign company.

Sometimes, a question is raised by the non-resident tax payers that Indian laws cannot bind non-resident payers. But it is clear beyond doubt that under Indian constitutional scheme, Parliament in India may make laws which operate extra territorial. Article 245(1) of the Indian Constitution prescribes the extent of laws made by Parliament. They may be made for the whole or any part of the territory of India. Article 245(2) declares that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Therefore, a parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The operation of the law can extend to persons, things and acts outside the territory of India. The general principle, flowing from the sovereignty of States, is that laws made by one State can have no operation in another State. But, while the enforcement of the law cannot be contemplated in a foreign State, it can, none the less, be enforced by the courts of the enacting State to the degree that is permissible with the machinery available to them. They will not be regarded by such courts as invalid on the ground of such extra-territoriality.

But the question is whether a nexus with something in India is necessary. According to Supreme Court, unless such nexus exists, Parliament will have no competence to make the law. It is to be noted that article 245(1) empowers Parliament to enact laws for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India. The only question then is whether the ingredients, in terms of the impugned provision, indicate a nexus. The principle was approved by the Supreme Court in *Electronics Corporation of India Ltd. v. CIT* [1990] 183 ITR 43. The court said approving the aforesaid ratio that while the enforcement of the law cannot be contemplated in a foreign State, it can none the less, be enforced by the courts of the enacting State to the degree that is permissible with the machinery available to them. The law will not be regarded by such courts as invalid on the ground of such extra-territoriality or ineffectiveness.

In view of the great public importance of the question, the question was again referred to Constitutional Bench of Supreme Court in the case of *GVK Industries Ltd.v. ITO*[2011] 197 TAXMAN 337 (SC). The two questions that have arisen for consideration before the Constitution Bench of the Supreme Court are:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor are expected to have any direct or indirect, tangible

or intangible impact(s) on, or effect(s) on, or conesquences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well being of, or security of inhabitants of India, and Indians?

(2) Does the Parliament have the powers to legislate 'for' any territory, other than the territory of India or any part of it?

The Attorney General contends that the Parliament is a 'Sovereign Legislature', and that such a "Sovereign Legislature has full power to make extra-territorial laws." He further contends that the Courts in India do not have the powers to declare the 'extra-territorial laws' enacted by the Parliament as invalid, on the ground that they have an 'extra-territorial effect', notwithstanding the fact: (a) that such extra-territorial laws are with respect to extra- territorial aspects or causes that have no impact on or nexus with India; (b) that such extra-territorial laws need not, in any manner or form, work to, or intended to be to the benefit of India; and (c) that such extra-territorial laws might even be detrimental to India.

The Hon'ble Supreme Court held that the Parliament is constitutionally restricted from enacting a legislation with respect to extra-territorial aspects or causes that do not have nor are expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) on or consequences for: (a) territory of India, or any part of India; or (b) interests of, welfare of, well being of or security of inhabitants of India and Indians. The question, as to whether a particular law enacted by Parliament does show such a real connection, or expected real connection between extra-territorial aspect or cause or something in India or related to India and Indians, in terms of impact effect or consequence, would be a mixed matter of facts and law and where Parliament itself posits a degree of such relationship beyond constitutional requirement that it be real and not fanciful, then Courts would have to enforce such a requirement in operation of law as a matter of that law itself and not of Constitution. The Parliament has no powers to legislate for any territory, other than territory of India or any part of it and any laws enacted by Parliament with respect to extra- territorial aspects or causes that have no impact on or nexus with India would be ultra vires, and would be laws made 'for' a foreign territory.

Vodafone case is the live example. But it is important to note that the issue of whether laws that deal entirely with aspects or causes that occur, arise or exist, or may be expected to do so, within India, and yet require to be operated outside the territory of India could be invalidated on the grounds of such extra-territorial operation was not before the Court.

CHAPTER 5

AMOUNT ON WHICH TDS HAVE TO BE DEDUCTED

5.1 Grossing up required where tax borne by payee

As per section 195A, in a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income, which is liable for TDS, is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provision such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement. Delhi Tribunal in the case of *Shri Ram Fibres Ltd. v. ITO* [1989] 31 ITD 169 (Delhi) held that grossing up the amount of tax on tax is not only proper but it is what is warranted by the Act. Grossing up the tax to such an extent as would leave the net amount as agreed to be paid after deduction of the tax from the gross amount including the tax is proper and in accordance with the provision contemplated by section 195 of the Income-tax Act.

Hence, persons responsible for paying to non-resident persons, any sums which are stipulated to be paid net of taxes should carefully note that the calculation of tax to be deducted at source as required by section 195, should be made not with reference to the net of tax amount payable to the non-resident but should be made with reference to the gross amount. The tax so calculated and deducted should be paid to the credit of the Central Government as required by section 200, read with rule 30 of the Income-tax Rules, 1962. [Circular: No. 370 [F.No. 391/3/78-FTD], dated 3-10-1983]

But there is one exception. Scheme for taxation of perquisites was simplified with employer given option to pay tax on behalf of employees. Before amendment made by the Finance Act 2002, under the existing provision of section 192 of the Act, an employer is required to deduct tax at source on income under the head 'Salaries', inclusive of the value of perquisites. In case, such tax is paid by an employer on behalf of an employee, the same being in the nature of an obligation which, but for such payment, would have been payable by the employee, is considered a perquisite, and is chargeable to tax. The Finance Act, 2002 provides for a new scheme of taxation of perquisites, wherein an employer has been given an option to pay tax on the whole or part value of perquisite (not provided for by way of monetary payments), on behalf of an employee, without making any deduction from the income of the employee. To bring into effect this new scheme, a new clause (10CC) has been inserted in section 10, to exempt the amount of tax actually paid by an employer, at his option, on the income in the nature of a perquisite, (not provided for by way of monetary payment) on behalf of an employee, from being included in perquisites. Such tax paid by the employer shall not be treated as an allowable expenditure in the hands of the employer under section 40 of the Income-tax Act, 1961. The amendments take effect from assessment year 2003-04 and subsequent years. Amendment is also made in section 195A of the Income-tax Act, 1961, so as to exclude the tax paid by the employer on behalf of the employee, on the income in the nature of perquisites, (not provided for by way of monetary payment) for calculating the income of the employee for the purpose of deducting tax at source.

Clarification contained in Circular No. 155, dated 21-12-1974 reiterated to ensure proper computation of tax to be deducted at source in the case of non-resident whose tax liability is to be borne by payer

CLARIFICATION 1

1. It has come to the notice of the Board that in certain cases where payments are made to non-residents and the tax payable by the non-resident is borne by the person making the payment, the provision of section 195 are not being followed. As a result such persons become liable to pay interest and penalty under section 201(1A) and section 221, respectively and also punishment under section 276B.

2. Board's Circular No. 155, dated 21-12-1974 [Clarification 2] outlines the method of computation of tax to be deducted at source under section 195 in the case of a non-resident, whose tax liability is to be borne by the payer and its payment to the credit of the Central Government. Paras 2, 3 and 4 of this circular are reproduced below :

"2. Where the amount payable to a non-resident is stipulated to be paid to him net of tax (i.e., where the tax payable by the non-resident is borne by the person making the payment), the income chargeable to tax in the hands of the recipient is determined by the grossing up the net of tax payment to such an amount as would, after deducting the tax on such gross amount, leave the stipulated net amount of income. Accordingly, the sum chargeable to tax in the hands of the non-resident recipient would be this grossed up amount and it is with reference to this grossed up amount that tax has to be deducted as required by the provision of section 195.

3. Persons responsible for paying to a non-resident person, any sums which are stipulated to be paid net of taxes should carefully note that the calculation of tax to be deducted at source as required by section 195, should be made not with reference to the net of tax amount payable to the non-resident but should be made with reference to the gross amount as aforesaid. Deduction of tax at source in this manner should be made every time any such payment is made to the non-resident.

4. The tax so calculated and deducted should be paid to the credit of the Central Government as required by section 200, read with rule 30 of the Income-tax Rules, 1962 and should not be withheld on the ground that the tax will, in any case, be paid by the persons making the payment ultimately when regular assessments are made in the case of non-resident payee."

3. The contents of Board's Circular No. 155, dated 21-12-1974 are being reiterated so as to ensure that the correct amount of tax is deducted at source under section 195 at the time of payment of non-residents and after deduction, such tax is paid to the credit of the Central Government within the prescribed time.

Circular: No. 370 [F.No. 391/3/78-FTD], dated 3-10-1983.

CLARIFICATION 2

1. Section195 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being "interest on securities") or any other sum (not being dividends) chargeable under the provision of the Income-tax Act, to deduct income-tax at the rates in force unless he is himself liable to pay income-tax thereon as an agent. Payments to a non-resident by way of royalty and payments for technical services rendered in India are common examples of sums chargeable under the provision of the Income-tax Act to which the aforesaid requirement of tax deduction at source will apply. The term "rates in force" means the rates of income-tax specified in this behalf in the Finance Act of the relevant year.

2. Where the amount payable to a non-resident is stipulated to be paid to him net of taxes (i.e., where the tax payable by the non-resident is borne by the person making the payment), the income chargeable to tax in the hands of the recipient is determined by grossing up the net of tax payment to such an amount as would after deducting the tax on such gross amount, leave the stipulate net

amount of income. Accordingly, the sum chargeable to tax in the hands of the non-resident recipient would be this grossed up amount, and it is with reference to this grossed up amount that tax has to be deducted as required by the provision of section 195.

3. Persons responsible for paying to a non-resident person, any sums which are stipulated to be paid net of taxes should carefully note that the calculation of tax to be deducted at source as required by section 195, should be made not with reference to the net of tax amount payable to the non-resident but should be made with reference to the gross amount as aforesaid. Deduction of tax at source in this manner should be made every time any such payment is made to the non-resident.

4. The tax so calculated and deducted should be paid to the credit of the Central Government as required by section 200 read with rule 30 and should not be withheld on the ground that the tax will, in any case, be paid by the person making the payment ultimately when regular assessments are made in the case of non-resident payee.

5. Failure to deduct tax or failure to pay the tax as required by the provision of the Income-tax Act would render a person liable to penalty under section 201 read with section 221. In addition he would also be liable under section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. Attention is also invited to section 276B, wherein it is provided that if a person without reasonable cause or excuse fails to deduct or after deducting fails to pay the tax as required under the provision of Chapter XVII-B, he shall be punishable with rigorous imprisonment for a term which may extend to six months, and shall also be liable to fine which shall be not less than a sum calculated at the rate of fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

Circular: No. 155 [F.No. 484/31/74-FTD], dated 21-12-1974.

5.2 Service Tax

One of the points of controversy is; whether TDS have to be deducted on whole amount including Service Tax or net amount excluding Service Tax. As per Government Circular in relation to section 194I, (CIRCULAR NO. 4/2008, DATED 28-4-2008) Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of service tax. Therefore, it has been clarified that TDS under section 194-I of Income-tax Act would be required to be made on the amount of rent paid/payable without including the service tax. This circular is issued only for the purpose of section 194I. No clarification is available in respect of other sections.

Section 194-I of the Income-tax Act, 1961 - Deduction of tax at source - Rent - Clarification on deduction of tax at source (TDS) on service tax component on rental income under section 194-I

CIRCULAR NO. 4/2008, DATED 28-4-2008

1. Representations/letters have been received in the Board seeking clarification as to whether TDS provision under section 194-I of the Income-tax Act will be applicable on the gross rental amount payable (inclusive of service tax) or net rental amount payable (exclusive of service tax).

2. The matter has been examined by the Board. As per the provision of section 194-I, tax is deductible at source on income by way rent paid to any resident. Further rent has been defined in section 194-I as

"rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(*a*) land; or

(*b*) building (including factory building); or

(*c*) land appurtenant to a building (including factory building); or

(*d*) machinery; or

(*e*) plant; or

(*f*) equipment; or

(*g*) furniture; or

(*h*) fittings,

whether or not any or all of the above are owned by the payee;

3. Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of service tax. Therefore, it has been decided that tax deduction at source (TDS) under section 194-I of Income-tax Act would be required to be made on the amount of rent paid/payable without including the service tax.

4. These instructions may be brought to the notice of all officers working in your region for strict compliance.

5. These instructions should also be brought to the notice of the officers responsible for conducting internal audit and adherence to these should be checked by the auditing parties.

5.3 Reimbursements

One of the points of controversy is; whether TDS have to be deducted on whole amount including reimbursements or net amount excluding reimbursements. There is no clarity on this point. Authority for Advance Ruling in the case of *Danfoss Industries (P.) Ltd., In re* [2004] 138 Taxman 280/268 ITR 1 (AAR - New Delhi) held that to apply section 195, the amount in question should be income of the payee and not a mere reimbursement of the cost incurred by the payee. The Authority further held that one of the difficult terms in the Act which admits of no precise definition is the term 'income'. It is an elusive term. Even the definition clause [section 2(24)] enumerates twenty items, some of which may and the others may not be 'income' in stricto senso. The definition is inclusive and not exhaustive. If the payment in question falls in any of the twenty items of section 2(24) or has the attributes of income, section 195 will be attracted. In this case the consideration clause in proposed agreement shows that there is no direct nexus between actual costs incurred by 'D Singapore' in providing said services to 'D' group of companies and fees payable by each individual company which avails services. The assessee's view was that the payments were only in the nature of reimbursement of a portion of the actual expenditure incurred by 'D Singapore' and there would be no income embedded in it and section 195 would not be applicable. But the Authority held that it was clear from the agreement that there was no direct nexus between the actual costs incurred by 'D Singapore' in providing the said services to 'D' group of companies and the fees payable by each individual company which avails services. In the absence of the break-up of the cost incurred by 'D Singapore' in providing such services and fees payable by each individual company, one could not conclude that the service fee payable by the applicant would be nothing but reimbursement of costs incurred by 'D Singapore' in providing services to the applicant. In the instant case, the applicant is liable to pay fees for services to be provided by 'D Singapore'. Even assuming that the fee charged by 'D Singapore' from the applicant and similarly situated group companies is equivalent to the expenses incurred by it in providing the services and there is no profit element, it would then be a case of quid pro quo for the service fees and not of reimbursement of expenses. Thus, the payments to be made by applicant pursuant to the agreement proposed to be entered into between the said 'D Singapore' for the services to be provided by it to the applicant cannot be said to be reimbursement of the actual expenditure incurred by 'D Singapore' and it cannot be said that no income is embedded into such payment. Therefore, the payments have to be made after withholding tax under section 195.

In the case of *Mahindra & Mahindra Ltd. v. Dy. CIT* [2005] 1 SOT 896 (Mum.) the assessee deducted tax from fee paid to foreign companies for supply by these foreign companies of technical information and also for sending technical skilled personnel to put into commercial use, information supplied but did not deduct tax on expenses incurred by it on airfare, hotel expenses and local travelling for foreign technicians visiting India on ground that as none of them had permanent establishment in India, income was not taxable in India, and, therefore, section 195 was not applicable. But the tribunal held that the expenses in question could not be separated from fees because same were incurred during earning of that fees only and, therefore, assessee's contention that section 195 was not applicable to these expenses had no merit.

Mumbai tribunal in the case of *Nathpa Jhakri Joint Venture v. Asstt. CIT* [2010] 37 SOT 160/131 TTJ 702/5 ITR (Trib.) 75 (Mum.) held that payment made towards reimbursement of expenses by assessee-payer to non-resident payee would not be in nature of income and, resultantly same would not be taxable in hands of payee and, assessee would not be liable to deduct tax at source under section 195. In this case the amount was reimbursed to its non-resident associate concern towards bank guarantee commission, social insurance for expatriates who worked for execution of the contract and software charges.

In the case of *Cairn Energy India Pty. Ltd. v. Asstt. CIT* [2009] 126 TTJ 226/[2010] 2 ITR (Trib.) 38 (Chennai) also the tribunal held that no deduction of tax was required from payments made by assessee to its non- resident parent company in respect of expenditure incurred by latter in connection with business activity carried on by assessee in India; these payments made by assessee to its parent company were by way of reimbursement of expenses.

It is not the case that reimbursement in each and every case is taxable and TDS have to be deducted or no TDS is required in all cases. All depends on the facts of the case. Where the payment is for actual expenditure without any mark up and also not part of the services provided by the foreign concern then it may be argued that no TDS is required as there is no income element. But where the reimbursement is just part of the service contract and without these expenses service cannot be rendered then TDS have to be deducted. There are various cases on both sides but generalisation from these cases is not an easy task.

CHAPTER 6

TIME OF DEDUCTION

A bare reading of the provision of section 195 clearly shows that, if any sum to be paid by an assessee to any non-resident, is chargeable to tax under the Act, then the assessee is under obligation to deduct the tax at source either at the time of payment or at the time of credit in the books of the assessee, whichever is earlier. The head under which such sum is credited is irrelevant in view of the specific provision of the Explanation appended to the section. Entries in the books are not determinative of either the nature of receipt of any sum or the date of the accrual of income. But the entry in the books is certainly relevant vis-a-vis the obligation to deduct the tax at source where the sum to be paid is found to be chargeable to tax. Section 195 is a mandatory and has to be invoked once the conditions mentioned therein are fulfilled.

Question as to whether remittances become income of payee on date on which provision is made in books of account or on a later date, can only be decided by terms and conditions of contract, if any, and in absence of such evidence, when entries are made in books of account, they give rise to obvious presumption that income has accrued to party whose account is credited in books of assessee and moment entries are made in books of account, liability to deduct tax at source springs up immediately under section 195(1).

In the case of *P.C. Roy & Co. (India) (P.) Ltd. v. A.C. Mukherjee* [1958] 33 ITR 817 (Cal.), the assessee had chartered a foreign ship and under the agreement the hire charges had to be paid in London or Hongkong. The assessee was, however, to make advance to the master of the ship in India which was adjusted from the hire. The contention of the assessee was that advance was in the nature of loan and no tax was required to be deducted at source. It was held that it was payment of hire charges in advance and tax was to be deducted at source.

Delhi Tribunal in the case of *C.J. International Hotels Ltd. v. ITO* (TDS) [2001] 79 ITD 506 (Delhi) held that it is not open to revenue, for purpose of determining TDS liability of an assessee-tax-deductor, to tinker with, or in any way reject, method of accounting employed by such assessee-tax-deductor. TDS liability under section 195 arises only when income is credited to account of payee or on actual payment of same, whichever is earlier and mere accrual of income in hands of foreign company would not be sufficient proximate reason for tax-deductor's liability under section 195.

Payment contemplated under section 195 not only includes cash payment or payment by cheque or draft, but also a payment by any other mode i.e. in kind. An adjustment of the amount payable to the non-resident or deduction thereof by the non-resident from the amounts due to the resident-payer (of the income) would fall to be considered under 'any other mode' indicated in section 195(1); such adjustment or deduction also is equivalent to actual payment. Commercial transactions very often taken place in the aforesaid manner and the provision of section 195 could not be sought to be defeated by contending that an adjustment or deduction of the amounts payable to the non-resident could not be considered as actual payment. Section 195 applies also to a case where money is paid into Court under a decree obtained by a non-resident.

But in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode. (first proviso to sub-section (1) of section 195). Similarly TDS have to deducted at the time of payment only in the case of salary payments u/s 192.

CHAPTER 7

TDS/WITHHOLDING TAX RATES

Once it is clear that tax has to be deducted then the question is; at what rate? Under the provision of the Act, there are three types of provision for TDS.

1. TDS is deductible at the normal rates like TDS on salaries u/s 192. In this case the income have to computed based on normal provision and TDS have to be deducted only on taxable income and not on gross income. In this case the payer is duty bound to calculate the taxable income.
2. TDS rates are specified in the provision itself like TDS on payment to a non-resident sportsman or sports association u/s 194E. In this case the TDS have to be computed on gross income based on specified rates.
3. TDS rates are not specified in the provision like TDS on other sums u/s 195 to a non-resident, not being a company, or to a foreign company. In this case either the TDS have to be computed on gross income based on normal rates or the payer has to take certificate from income tax department for lower or nil deduction. Under this provision, the payer has no power to compute taxable income.

Under section 90, the Central Government is empowered to enter into an agreement with the Government of any foreign country for the avoidance of double taxation of income and to make provision for implementing the agreement by the issue of a notification in the Official Gazette. India has entered into comprehensive DTAAs with eighty countries. These DTAAs have also provided tax rates for some income like tax rate on dividend, royalties etc. Some other incomes have to be taxable as per domestic law like business income. Hence a question that arises for payer consideration is; at which rates he should deduct tax?

Should treaty provision override domestic law or domestic laws override treaty provision, is never ending controversy world over. Fortunately, it is not so in India. The judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provision of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provision of the Income-tax Act. If it was not the intention of the Legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provision" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAA which would automatically override the provision of the Income-tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAA.

CBDT circular (No. 333 [F. No. 506/42/81-FTD], dated 2-4-1982) clarifies that "where a double taxation avoidance agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provision in the Income-tax Act. Where there is no specific provision in the agreement, it is basic law, i.e., the Income-tax Act, that will govern the taxation of income." In other words, the provision of DTAAs will prevail over the provision of the Income Tax Act on the same subject-matter in a case of conflict if they are more beneficial to the taxpayer [vide *Union of India & Anr. vs. Azadi Bachao Andolan & Anr.* (2003) 184 CTR (SC) 450 : (2003) 263 ITR 706 (SC) and *CIT v. P.V.A.L. Kulandagan Chettiar* [2004] 137 Taxman 460/267 ITR 654 (SC)].

Correct rates of tax applicable in case of remittance to a country with which Double Taxation Avoidance Agreement is in force

1. It has been represented to the Board that when making remittances of the nature of royalties and technical fees, tax is being deducted at source at the rates specified in the Finance Act of the relevant year, without taking into account the special rates for taxation of such income provided for under the Double Taxation Avoidance Agreement with the country concerned.

2. The expression "rates in force" has been defined in section 2(37A) of the Income-tax Act. Under sub-clause (iii) of section 2(37A), for purposes of deduction of tax under section 195, the expression is to mean the rate or rates of income-tax specified in this behalf in the Finance Act in the relevant year, or the rates of tax specified in a Double Taxation Avoidance Agreement entered into by the Central Government, whichever is applicable by virtue of the provision of section 90 of the Income-tax Act, 1961.

3. It is hereby clarified that in view of the provision of sub-section (2) of section 90 of the Act, in case of a remittance to a country with which a Double Taxation Avoidance Agreement is in force, the tax should be deducted at the rate provided in the Finance Act of the relevant year or at the rate provided in the DTAA, whichever is more beneficial to the assessee.

Circular: No. 728, dated 30-10-1995.

See also Circular No. 7/2007, dated 23-10-2007 and CIRCULAR NO. 07/2011 [F.NO. 500/135/2007-FTD-I], DATED 27-9-2011. (Discussed in succeeding paragraphs)

Hence tax has to be deducted at the rate specified in the relevant provision of this Act or as prescribed under the relevant DTAA with that country, whichever is more beneficial. (Both the rates are given in Annexure 1)

But recently a new section 206AA was inserted by the Finance (No. 2) Act, 2009, w.e.f. 1-4-2010. If the deductee has no PAN, this section prescribes TDS rate of 20% if the normal TDS rates are lower than 20%. The relevant section is given below:

Requirement to furnish Permanent Account Number (PAN)

206AA. (1) Notwithstanding anything contained in any other provision of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:—

(i) at the rate specified in the relevant provision of this Act; or

(ii) at the rate or rates in force; or

(iii) at the rate of twenty per cent.

(2) No declaration under sub-section (1) or sub-section (1A) or sub-section (1C) of section 197A shall be valid unless the person furnishes his Permanent Account Number in such declaration.

(3) In case any declaration becomes invalid under sub-section (2), the deductor shall deduct the tax at source in accordance with the provision of sub-section (1).

(4) No certificate under section 197 shall be granted unless the application made under that section contains the Permanent Account Number of the applicant.

(5) The deductee shall furnish his Permanent Account Number to the deductor and both shall indicate the same in all the correspondence, bills, vouchers and other documents which are sent to each other.

(6) Where the Permanent Account Number provided to the deductor is invalid or does not belong to the deductee, it shall be deemed that the deductee has not furnished his Permanent Account Number to the deductor and the provision of sub-section (1) shall apply accordingly.

[Inserted by the Finance (No. 2) Act, 2009, w.e.f. 1-4-2010]

Thus every person whose receipts are subject to deduction of tax at source (i.e., the deductee) shall furnish his PAN to the deductor. It is compulsory from 1-4-2010. If such person does not furnish PAN to the deductor, the deductor have to deduct tax at source at higher of the following rates—

(a) The rate prescribed in the Act (See Annexure1);

(b) At the rate in force, i.e., the rate mentioned in the Finance Act (See Annexure); or

(c) At the rate of 20 per cent.

Tax would also have to be deductible at the above-mentioned rates in cases where the deductee files a declaration under section 197A in Form No. 15G or 15H but he does not provide his PAN. Further no certificate under section 197 is now granted by the Assessing Officer unless the application contains the PAN of the applicant. It is mandatory for quoting of PAN of the deductee by both the deductor and the deductee in all correspondence, bills and vouchers exchanged between them. Where the PAN provided to the deductor is invalid or does not belong to the deductee, it is deemed that the deductee has not furnished his PAN to the deductor and above provision becomes applicable.

It affects mainly royalty and FTS payments. While TDS rate under section 115A of the Act is 10% if the agreement is entered into on or after 1st June, 2005, in many DTAAs it is still higher than 10%. Practically, after insertion of section 206AA, it will be 20% under the Act also as most of the non residents and foreign companies have no PAN in India.

But the question that for consideration is; whether this section will override DTAA also? Where the TDS rates prescribed under relevant DTAA is lower than 20% but the deductee has no PAN then what should be the proper rate of TDS. There is a view in certain circles that this section will override even the rates prescribed under different DTAAs. It will be better if CBDT comes with explanatory circular on the subject. There are two predominant views which are discussed below:

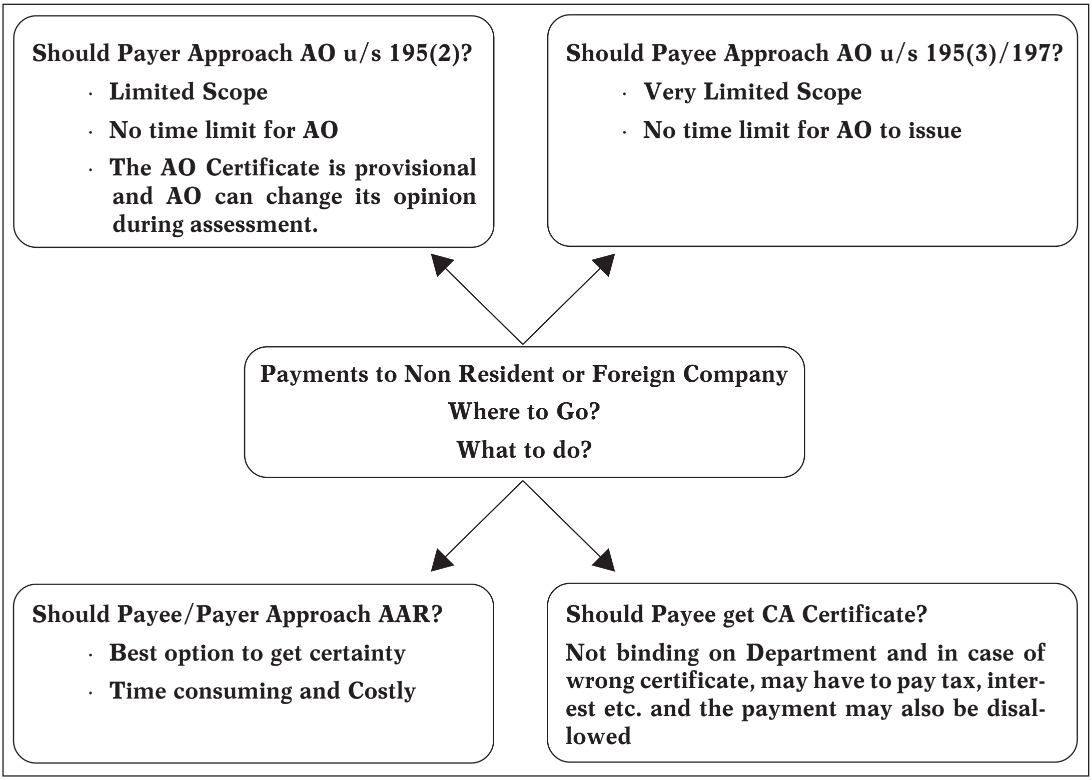
- First View: According to this view, this provision does not override treaty provision and TDS have to be deducted at the rate specified in the relevant provision of this Act or as prescribed under the relevant DTAA with that country, whichever is more beneficial.
- Second View: According to this view, this provision override treaty provision and TDS have to be deducted at the rate specified in the relevant provision of this Act or as prescribed under the relevant DTAA with that country, whichever is more beneficial, but if the deductee has no PAN in India then it should be 20%. In this case, if the DTAA rates are lower than 20%, then the deductee can file the return and claim refund.

C H A P T E R 8

OPTIONS BEFORE PAYER

8.1 Introduction

There is no fool proof formula to get certainty while making payments to non residents and foreign companies. There are various options and each options have its own advantages and disadvantages. Some of the options are shown in the diagram below which are discussed in the succeeding paragraphs. While the CA certificate is most commonly used by taxpayers for making remittance but AAR ruling is best solution to get the final word. But it is time consuming process.



8.2 When AO certificate u/s 195(2) is mandatory?

The controversy relating to withholding taxes under Section 195 of the Act is far from solution. While interpreting section 195, every courts and tribunal have followed the decision of Supreme Court in the case of *Transmission Corporation of A.P. Ltd. v. CIT* [1999] 105 Taxman 742/239 ITR 587 (SC), but result is far from satisfactory. Hon'ble Supreme Court in the case of *Transmission Corporation of A. P. Ltd. v. CIT* [1999] 239 ITR 587, speaking through Justice M. B. Shah observed: "The scheme of Sub-sections (1), (2) and (3) of Section 195 and Section 197 leaves no doubt that the expression "any other sum chargeable under the provision of this Act" would mean 'sum' on which income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act. Consideration would be - whether payment of sum to non-resident is chargeable to tax under the provision of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum."

Special Bench of Tribunal in the case of *Mahindra & Mahindra Vs. Dy. Commissioner of Income Tax* [2009] 30 SOT 374 (MUM.) (SB) held: "From here it follows that Sub-section (2) onwards of Section 195 and Section 197 apply, primarily, in respect of a sum which is chargeable to tax. It is only where the sum is otherwise chargeable to tax but deduction of tax at source is not warranted on the whole or any part of it, depending upon the peculiar circumstances, that the person responsible for paying such sum or the person entitled to receive such sum can apply for no deduction or deduction at lower rate of tax." In this case the Tribunal followed the decision of Supreme Court in the case of *Transmission Corporation.*

But on the other hand Karnataka High Court in the case of *CIT v. Samsung Electronics Co. Ltd.* [2009] 185 TAXMAN 313 (KAR.), practically held that in every case of non deduction, even the sum is otherwise not chargeable to tax, there is no option with the payee except to avail the option of section 195(2). Again in this case also the court followed the decision of Supreme Court in the case of *Transmission Corporation.*

In a recent decision in the case of *Van Oord ACZ India (P) Ltd. v. CIT* [2010] 189 TAXMAN 232 (DELHI), Delhi High Court held that the obligation to deduct tax at source is attracted only when the payment is chargeable to tax in India, however, if the payee considers that whole of the said sum would not be income chargeable in the case of the recipient, he may move an application to the Assessing Officer to determine this aspect. While interpreting section 195, the court relied heavily on the Supreme Court decision in case of *Transmission Corporation case* and Special Bench of Income Tax Appellate Tribunal in the case of *Mahindra & Mahindra Vs. Dy. Commissioner of Income Tax* [2009] 30 SOT 374 (MUM.)(SB) but distinguished and dissented from Karnataka High Court decision in the case of *CIT v. Samsung Electronics Co. Ltd.* [2009] 185 TAXMAN 313 (KAR.).

Different interpretations clouded the already confused state of withholding tax regime. Payments to non residents and foreign companies can be made based on Chartered Accountant certificate (Form 15CB). Language of this certificate further complicates the issue. But the taxpayers did not have to wait long and get the required relief from the Supreme Court decision in the case of *GE India Technology Cen. (P.) Ltd. v. CIT* [2010] 193 TAXMAN 234 (SC). The apex court held that the moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9. Section 195(2) is not a mere provision to provide information to ITO(TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable. This is also the established position before the Karnataka High Court decision in the case of *CIT v. Samsung Electronics Co. Ltd.* [2009] 185 TAXMAN 313 (KAR.). The following diagram discusses the different options for the payer.

Withholding Tax options before Payer

Where whole amount is taxable, like interest etc.	**Where payment is partly taxable like capital gains**	**Where amount is not taxable at all like dividend**
Deduct TDS and get CA certificate and remit the payment. Rate of TDS should be lower of the rates provided under ITA or DTAA.	Either Deduct TDS on whole amount and get CA certificate and remit the payment Or Get certificate for lower deduction from AO and deduct TDS as per AO certificate and remit payment. Though as per language of form 15CB, CA can give certificate for lower deduction also but consensus of tax advisors are against this approach	As per majority view, get CA certificate and remit the payment without TDS. But in few cases like Samsung decision, it was held that one has to get certificate for lower deduction or nil deduction from AO otherwise have to deduct TDS on the whole amount. But after Supreme Court decisions it is possible to remit without AO certificate

But it is very difficult to ascertain
Whether the payment is taxable or not?
Like, whether the payment is FTS, Royalty or business income?

LANDMARK DECISIONS

Supreme Court in the case of *Transmission Corporation of A. P. Ltd. v. CIT* [1999] 239 ITR 587, speaking through Justice M. B. Shah observed:

"The scheme of Sub-sections (1), (2) and (3) of Section 195 and Section 197 leaves no doubt that *the expression "any other sum chargeable under the provision of this Act" would mean 'sum' on which income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act.* Consideration would be - whether payment of sum to non-resident is chargeable to tax under the provision of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum. What would be the income is to be computed on the basis of various provision of the Act including provision for computation of the business income, if the payment is trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force. Under the Act, total income for the previous year would become chargeable to tax under Section 4. Sub-section (2) of Section 4 inter alia, provides that in respect of income chargeable under Sub-section (1), income-tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted"

Delhi Tribunal in the case of *Dolphin Drilling Limited v ACIT* [2009] 29 SOT 612 (DELHI), held:

"The decision of Hon'ble Supreme Court in the case of Transmission Corporation of A.P. Ltd. vs. CIT is also of no assistance to the Department inasmuch as in this case a preposition that has been laid down is that income-tax on the gross sum chargeable to tax is to be deducted, and it is the statutory obligation of the person responsible; for payment of such sum chargeable to tax, to deduct tax thereon before making payment. Here, in the present case, it is the case of the assessee that the payment of crew salary and expenses is not chargeable to tax as fees for technical services in the hands of Alfa Crew, and as such the question of deducting tax at source under s. 195 of the Act did or could not arise. This decision would have gone against the assessee only after it is found that the payment of salary crew and expenses paid to Alfa Crew were chargeable to tax in the hands of Alfa Crew and thus, the tax was deductible under s. 195 of the Act. ………… From the said decision, it is thus clear that in order to invoke s. 195, it is to be established that the sum paid to non-resident is chargeable under the Act, and if it is found to be not chargeable under the Act, the provision of s. 195 would not be applicable."

Special Bench of Income Tax Appellate Tribunal in the case of *Mahindra & Mahindra Vs. Dy. Commissioner of Income Tax* [2009] 30 SOT 374 (MUM.) (SB) held:

"From here it follows that Sub-section (2) onwards of Section 195 and Section 197 apply, primarily, in respect of a sum which is chargeable to tax. It is only where the sum is otherwise chargeable to tax but deduction of tax at source is not warranted on the whole or any part of it, depending upon the peculiar circumstances, that the person responsible for paying such sum or the person entitled to receive such sum can apply for no deduction or deduction at lower rate of tax. Thus the pre-requisite condition for the application of Section 195 and thereafter Section 201 is that the amount paid to the non-resident is otherwise chargeable to tax under the provision of this Act…………If however the amount paid or payable to the non resident is not chargeable to tax under the regular provision of this Act or such amount is not taxable by virtue of the provision Double Taxation Avoidance Agreement (hereinafter called the DTAA) entered into by India with such other country of which the non- resident is resident, in accordance with Chapter IX, then the provision of Chapter XVII about the Collection and recovery of tax are ruled out and the person responsible for paying-such sum cannot be fastened with any liability for deduction of tax at source and cannot under any circumstance be treated as assessee in default."

Karnataka High Court in the case of *CIT v. Samsung Electronics Co. Ltd.* [2009] 185 TAXMAN 313 (KAR.), held:

"If one is allowed the liberty of giving a rough and crude comparison to the manner in which the provision of section 195 of the Act operate on a resident payer who makes payment to a non-resident recipient and if the payment bears the character of a semblance of an income receipt in the hands of the non-resident recipient, then the obligation on the part of the resident payer who makes such a payment to the non-resident recipient is like a guided missile which gets itself attached to the target, the moment, the resident-assessee makes payment to the non-resident recipient and there is no way of the resident payer avoiding the guided missile zeroing on the resident payer whether by way of contending that the amount does not necessarily result in the receipt of an amount taxable as income in the hands of the non-resident recipient under the Act or even by contending that the non-resident recipient could have possibly avoided any liability for payment of tax under the Act by the over all operation of different provision of the Act or even by the combined operation of the provision of a Double Taxation Avoidance Agreement and the Act as is sought to be contended by the respondents in the present appeals…………..The only limited way of either avoiding or warding off the guided missile is by the resident payer invoking the provision of section 195(2) of the Act and even here to the very limited extent of correcting an incorrect identification, an incorrect computation or to call in aid the actual determination of the tax liability of the non-resident which, in fact, had been determined as a part of the process of assessing the income of the non-resident and by using that as the basis for claiming a proportionate reduction in the rate at which the deduction is required to be made on the payment to the non-resident. Except for this method, there is no other way of the resident payer avoiding the obligations cast on it by the provision of section 195(1) of the Act and as a consequence of such default, when is served with a demand notice in terms of section 201 of the Act."

Delhi High Court in the case of *Van Oord ACZ India (P) Ltd. v. CIT* [2010] 189 TAXMAN 232 (DELHI) held;

"It is clear from the above that the Supreme Court dealt with a situation where the sum paid to the non-resident was chargeable and opined that in such a situation tax at source is to be deducted and entire amount paid and not on the "pure income profits", as it was not for the assessee to determine as to how much of the sum paid by the assessee to the recipient would be taxable at the hands of the recipient. The Court was not confronted with the situation where the amount paid was not chargeable to tax at the hands of non-residents at all."

Supreme Court in the case of *GE India Technology Cen. (P.) Ltd. v. CIT* [2010] 193 TAXMAN 234 (SC) held;

"In this background, the picture that emerges is that while under section 195(1) of the Act, there is an obligation on the part of the person responsible for paying to a non-resident does arise if and only if the payment partakes the character of income payment, in the sense that, if an amount is not in the nature of income payment at all then section 195(1) of the Act does not operate……….. However, section 195(2) of the Act provides for a limited extent of a possible reduction in the actual amount to be deducted at source by the resident payer if the resident payer is able to demonstrate before the Assessing Officer that the entire payment does not bear the character of income, but only a part of the payment bears the character of income and the payment in respect of goods purchased by the resident and paid to the non-resident is a very good illustration where the cost of the goods *i.e.*, the entire cost of the goods by itself does not constitute income even in the hands of the non-resident recipient but only the profit part of the payment which has to be ascertained in the manner as provided for under the Act, particularly, under the head 'profits and gains of business or profession' and even here the scope for such reduction through the application at the instance of a resident payer is only to the extent of demonstrating as to what percentage of the payment bears the character of income and seek for permission to deduct only such proportionate sum from out of the actual payment which is chargeable to tax as income of the non-resident recipient."

8.3 Scope of AO Certificate u/s 195(2)

As no form is prescribed for application under section 195(2), the payer can submit the required details on simple paper also. Even the ITO can treat an application for tax clearance certificate as one under section 195(2). It cannot be said that the application must contain in it all the requirements of section 195(2) to enable the ITO to exercise his jurisdiction. An assessee can approach the ITO by merely stating that an order under section 195(2) may be made. Even mentioning of a wrong section is immaterial.

In the case of *Graphite Vicarb India Ltd. v. ITO* [1986] 18 ITD 58 (Cal.), the Tribunal held that a reading of section 195(2) shows that it envisages disputes about the appropriate proportion of the sum which would be chargeable to tax. This sub-section does not envisage a case where the assessee claims that no portion of the sum to be remitted is liable to tax at all. The jurisdiction of the ITO under section 195(2) is to say as to what portion of the sum to be remitted is to be regarded as taxable under the Act. His jurisdiction does not extend to say that the whole amount is exempt from tax. This is clear from the phrase 'appropriate proportion' used in the sub-section. As the sub-section stands, the assessee can ask for the determination of the appropriate proportion of the sum that is liable to tax. The assessee cannot ask for a declaration that such proportion would be nil. Where the assessee admits that some portion of the amount to be remitted is liable to tax but is unable to determine that portion, he can invoke section 195(2). This section is not available to the remitter while remitting the amount in a case where he considers the amount to be wholly exempt from tax. His remedy is to start assessment proceeding in the case of the recipient and put forward his claim that the entire sum is exempt. If no portion is considered to be liable to tax, then section 195(2) does not come into play at all.

In the case of *Mangalore Refinery & Petrochemicals Ltd. v. Dy. DIT* [2008] 113 ITD 85 (Mum.) the assessee contended that it had obtained an NOC from Assessing Officer under section 195(2) for remitting payment relating to first contract and, therefore, it believed that for making similar payment under contract in question it was not necessary to approach Assessing Officer under section 195(2). But the Tribunal held that on basis of this belief one could not hold that assessee was justified in not deducting tax while remitting amount to non-resident. Hence no precedential value can be attached with AO certificate.

8.4 Relevance of AO Certificate u/s 195(2)

Bombay High Court in the case of *Dodsal (P.) Ltd. v. CIT* [2003] 131 Taxman 565/260 ITR 507 (Bom.) held that Orders passed under section 195(2) are provisional and tentative. These orders do not bind the ITO in regular assessment proceedings. Delhi High Court in the case of *Areva T&D, SA v. ADIT* [2011] 10 taxmann.com 319 (Delhi) also held that if any opinion is expressed at time of grant of certificate under section 197, it is tentative or provisional or interim in nature and same would not even debar Assessing Officer from initiating a proceeding under section 147 on ground that there has been a change of opinion.

8.5 Payments to non-resident without tax deduction in certain cases under rule 29B as per section 195(3)

Under section 195, any person responsible for paying any sum to a non-resident is required to deduct tax at source on such income at the time of payment. The following persons in respect of the following incomes are eligible to apply under section 195(3) to obtain a certificate to receive income without tax deduction:

1. Banking companies - In the case of a non-Indian banking company (which has not made prescribed arrangement for the declaration and payment of dividend in India and which carries on operation in India through a branch office), application can be filed in Form No. 15C to receive any income by way of interest (not being interest on securities), or any other sum (not being dividend) without tax deduction under section 195(1).

2. Other persons carrying on business/profession - In the case of any other person (who carries on a business or profession in India through a branch), application has to be submitted in Form No. 15D to obtain any income (other than interest or dividends) without tax deduction under section 195(1). The amount in both of the aforesaid cases should have been receivable by such branch on its own account and not on behalf of its head office or any branch situated outside India or any other person.

Conditions to be satisfied

If the following conditions are satisfied, the concerned Assessing Officer may grant a certificate authorising the recipient to receive the income without tax deduction under section 195(1):

1. The person concerned has been regularly assessed to income-tax in India and has furnished the returns of income for all assessment years for which such returns became due on or before the date on which the application is made.

2. He is not in default or deemed to be in default in respect of any tax (including advance tax and tax payable under section 140A), interest, penalty, fine, or any other sum payable under the Act.

3. He has not been subjected to penalty under section 271(1)(iii).

Additional conditions for persons carrying on business or profession other than banking - Where the person concerned is not a banking company, the following conditions are also to be satisfied:

1. He has been carrying on business or profession in India continuously for a period of not less than five years immediately preceding the date of the application.

2. The value of the fixed assets in India of such business or profession as shown in his books for the previous year which ended immediately before the date of the application (or where the accounts in respect of such previous year have not been made up before the said date, the previous year immediately preceding that year) exceeds Rs. 50 lakhs.

Procedure for issue of certificate - While issuing the certificate the Assessing Officer has not only to examine that the conditions are satisfied but he has also to ensure that issue of certificate will not be prejudicial to the interest of revenue.

The certificate will be valid for the financial year specified therein unless it is cancelled by the Assessing Officer at any time before the expiry of the said financial year. An application for a fresh certificate may be made (if necessary) after the expiry of the period of validity of the earlier certificate, or within 3 months before the expiry thereof.

C H A P T E R 9

WITHHOLDING TAX AND CA CERTIFICATE

9.1 Introduction

The Reserve Bank of India has mandated that except in the case of certain personal remittances which have been specifically exempted, no remittance shall be made to a non-resident unless a no objection certificate has been obtained from the Income-tax Department. This was modified to allow such remittances without insisting on a no objection certificate from the Income-tax Department, if the person making the remittance furnishes an undertaking (addressed to the Assessing Officer) accompanied by a certificate from an Accountant in a specified format. The certificate and undertaking are to be submitted (in duplicate) to the Reserve Bank of India/authorised dealers who in turn are required to forward a copy to the Assessing Officer concerned. The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from non-residents.

There has been a substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult. To monitor and track transactions in a timely manner, section 195 was amended *vide* Finance Act, 2008 to allow CBDT to prescribe rules for electronic filing of the undertaking. The format of the undertaking (Form 15CA) which is to be filed electronically and the format of the certificate of the Accountant (Form 15CB) have been notified *vide* Rule 37BB of the Income-tax Rules, 1962.

The revised procedure for furnishing information regarding remittances being made to non-residents with effect from 1st July, 2009 is as follows:—

(*i*) The person making the payment (remitter) will obtain a certificate from an accountant (other than employee) in Form 15CB.

(*ii*) The remitter will then access the website to electronically upload the remittance details to the Department in Form 15CA (undertaking). The information to be furnished in Form 15CA is to be filled using the information contained in Form 15CB (certificate).

(*iii*) The remitter will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. Form 15CA (undertaking) can be signed by the person authorised to sign the return of income of the remitter or a person so authorised by him in writing.

(*iv*) The duly signed Form 15CA (undertaking) and Form 15CB (certificate), will be submitted in duplicate to the Reserve Bank of India/authorized dealer. The Reserve Bank of India/authorized dealer will in turn forward a copy the certificate and undertaking to the Assessing Officer concerned.

(*v*) A remitter who has obtained a certificate from the Assessing Officer regarding the rate at or amount on which the tax is to be deducted is not required to obtain a certificate from the Accountant in Form 15CB. However, he is required to furnish information in Form 15CA (undertaking) and submit it along with a copy of the certificate from the Assessing Officer as per the procedure mentioned from Sl. Nos. (*i*) to (*iv*) above.

(*vi*) A flow chart regarding filing of Form 15CA and Form 15CB is given below. (*Circular No. 4/2009, dated 29-6-2009)*

Flow chart of filing undertaking form u/s 195 of IT Act, 1961

Remitter

↓

Obtains certificate of Accountant (Form 15CB). This form is available at the website : www.tin-nsdl.com

↓

Accesses the above website

↓

Electronically uploads the remittance details in Form 15CA

↓

Takes printout of filled undertaking form (15CA) with system generated acknowledgement number

↓

Printout of the undertaking form (15CA) is signed

↓

Submits the signed paper undertaking form to the RBI/Authorized dealer along with certificate of an Accountant in duplicate

↓

RBI/Authorized dealer remits the Amount

↓

A copy of undertaking (Form 15CA) & certificate of Accountant (Form 15CB) forwarded to Assessing Officer

9.2 Procedure for furnishing information under sub-section (6) of section 195 (new form 15CA)

9.2.1 General

1. Form 15CA should be used for furnishing information of remittances in e-mode in accordance with the provision of section 195(6) of the Income-tax Act, 1961. The information should be furnished after obtaining a certificate in Form 15CB from an accountant as defined in the Explanation to section 288 of the Income-tax Act, 1961. The print out Form 15CA should be signed and submitted to the Reserve Bank of India/authorized dealer prior to remitting the payment.

2. The Form should be furnished at the website of the Tax Information Network www.tin-nsdl.com.

3. Fields marked with (*) are mandatory.

4. Select the values from the drop down wherever provided.

5. Each transaction detail should be filled in separately.

9.2.2 Guidelines for Part A of Form 15CA

Remitter:

1. Permanent Account Number (PAN) and Tax Deduction and Collection Account Number (TAN) allotted by the Income-tax Department should be mentioned. TAN is mandatory in cases where-

(*a*) tax has been deducted or will be deducted at source;

(*b*) the remitter has obtained an order under section 195(2) of the Income-tax Act from the Assessing Officer.

2. In case an invalid PAN and/or TAN is filled in by the remitter, the Form will not be generated.

3. In case the remitter does not have a TAN, it is mandatory to quote PAN of the remitter.

4. PAN of the remitter should invariably be given. However, the same is mandatory if status of entity is company or firm. If PAN is not given in such cases, the remitter will not be allowed to generate the Form.

5. Details in at least two address fields for remitter should be mentioned.

6. Name of the entity should be mentioned in the "Name of remitter" field.

7. No value is to be provided in Area code, AO type, Range code and AO number. The fields will be entered by the system after validating the PAN and/or TAN.

8. Email id and mobile no., if any, should be provided.

Recipient of remittance:

1. Complete address of recipient of remittance, separated by coma, should be provided.
2. PAN, allotted by the Indian Income-tax Department should be mentioned.
3. If status of entity is "company", then provide type of company i.e., "domestic" or "other than domestic".
4. In the field "Principal Place of Business", the country of tax residence of the recipient of the remittance should be mentioned.

Information for accountant

1. Enter name of the Chartered Accountant in the field "Name of the accountant".
2. Details in at least two address fields should be mentioned.
3. Date of certificate should not be a future date.
4. Registration No. should be numeric.
5. Details of accountant are not required if point No. 15 is selected *i.e.* any order u/s 195(2)/195(3)/ 197 of the Income-tax Act has been obtained from Assessing Officer.
6. Certificate number is an alphanumeric field.

Guidelines for PART B of the Form (Particulars of Remittance and TDS)

1. Provide the values as per the accountant certificate obtained in Form 15CB.
2. In case name of the country is not available in drop down list, select value "other" from the drop down and provide name of the country.
3. In case currency name is not available in drop down then select value "other" from the drop down and provide name of the currency.
4. Proposed date of remittance should be current date or a future date.
5. Amount of TDS should be less than amount of remittance.
6. Actual amount of remittance after TDS should be less than amount of remittance.
7. BSR code of the bank through which the remittance is made should be mentioned.
8. Rate of TDS as per DTAA (if applicable) should be mentioned upto two decimal places.
9. Amount should be mentioned upto 2 decimal places.
10. Select any one out of fields 12, 13, 14 and 16. One form is to be filled for one type of remittance.

11. Details of "responsible person" should be mentioned for verification.
12. If no tax has been deducted then value "0.00" should be mentioned in "Amount of TDS" field (foreign currency and Indian Rs.)
13. Value for "rate of deduction as per the Income-tax Act" should be "0.00" if no tax has been deducted and "amount of TDS in Indian and foreign currency" should be "0.00".

Generation of Form 15CA

1. After filling up the information, click "submit". On submission of details if system shows any errors, rectify and re-submit the form.
2. A confirmation screen with all the data filled by the user will be displayed. The same can be either confirmed or edited.
3. On confirmation, a filled up Form 15CA with an acknowledgement number will be displayed. Print out of the Form should be taken, signed and submitted prior to remitting the payment.
4. Form 15CA can be re-printed by selecting the re-print option. For re-printing, please enter "acknowledgement No.", "PAN" and/or "TAN" mentioned in the Form.

9.3 Clarification regarding remittance of consular receipts to non-residents

As per Article 28 of the Schedule to section 2 of the Diplomatic Relations (Vienna Convention) Act, 1972, the fees and charges levied by a diplomatic mission in the course of its official duties shall be exempt from all dues and taxes. In view of the above, while remitting consular receipts abroad, diplomatic missions in India will be required to submit only a self-certified undertaking in Form No. 15CA to the remitter bank. They are not required to obtain a certificate from an accountant/certificate of the Assessing Officer (Form 15CB). The procedure for furnishing information regarding remittances of Consular receipts by diplomatic missions in India will be as follows:—

(*i*) The diplomatic mission will access the website to electronically upload the remittance details to the Income-tax Department in Form 15CA (undertaking).

(*ii*) The diplomatic mission will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. Form 15CA (undertaking) can be signed by the head of the mission or by an officer of the mission so authorized by the head of the mission.

(*iii*) The duly certified Form 15CA (undertaking) will be submitted in duplicate to the Reserve Bank of India/authorized dealer. The Reserve Bank of India/authorized dealer will in turn forward a copy of the undertaking to the Assessing Officer concerned – (*Circular : No. 9/2009, dated 30-11-2009)*

9.4 What is relevance of CA Certificate?

In view of the provision of section 195, it is obligatory for a person making any payments to any non-residents that income-tax thereon in connection with the same is deducted at source. It is with a view to ensure compliance with this requirement of the RBI to obtain a 'no objection certificate', the Assessing Officer had to examine all the remittances. This procedure resulted in inordinate delays in making the remittances because on many occasions the process of determining tax deductions by the Assessing Officer took long time. It was in this backdrop and in the light of increased measure of faith in taxpayers and professionals, that the system was simplified in 1997. The CBDT has, vide Circular No. 759, dated 18-11-1997 [(1997)143 CTR (St) 290], dispensed with the requirement of obtaining a no objection certificate from the Assessing Officer before making a foreign remittance. Under the new scheme set out in the aforesaid circular, which has been subsequently modified by the CBDT Circular No. 10 of 2002, dated 9-10-2002 and *Circular No. 4/2009, dated 29-6-2009*, it is not necessary for an assessee to obtain prior determination of tax withholding liability. The assessee could, under the new scheme, approach any independent chartered accountant for determining his withholding tax liability from a remittance, and make a remittance on the basis of this certification, as long as the assessee tax deductor gave an undertaking to the Assessing Officer.

So far as TDS under the revised procedure of making remittances to non-residents is concerned, the position is now like this. In case a person has to make a remittance to a non-resident, and he is of the view that the no TDS is warranted or tax is required to be deducted at a certain rate, he can approach an independent chartered accountant for certifying, in the prescribed format, the rate at which tax is to be deducted or that tax is not to be deducted, and make the remittance on the basis of such a certificate. Even this remittance on the basis of the chartered accountant's certificate is at assessee's own risk of consequences which follow the short deduction or non-deduction of tax at source. The assessee has to give an undertaking to that effect. However, as long as the assessee's stand is at least supported by a chartered accountant's certificate, the assessee is at least allowed to make the remittance on that basis.

Hence, it is essential to understand the nature of a chartered accountant's certificate on the basis of which foreign remittances are made. Mumbai Tribunal in the case of *DCIT v. Rediff.com India Ltd.* [2011] 13 taxmann.com 61 (Mum.) held that the certificate issued by chartered accountant, on question of taxability of payment to non-resident in India, has no decisive impact on determination of taxability of income in hands of recipient non-resident. It is only a prima facie, evidence about taxability status and its acceptability by revenue authorities is confined to permitting remittance on basis of taxability status certified by chartered accountant. It is not abandonment of the institution of the Assessing Officer (TDS) in favour of the professionals in accountancy practice. It cannot substitute for adjudication on taxability in the hands of non-resident by the Assessing Officer, nor can it be used as a shield by the assessee to thwart any probe on that aspect of the matter by the tax authorities. As a matter of fact, as assessee tax deductor's mandatory undertaking accompanying this certificate shows, the question of taxability in the hands of the recipient remains open and the assessee continues to have obligation to file all the relevant details, enabling determination of such liability, before the revenue authorities.

CHAPTER 10

FOREIGN INSTITUTIONAL INVESTORS AND WITHHOLDING TAX

Taxation of Foreign Institutional Investors (FII) is tricky issue. As per various regulatory frameworks, FII operating in India generally have three types of incomes from transactions in shares and securities. Under the domestic law, dividend is not taxable in India hence poses no problem. Business profit is taxable but FII generally operate through independent settlement agent and domestic custodian hence remains out of tax net in absence of PE. Capital gain is taxable under domestic law in certain circumstances but it is not taxable under few DTAA like Indo-Mauritius Treaty. But in other DTAA, capital gain is taxable. So it is the common arguments of FIIs' that their income from transactions in shares and securities are business income and not taxable in India in absence of PE. On the other side, it is the common contention of the revenue that FII cannot do business in India as per regulatory framework and their income from transactions in shares and securities are capital gains hence taxable in India.

In the ruling of *In re Royal Bank of Canada*, [2010] 189 TAXMAN 466 (AAR - NEW DELHI), the Authority has to decide two issues. First issue was taxation of income from 'Derivative Transactions' and AAR on facts held that trading by FII in derivatives is not prohibited under the regulatory regime of SEBI and FEMA but the basic question to be addressed is about the characterization of income and if the resulting income is business income; it is not liable to be taxed in India in absence of PE. On the second question, the ruling was sought on the proposed activity of purchase and sale of equity shares and other securities. It was the contention of the applicant that the income from these transactions should also be classified as 'business income' and not as 'capital gain. The AAR held that the question has to be decided on the basis of actual facts but not on hypothetical basis. No doubt, the advance ruling can be sought in respect of a transaction "proposed to be undertaken". But where the determination of the question depends on assessment of certain crucial facts, the actual pattern of dealings or the *modus operandi* of the transactions, it would not be appropriate to undertake the task of giving a definite ruling at this juncture, especially when the authority is called upon to reconsider the earlier ruling on the same issue.

But on the other hand Mumbai Tribunal in the case of *LG Asian Plus Ltd. v. Assistant Director of Income-tax (International Taxation)-3(2)* [2011] 11 taxmann.com 414 (Mum.) held that FIIs can only make investment in securities in country's capital market and they cannot undertake trade in them. Hence, income arising to a FII from transfer of securities falls within ambit of section 115AD, as per which income arising from transfer of such securities is to be considered as short-term capital gain. Further, once inclusion of such income from transfer of securities is held to be falling under head 'Capital gains', it cannot be considered as 'Business income', whether speculative or non-speculative. Following diagram shows possible treatment in the case of TDS on payments to FII.

FII TAXATION IN INDIA
(Normal Practice)

DIVIDEND	CAPITAL GAINS	BUSINESS PROFITS
Dividend is exempt in India (Section 115O)	Capital gains are taxable u/s 115AD But in few DTAA capital gains is not taxable in India like Indo-Mauritius DTAA	Generally FII have no PE in India, thus business profits are normally not taxable.
No TDS required (Section 195)	**No TDS required (Section 196D)**	**No TDS required (Section 196D)**
No CA certificate prescribed and domestic custodian take CA letter/ opinion that no TDS required before remittance	No CA certificate prescribed and domestic custodian take CA letter/ opinion that no TDS required before remittance	CA certificate (15CB) prescribed

CONCLUSION

FII operating from Mauritius/Cyprus etc. - Normally no tax is payable in India
FII operating from other countries - Do substantial transactions and avoid Indian taxes
Whether FII can do business in India? Doubtful

CHAPTER 11

WHEN DEDUCTOR CAN CLAIM REFUND OF TDS?

TDS is one of the modes of collection of Income Tax by the Income tax department. Under this method, income tax is deducted by the payer of certain amounts on behalf of payee. TDS is provisional receipt of income tax on behalf of payee and it is not the final tax liability and if the actual income tax liability of payee is more than TDS, then balance amount have to be paid by the payee. Similarly if TDS is more than actual income tax liability then refund can be claimed by payee. Under the provision of the Act, refund of excess amount can be claimed only by payee even where TDS is not deductible or deductible at lesser amount. There is no provision of refund to deductor of TDS. But in case of non-resident payees, it poses genuine problems in certain cases. Hence, from time to time, CBDT issued various guidelines for refund of amount to deductors. Recently the CBDT have issued Circular No. 7/2007, dated 23-10-2000. Before that the Board had issued Circular No. 769, dated 6-8-1998, laying down procedure for refund of tax deducted under section 195, in certain situations to the person deducting the tax at source from the payment to the non-resident. After reconsideration, Circular No. 769 was revoked by the Board Circular No. 790, dated 20th April, 2000. Latest guideline is given below:

Circular No. 7/2007, dated 23-10-2007

1. The Board had issued Circular No. 790, dated 20th April, 2000, laying down the procedure for refund of tax deducted at source under section 195, in certain situations to the person deducting the tax at source from the payment to the non-resident. Representations have been received in the Board from taxpayers requesting that the said Circular may be amended to take into account situations where genuine claim for refund arises to the person deducting the tax at source from payment to the non-resident and it does not fall in the purview of the said Circular.

2. The cases which are being referred to the Board mainly relate to circumstances where, after the deposit into Government account of the tax deducted at source under section 195,

(*a*) the contract is cancelled and no remittance is made to the non-resident;

(*b*) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source;

(*c*) the contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part;

(*d*) the contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at source or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident;

(*e*) there occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provision of Income-tax Act;

(*f*) an order is passed under section 154 or 248 or 264 reducing the tax deduction liability of a deductor under section 195;

(*g*) there occurs deduction of tax twice from the same income by mistake;

(*h*) there occurs payment of tax on account of grossing up which was not required under the provision of the Income-tax Act;

(*i*) there occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India.

2.1 In the cases mentioned above, income does not either accrue to the non-resident or it accrues but the excess amount in respect of which refund is claimed, is borne by the deductor. The amount deducted as tax under section 195 and paid to the credit of the Government therefore belongs to the deductor. At present, a refund is given only on a claim being made by the non-resident with whom the transaction was intended or in terms of Circular No. 790, dated 20th April, 2000.

3. In the type of cases referred to in sub-paragraph (*a*) of paragraph 2, the non-resident not having received any payment would not apply for a refund. For cases covered by sub-paragraphs (*b*) to (*i*) of paragraph 2, no claim may be made by the non-resident where he has no further dealings with the resident deductor of tax or the tax is to be borne by the resident deductor. This resident deductor is, therefore, put to genuine hardship as he would not be able to recover the amount deducted and deposited as tax.

4. The matter has been considered by the Board, in the type of cases referred to above, where no income has accrued to the non-resident due to cancellation of contract or where income has accrued but no tax is due on that income or tax is due at a lesser rate, the amount deposited to the credit of Government to that extent under section 195, cannot be said to be 'tax'.

4.1 It has been decided that, this amount can be refunded, with prior approval of the Chief Commissioner of Income-tax or the Director General of Income-tax concerned, to the person who deducted it from the payment to the non-resident, under section 195.

5. Refund to the person making payment under section 195 is being allowed as income does not accrue to the non-resident or if the income is accruing no tax is due or tax is due at a lesser rate. The amount paid into the Government account in such cases to that extent, is no longer 'tax'. In view of this, no interest under section 244A is admissible on refunds to be granted in accordance with this circular or on the refunds already granted in accordance with Circular No. 769 or Circular No. 790.

6. In case of refund being made to the person who made the payment under section 195, the Assessing Officer may, after giving intimation to the deductor, adjust it against any existing tax liability of the deductor under the Income-tax Act, 1961, Wealth-tax Act, 1957 or any other direct tax law. The balance amount, if any, should be refunded to the person who made such payment under section 195. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer or the Assessing Officer in favour of the 'Income-tax Department' and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the major head '020- Corporation Tax' or the major head '021-Taxes on incomes other than Corporation tax' depending upon whether the payment was originally credited to the major head '020-Corporation tax' or to the major head '021-Taxes on Income other than Corporation tax'.

7. A refund in terms of this circular should be granted only after obtaining an undertaking that no certificate under section 203 has been issued to the non-resident. In cases where such a certificate has been issued, the person making the refund claim under this circular should either obtain it or should indemnify the Income-tax Department from any possible loss on account of any separate claim of refund for the same amount by the non-resident. A refund in terms of this circular should be granted only if the deductee has not filed return of income and the time for filing of return of income has expired.

8. The refund as per this circular is, *inter alia*, permitted in respect of transactions with non-residents, which have either not materialized or have been cancelled subsequently. It, therefore, needs to be ensured by the Assessing Officer that they disallow corresponding transaction amount, if claimed, as an expense in the case of the person, being the deductor making refund claim. Besides, in all cases, the Assessing Officer should also ensure that in the case of a deductor making the claim of refund, the corresponding disallowance of expense amount representing TDS refunded is made.

9. The limitation for making a claim of refund under this circular shall be two years from the end of the financial year in which tax is deducted at source. However, all cases for claim of refund under items (*c*) to (*i*) of paragraph 2 which were pending before the issue of this circular and where the claim for refund was made after the issuance of Circular No. 790 may also be considered.

10. It has been represented to the CBDT that in Circular No. 769, dated 6th August, 1998, there was no time-limit for making a claim for refund. A time-limit of two years, for making a refund claim, was stipulated *vide* Circular No. 790, dated 20th April, 2000. Some cases covered by Circular No. 769, which were also covered by Circular No. 790, now listed in items (*a*) and (*b*) of paragraph 2 of this Circular, and filed before the issue of Circular No. 790, became time-barred because of tile specification of time-limit in Circular No. 790. It is hereby clarified that such cases may also be considered for refund.

11. This Circular is issued in supersession of the Circular No. 790/2000, dated 20th April, 2000

SECTION 239 OF THE INCOME-TAX ACT, 1961 - REFUNDS - PROCEDURE FOR REFUND OF TAX DEDUCTED AT SOURCE UNDER SECTION 195 TO THE PERSON DEDUCTING THE TAX - AMENDMENT IN CIRCULAR NO. 7/2007, DATED 23-10-2007

CIRCULAR NO. 07/2011 [F.NO. 500/135/2007-FTD-I], DATED 27-9-2011

1. The Board had issued Circular No. 7/2007, dated 23-10-2007 laying down the procedure for refund of tax deducted at source under section 195 of the Income-tax Act, 1961 to the person deducting tax at source from the payment to a non -resident .

2. Para 2 of the Circular lists the circumstances under which the provision of the said Circular shall apply. This paragraph does not cover a situation where the tax is deducted at a rate prescribed in the relevant DTAA which is higher than the rate prescribed in the Income-tax Act, 1961. Since the law requires deduction of tax at a rate prescribed in the relevant DTAA or under the Income-tax Act, whichever is lower, there is a possibility that in such cases, excess tax is deducted relying on the provision of the relevant DTAA. Since in these cases as well, the resident deductor is put to genuine hardship, the Board has decided that the provision of Circular No. 7/2007, dated 23-10-2007 shall also apply to those cases where deduction of tax at a higher rate under the relevant DTAA has been made while a lower rate is prescribed under the domestic law.

3. Circular No. 7/2007, dated 23-10-2007 stands modified to this extent.

If the case is not covered by guidelines then the non-resident payee have to claim the refund himself/itself only.

CHAPTER 12

CONSEQUENCES OF DEFAULT ON WITHHOLDING TAX

12.1 Tax

If the person is responsible for making deduction of tax at source but fails to do so and the payee assessee i.e. the real assessee has also not paid the taxes on such income then the department can recover the amount of TDS from the defaulting person. Vodafone case is a live example. But where the payee has already paid the taxes on captioned income, no demand can be made against the defaulting payer. [See Circular No. 275/201/95-IT(B), dated 29-1-1997 and *Hindustan Coca Cola Beverage (P.) Ltd. v. CIT* [2007] 163 Taxman 355/293 ITR 226 (SC)]

A. Circular No. 275/201/95-IT (B), dated 29-1-1997

Where taxes have been paid by deductee-assessee

The Board is of the view that no demand visulasied under section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer in charge of TDS that taxes have been paid by the deductee-assessee.

B. *Hindustan Coca Cola Beverage (P.) Ltd. v. CIT* [2007] 163 Taxman 355/293 ITR 226 (SC)

The assessee was engaged in the manufacture and sale of soft drinks. It entered into an agreement with 'P' for use of its premises for receipt, storage and dispatch of goods belonging to it and paid warehousing charges on which tax was deducted under section 194C at 2 per cent. The Assessing Officer held that the warehousing charges were in the nature of 'rent' as defined in *Explanation* to section 194-I and, therefore, tax ought to have been deducted at 20 per cent under the said provision as against deduction of tax at 2 per cent under section 194C. The Assessing Officer, therefore, held the assessee to be assessee-in-default for the shortfall in the amount of tax deducted at source. Accordingly, he levied interest under section 201(1A) on the amount of tax alleged to be short-deducted. On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer. On further appeal, the Tribunal confirmed the order of the Commissioner (Appeals). The further appeal filed by the assessee was also dismissed by the High Court. Thereafter, the assessee filed an application under section 254(2) for rectification of the order of the Tribunal on the ground that its alternative contention that the warehouse had been assessed on its income and the tax due had been recovered from it by the department and also it had received refund from the department and, therefore, no further tax could have been collected from it, had not been considered by the Tribunal. The Tribunal, while allowing the assessee's application, held that there was a mistake apparent on the face of record and, therefore, constituted a rectifiable mistake under section 254(2) and, accordingly, recalled its earlier order and held that the tax once again could not be recovered from the assessee since the tax had already been paid by the recipient of income. On the revenue's appeal, the High Court held that the Tribunal's earlier order got itself merged into the order passed by it dismissing the appeal of the assessee and, therefore, the Tribunal could not have reopened the matter for any further hearing.

Held that the Circular No. 275/201/95-IT(B), dated 29-1-1997 issued by the Central Board of Direct Taxes would put an end to the controversy. The circular declares that no demand visualized under section 201(1) should be enforced after the tax deductor has satisfied the officer-in-charge of TDS that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201(1A) till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C. In the instant case, the assessee had paid the interest under section 201(1A) and there was no dispute that the tax due had been paid by 'P'. It was not disputed that the circular was applicable to the facts situation at hand. Hence, the judgment of the High Court was, to be set aside.

12.2 Interest

Interest has to be paid from the date when the TDS was deductible to the date on which such tax is actually paid. Interest is mandatory and even payable where the tax is paid by payee instead of payer. Hence the payer can avoid the tax liability where the tax has already been paid by payee but cannot avoid interest liability even the default is bonafide.

Even where taxpayer has deducted tax by mistake on payments which are not liable for TDS, assessee cannot justify non-deposit of it on ground that no TDS was liable to be deducted and interest has to be paid in case of late deposit.

But the question can arise where the payee is incurring losses and may not be liable to pay taxes. Whether in such cases, the payer is liable to pay interest if fails to deduct TDS? In the case of *ITO v. Intel Tech India (P.) Ltd.* [2009] 32 SOT 227 (Bang.), the tribunal held that interest has still to be paid even the payee was not liable to pay tax as the payee was incurring losses. The tribunal held that since the deductee had filed return and had disclosed the transaction and no tax was payable as per return on such transaction, default would end on date on which the deductee had filed return and, therefore, the deductor would be liable to pay interest on the amount of tax to be deducted from the date of deduction till the time deductee filed its return of income.

12.3 Penalty

The defaulting person may be held liable for the amount of penalty which can extend up to the amount of TDS. But where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty can be levied. Penalty can be levied even where before the levy of such penalty the defaulting person has paid the tax.

12.4 Prosecution

Prosecution is possible only if the TDS is deducted and after deduction it is not paid to the credit of Indian Government account either fully or partly. If there is no deduction of TDS at all or less deduction of TDS, but whatever is deducted, is paid to the Government account then there cannot be any prosecution. As per decision of Supreme Court in the case of *Madhumilan Syntex Ltd. v. UOI*[2007] 160 Taxman 71/290 ITR 199 (SC), even prosecution is possible on late deposit of TDS after deduction.

Particulars	**Prosecution**
TDS not deducted	No prosecution possible
TDS less deducted and paid on time	No prosecution possible
TDS deducted but not paid at all either wholly or partly	Prosecution possible
TDS deducted but not paid on time either wholly or partly	Prosecution possible as per Supreme Court decision

Instruction: Issued by CBDT, dated 28-5-1980
But prosecution under section 276B should not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such consideration will, of course, apply to levy of interest under section 201(1A).

12.5 Disallowance of Salary payments

As per section 40(*a*)(*iii*), the deduction of salary payments will not be allowable unless the following conditions are fulfilled :

1. Payment is chargeable under head "salaries" of the recipient.
2. Payment is made abroad or (to a non-resident in India also w.e.f. 1-4-2004). Hence payments to non-resident are covered whether the payment is made in India or abroad but payments to resident person are covered only where the payments are made abroad.
3. The recipient himself pays the tax or tax has been deducted at source under Chapter XVII-B.
4. Taxes have to be deducted on salary payments at the time of actual payments. If the payments are not made but salary accrues during the year then it is very difficult to claim the payment while computing business profits if the payer follow mercantile system of accounting. Also the recipient of salary have to pay income tax on accrual basis even salary is not received by him/her. This provision poses practical difficulties for the payer. In the case of expatriate employee it is sometimes very difficult to know the time and manner of compliance by the payer.
5. It is important to note that if the payment is made to resident in India for salary then, even no TDS is made, disallowance cannot be made under section 40(a) though other consequences for default of TDS will follow.
6. Where salary is exempt from taxability under any section, the provision of section 40(*a*)(*iii*) will not be applicable to such a case.

12.6 Disallowance of payments other than salary

If the person responsible for making payments does not deduct TDS then payment is not allowable as expenses while computing business income. Practically all payments to non residents are covered under section 40(a)(i) except salary which is covered under section 40(a)(iii) [discussed above]. But where the payment is not taxable in India then no disallowance can be made even the tax has not been deducted at source. This provision is tabulated below:

Different situations	**When allowable as deduction**
Tax has been deducted in the previous year (PY) and paid in PY even though after the time prescribed under section 200(1).	Allowable in the PY
Tax has been deducted in the PY and paid according to section 200(1), even though after the expiry of PY.	Allowable in the PY
Tax has been deducted in the PY and not paid in the PY and also not paid according to section 200(1) after the expiry of PY.	Not allowable in the PY, but the same is allowable in such other PY in which the same is paid even the payment is not related with that PY. It cannot be disallowed considering as prior period expenses. [*CIT v. SMCC Construction India* [2010] 320 ITR 534/229 CTR 24 (Delhi)]
Tax has not been deducted in the PY but afterwards	Allowable in the PY in which the TDS is deducted and paid even the payment is not related with that PY. It cannot be disallowed considering as prior period expenses. [*CIT v. SMCC Construction India* [2010] 320 ITR 534/229 CTR 24 (Delhi)]

Different situations	When allowable as deduction
Tax has not been deducted at all, but the same is paid by the assessee on his own.	This position is not clear from the provision of the Act, but the same has to be allowed in the year of payment as the Government is concerned more with their revenue than with the question as to who paid the amount. It cannot be disallowed considering as prior period expenses. [*CIT v. SMCC Construction India* [2010] 320 ITR 534/229 CTR 24 (Delhi)]

CHAPTER 13

ANNEXURE1 -WITHHOLDING TAX RATES UNDER THE ACT AND DTAAS

13.1 Rates for tax deduction at source under the Act

During the financial year 2011-12, tax is to be deducted at source at the following rates:

*Nature of payment**	*TDS (SC:* Nil, *EC:* Nil, *SHEC:* Nil*)*
◆ **Sec. 192** - Payment of salary to a resident/non-resident [normal rate of tax is applicable - SC : *Nil*, EC : 2% and SHEC : 1%]	–
◆ **Sec. 193** - Interest on securities to a resident—	
a. interest on (*a*) debentures/securities for money issued by or on behalf of any local authority/statutory corporation, (*b*) listed debentures of a company [not being listed securities in demat form], (*c*) any security of the Central or State Government [*i.e.*, 8% Savings (taxable) Bonds, 2003, but not any other Government security]	10
b. any other interest on securities (including interest on non-listed debentures)	10
◆ **Sec. 194** - Dividend to a resident—	
a. deemed dividend under section 2(*22*)(*e*)	10
b. any other dividend	*Nil*
◆ **Sec. 194A** - Interest other than interest on securities to a resident	10
◆ **Sec. 194B**† - Winnings from lottery or crossword puzzle or card game or other game of any sort to a resident/non-resident	30
◆ **Sec. 194BB**† - Winnings from horse races to a resident/non-resident	30
◆ **Sec. 194C** - Payment to a resident contractor/sub-contractor—	
a. payment/credit to an individual or a Hindu undivided family	1
b. payment/credit to any person other than an individual or a Hindu undivided family	2
◆ **Sec. 194D** - Insurance commission to a resident	10
◆ **Sec. 194E** - Payment to a non-resident sportsman or sports association	10
◆ **Sec. 194EE** - Payment in respect of deposits under National Savings Scheme, 1987 to a resident/non-resident	20

*Nature of payment**	*TDS (SC:* Nil, *EC:* Nil, *SHEC:* Nil*)*
◆ **Sec. 194F** - Payment on account of repurchase of units of MF or UTI to a resident/non-resident	20
◆ **Sec. 194G‡** - Commission on sale of lottery tickets to a resident/ non-resident	10
◆ **Sec. 194H** - Commission or brokerage to a resident	10
◆ **Sec. 194-I** - Rent to a resident—	
a. rent of plant and machinery	2
b. rent of land or building or furniture or fitting	10
◆ **Sec. 194J** - Fees for professional or technical services to a resident	10
◆ **Sec. 194LA** - Payment of compensation to a resident on acquisition of certain immovable property	10

	*If the recipient is (*a*) a non-resident non- corporate person (payment/ credit may or may not exceed Rs. 1 crore) or (*b*) non-domestic company and aggregate payment or credit does not exceed Rs. 1 crore (SC : Nil, EC : 2%, SHEC : 1%)*					*If the recipient is a non-domestic company and aggregate payment/ credit subject to tax deduction exceeds Rs. 1 crore (SC : 2%, EC : 2%, SHEC 1%)*				
*Nature of payment**	IT	*SC*	*EC*	*SHEC*	*Total*	*IT*	*SC*	*EC*	*SHEC*	*Total*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*	*(7)*	*(8)*	*(9)*	*(10)*	*(11)*
◆ **Sec. 194LB** - Payment by way of interest by infrastructure debt fund (applicable from June 1, 2011 onwards)	5	*Nil*	0.1	0.05	5.15	5	0.1	0.102	0.051	5.253
◆ **Sec. 195** - Payment of other sum to a non-resident [*See* Note 2]—										
a. income from foreign exchange assets payable to an Indian citizen	20	*Nil*	0.4	0.2	20.6	NA	NA	NA	NA	NA
b. income by way of long-term capital gains referred to in section 115E	10	*Nil*	0.2	0.1	10.3	NA	NA	NA	NA	NA
c. short-term capital gains under section 111A	15	*Nil*	0.3	0.15	15.45	15	0.3	0.306	0.153	15.759
d. long-term capital gains [not being covered by section 10(*33*), 10(*36*) and 10(*38*)]	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012
e. income by way of interest payable by Government/Indian concern on money borrowed or debt incurred by Government or Indian concern in foreign currency (not being interest referred to in section 194LB)	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012
f. royalty [*see* Note 5]										
• where the agreement is made before June 1, 1997	30	*Nil*	0.6	0.3	30.9	30	0.6	0.612	0.306	31.518
• where the agreement is made after May 31, 1997 but before June 1, 2005	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012
• where the agreement is made on or after June 1, 2005	10	*Nil*	0.2	0.1	10.3	10	0.2	0.204	0.102	10.506
g. royalty [not being royalty of the nature referred to in (*f*) *supra*] [*see* Note 6]										

	If the recipient is (a) a non-resident non- corporate person (payment/ credit may or may not exceed Rs. 1 crore) or (b) non-domestic company and aggregate payment or credit does not exceed Rs. 1 crore (SC : Nil, EC : 2%, SHEC : 1%)					If the recipient is a non-domestic company and aggregate payment/ credit subject to tax deduction exceeds Rs. 1 crore (SC : 2%, EC : 2%, SHEC 1%)				
*Nature of payment**	IT	*SC*	*EC*	*SHEC*	*Total*	*IT*	*SC*	*EC*	*SHEC*	*Total*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*	*(7)*	*(8)*	*(9)*	*(10)*	*(11)*
• where the agreement is made after March 31, 1961 but before April 1, 1976										
- if recipient is a non-resident non-corporate person	30	*Nil*	0.6	0.3	30.9	NA	NA	NA	NA	NA
- if recipient is non-domestic com pany	50	*Nil*	1	0.5	51.5	50	1	1.02	0.51	52.53
• where the agreement is made after March 31, 1976 but before June 1, 1997	30	*Nil*	0.6	0.3	30.9	30	0.6	0.612	0.306	31.518
• where the agreement is made after May 31, 1997 but before June 1, 2005	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012
• where the agreement is made on or after June 1, 2005	10	*Nil*	0.2	0.1	10.3	10	0.2	0.204	0.102	10.506
h. fees for technical services [*see* Note 7]										
• where the agreement is made after February 29, 1964 but before April 1, 1976										
- if recipient is a non-resident non-corporate person	30	*Nil*	0.6	0.3	30.9	NA	NA	NA	NA	NA
- if recipient is non-domestic com pany	50	*Nil*	1	0.5	51.5	50	1	1.02	0.51	52.53
• where the agreement is made after March 31, 1976 but before June 1, 1997	30	*Nil*	0.6	0.3	30.9	30	0.6	0.612	0.306	31.518
• where the agreement is made after May 31, 1997 but before June 1, 2005	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012
• where the agreement is made on or after June 1, 2005	10	*Nil*	0.2	0.1	10.3	10	0.2	0.204	0.102	10.506
i. any other income										
- if recipient is a non-resident and non-corporate assessee	30	*Nil*	0.6	0.3	30.9	NA	NA	NA	NA	NA
- if recipient is a non-domestic com pany	40	*Nil*	0.8	0.4	41.2	40	0.8	0.816	0.408	42.024
◆ **Sec. 196B** - Income from units (including long-term capital gains on transfer of such units) to an offshore fund	10	*Nil*	0.2	0.1	10.3	10	0.2	0.204	0.102	10.506
◆ **Sec. 196C** - Income from foreign currency bonds or GDR (including long-term capital gains on transfer of such bonds) (not being dividend)	10	*Nil*	0.2	0.1	10.3	10	0.2	0.204	0.102	10.506
◆ **Sec. 196D** - Income of Foreign Institutional Investors from securities (not being dividend, short-term or long-term capital gain)	20	*Nil*	0.4	0.2	20.6	20	0.4	0.408	0.204	21.012

**Surcharge is applicable for TDS purposes only when the recipient is a foreign company and payment/credit subject to TDS exceeds Rs. 1 crore. In no other case, surcharge is applicable at the time of deduction of tax at source. Education cess and secondary and higher education cess are applicable for TDS purposes in the case of tax deduction from payment of salary to a resident or a non-resident. Education cess and secondary and higher education cess are also applicable in the case of payment or credit of any other sum to a non-resident or a foreign company. In no other case, education cess and secondary and higher education cess are applicable for TDS purposes. Moreover, if the PAN of the deductee is not intimated to the deductor, tax will be deducted at source either at the rate given in the table or at the rate of 20 per cent, whichever is higher. Further, under section 94A(5), if payment or credit is made or given to a deductee who is located in a notified jurisdictional area, tax is deductible at the rate given in the table or at the rate of 30 per cent, whichever is higher.*

†Under sections 194B and 194BB, if recipient is a non-resident (other than a foreign company), tax is deductible at the rate of 30.9% (i.e., IT: 30%, EC: 2% and SHEC: 1%). If the recipient is a non-domestic company, tax is deductible at the rate of 30.9% (i.e., IT: 30%, EC: 2% and SHEC: 1%), if payment does not exceed Rs. 1 crore or at the rate of 31.518% (i.e., IT: 30%, SC: 2%, EC: 2% and SHEC: 1%) if payment/credit exceeds Rs. 1 crore.

‡Under section 194G, if recipient is a non-resident (other than a foreign company), tax is deductible at the rate of 10.3% (i.e., IT: 10%, EC: 2% and SHEC: 1%). If the recipient is a non-domestic company, tax is deductible at the rate of 10.3% (i.e., IT: 10%, EC: 2% and SHEC: 1%), if payment/credit does not exceed Rs. 1 crore or at the rate of 10.506% (i.e., IT: 10%, SC: 2%, EC: 2% and SHEC: 1%) if payment/credit exceeds Rs. 1 crore.

Notes **:**

1. Under section 192 tax is deductible from salary. The payer shall calculate salary taxable in the hands of recipient. The amount so determined is subject to tax deduction under section 192. Under section 195, tax is deductible only if income is taxable in the hands of recipient in India. In any other case, gross payment is subject to tax deduction.

2. Tax is deductible at source under section 195 at the above rates or the rates specified in ADT agreements entered into by the Central Government under section 90 (whichever is lower) [section 2(*37A*)(*iii*)].

3. Tax is not deductible under section 193, 194, 194A, or 194EE if the recipient makes a declaration in Form No. 15G/15H under the provision of section 197A.

4. Under section 197 the recipient can apply the Assessing Officer in Form No. 13 to get a certificate of lower/no tax deduction. This benefit is, however, not available if tax is deductible under section 194B, 194BB, 194E, 194EE, 194F, 196B, 196C or 196D.

5. Royalty payable by Government or an Indian concern in pursuance of an agreement made by non-resident with the Government or the Indian concern after March 31, 1976, where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to section 115A(1A) to the Indian concern or in respect of computer software referred to in the second proviso to section 115(1A), to a person resident in India.

6. Not being royalty of the nature referred to above, payable by Government or an Indian concern in pursuance of an agreement made by non-resident with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to matter included in the industrial policy, the agreement is in accordance with that policy.

7. Fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by non-resident with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to matter included in the industrial policy, the agreement is in accordance with that policy.

13.2 Tax rates specified in the Income-tax Act

The following incomes are taxable at the rates specified by the Income-tax Act:

Section	**Income**	***Income-tax rates†***
(1)	*(2)*	*(3)*
111A	Short-term capital gains	15
112	Long-term capital gains	20
115A(1) (*a*)(*i*)	Dividend received by a foreign company or a non-resident non-corporate assessee [*it is not applicable in the case of dividends referred to in section 115-O]	20*
115A(1) (*a*)(*ii*)	Interest received by a foreign company or a non-resident non-corporate assessee from Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency	20
115A(1) (*a*)(*iia*)	Interest received from an infrastructure debt fund referred to in section 10(*47*) (applicable from June 1, 2011, *i.e.,* assessment year 2012-13)	5
115A (1)(*b*)	Royalty or fees for technical services received by a foreign company or non-resident non-corporate assessee from an Indian concern or Government in pursuance of an agreement approved by the Central Government and made after—	
	a. March 31, 1976 but before June 1, 1997	30
	b. May 31, 1997 but before June 1, 2005	20
	c. May 31, 2005	10
115AB	Income of an overseas financial organisation on transfer of units purchased in foreign currency being long-term capital gains	10
115AC	Income from bonds or Global Depository Receipts[1] or on bonds or Global Depository Receipts[1] of a public sector company sold by the Government and purchased in foreign currency or long-term capital gains arising from their transfer *[not applicable in the case of dividends referred to in section 115-O]	10*
115ACA	Income from Global Depository Receipts held by a resident individual who is an employee of an Indian company engaged in information technology software/services††	
	◆ Dividend [other than dividend referred to in section 115-O] on global Depository Receipts issued under employees stock option scheme and purchased in foreign currency	10
	◆ Long-term capital gain on transfer of such receipts	10
115AD	Income in respect of listed securities received by a Foreign Institutional Investor as specified[2] by the Government	
	◆ Short-term capital gain covered by section 111A	15
	◆ Any other short-term capital gain	30
	◆ Long-term capital gain	10
	◆ Other income [*not applicable in the case of dividends referred to in section 115-O]	20*

Section	**Income**	***Income-tax rates†***
115B	Profits and gains of life insurance business	12.5
115BB	Winnings from lotteries, crossword puzzles, or race including horse race (not being income from the activity of owning and maintaining race horse) or card game and other game of any sort or from gambling or betting of any form or nature	30
115BBA	Income of a non-resident foreign citizen sportsman for participation in any game in India or received by way of advertisement or for contribution of articles relating to any game or sport in India or income of a non-resident sport association by way of guarantee money	10
115BBC	Anonymous donation	30
115BBD	Income of an Indian company by way of dividends declared, distributed or paid by a subsidiary foreign company (applicable from the assessment year 2012-13)	15
115E	Income from foreign exchange assets and capital gains of non-resident Indian	
	a. income from foreign exchange asset [*not applicable in the case of dividends referred to in section 115-O]	20*
	b. long-term capital gain	10
115JB	Tax on book profits of certain companies	
	- Assessment year 2011-12	18%
	- Assessment year 2012-13	18.5%
115JC	Alternate minimum tax in the case of limited liability partnerships (applicable from the assessment year 2012-13)	18.5
161(1A)	Profits and gains of a business in the case of a trust	30
164	Income of private discretionary trust where shares of beneficiaries are indeterminate	30
164A	Income of an oral trust	30
167A	Income of a firm	30
167B	Income of an association of persons or body of individuals if shares of members are unknown	30
167B(2)	Income of an association of persons or body of individuals if total income of any member (excluding share from the association or body) exceeds the maximum amount not chargeable to tax [*if total income of any member of the association or body is chargeable to tax at a rate higher than 30.9 per cent, then tax shall be charged on that portion of the total income of the association/body which is relatable to the share of such member at such higher rate and the balance of the total income is taxable at a rate of 30.9 per cent]	30*

1. Issued by an Indian company in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993/Issue of Foreign Currency Exchangeable Bonds Scheme, 2008.

††An employee of an Indian company engaged in specified knowledge based industry or service or an employee of its subsidiary engaged in specified knowledge based industry or service.

Notes :

1. *Surcharge* - The above income-tax rates are subject to surcharge as follows—

	Assessment year 2011-12	***Assessment year 2012-13***
Individuals/HUF/AOP/BOI	*Nil*	*Nil*
Artificial juridical person	*Nil*	*Nil*
Co-operative society, local authority	*Nil*	*Nil*
Firm	*Nil*	*Nil*
Domestic company if net income does not exceed Rs. 1 crore	*Nil*	*Nil*
Domestic company if net income exceeds Rs. 1 crore	7.5%	5%
Foreign company if net income does not exceed Rs. 1 crore	*Nil*	*Nil*
Foreign company if net income exceeds Rs. 1 crore	2.5%	2%

In the case of section 115JB, surcharge is applicable only if book profit exceeds Rs. 1 crore.

2. *Education cess* - 2 per cent of sum total of income-tax and surcharge

3. *Secondary and higher education cess :* 1 per cent of income-tax and surcharge.

13.3 Tax rates applicable in India under various DTAAs

	Dividend [not being covered by section 115-O]		*Interest*		*Royalty*		*Fees for technical service*	
	Right of State to tax	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*
Armenia	Both	10%	Both	10%	Both	10%	Both	10%
Australia	Both	15%	Both	15%	Both	[Note 3]	Both	[Note 3]
Austria	Both	10%	Both	10%	Both	10%	Both	10%
Bangladesh	Both	10% (if at least 10% of the capital of the company paying the dividend is held by the recipient)	Both	10% [Note 2]	Both	10%	No separate provision	
Belarus	Both	10% if paid to a company holding 25% shares; otherwise 15%	Both	10% [Note 2]	Both	15%	Both	15%
Belgium	Both	15%	Both	15% (10% if granted by a bank)	Both	10%	Both	10%
Botswana	Both	7.5% (if shareholder is a company and holds at least 25% shares in the investee-company); otherwise 10%	Both	10%	Both	10%	Both	10%
Brazil	Both	15%	Both	15% [Note 2]	Both	25% for use of trademark; 15% for others	No separate provision	

	Dividend [not being covered by section 115-O]		Interest		Royalty		Fees for technical service	
	Right of State to tax	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*
Bulgaria	Both	15%	Both	15% [Note 2]	Both	15% of royalty relating to literary, artistic, scientific works other than films or tapes used for radio or television broad-casting; 20% in other cases	Both	20%
Canada	Both	15% if at least 10% of the shares of the company paying the dividends is held by the recipient of dividend; 25% in other cases	Both	15% [Note 2]	Both	10%-20%	Both	10%-20%
China	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Cyprus	Both	10% if at least 10% of the capital of the company paying dividend is held by the recipient, 15% in all other cases	Both	10% [Note 2]	Both	15%	Both	10%
Czeck Republic	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Denmark	Both	15% if at least 25% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	10% if loan is granted by bank; 15% for others [Note 2]	Both	20%	Both	20%
Germany	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Finland	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
France	Both	10%	Both	10%	Both	10%	Both	10%
Greece	Source	20%	Source	20%	Source	30%	No separate provision	
Hungary	Both	10%	Both	10%	Both	10%	Both	10%
Indonesia	Both	10% if at least 25% of the shares of the company paying the dividend is held by the recipient; 15% in other cases	Both	10% [Note 2]	Both	15%	No separate provision	
Iceland	Both	10%	Both	10%	Both	10%	Both	10%
Ireland	Both	10%-15%	Both	10% [Note 2]	Both	10%	Both	10%
Israel	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%

	Dividend [not being covered by section 115-O]		Interest		Royalty		Fees for technical service	
	Right of State to tax	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*
Italy	Both	15% if at least 10% of the shares of the company paying dividend is beneficially owned by the recipient company; 20% in other cases	Both	15% [Note 2]	Both	20%	Both	20%
Japan	Both	10%	Both	10%	Both	10%	Both	10%
Jordan	Both	10%	Both	10% [Note 2]	Both	20%	Both	20%
Kazakstan	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Kenya	Both	15%	Both	15% [Note 2]	Both	20%	Both	17.5%
Korea	Both	15% if at least 20% of the capital of the company paying dividend is held by the recipient; 20% in other cases	Both	10% if interest is paid to a bank; 15% for others [Note 2]	Both	15%	Both	15%
Kuwait	Both	10%	Both	10%	Both	10%	Both	10%
Kyrgyz Republic	Both	10%	Both	10%	Both	15%	Both	15%
Libyan Arab Jamahiriya	Source	20%	Source	20%	Source	30%	No separate provision	
Luxembourg	Both	10%	Both	10%	Both	10%	Both	10%
Malaysia	Both	10%	Both	10%	Both	10%	Both	10%
Malta	Both	10% if at least 25% of the shares of the company paying dividend is held by the recipient company; 15% in other cases	Both	10% [Note 2]	Both	15%	Both	10%
Mangolia	Both	15%	Both	15% [Note 2]	Both	15%	Both	25%
Mauritius	Both	5% if at least 10% of the capital of the company paying the dividend is held by the recipient; 15% in other cases	Both	20% [Note 2]; *Nil* in some cases	Both	15%	No separate provision	
Montenegro	Both	5% (in some cases 15%)	Both	10%	Both	10%	Both	10%
Myanmar	Both	5%	Both	10%	Both	10%	No separate provision	
Morocco	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Namibia	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Nepal	Both	10% if at least 10% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	10% if interest is paid to bank 15% for others [Note 2]	Both	15%	No separate provision	

	Dividend [not being covered by section 115-O]		Interest		Royalty		Fees for technical service	
	Right of State to tax	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*
Netherlands	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
New Zealand	Both	15%	Both	10% [Note 2]	Both	10%	Both	10%
Norway	Both	15% if at least 25% of the capital of the company paying the dividend is held by the recipient; 20% in other cases	Both	15% [Note 2]	Both	10%	Both	10%
Oman	Both	10% if at least 10% of shares are held by the recipient; 12.5% in other cases	Both	10% [Note 2]	Both	15%	Both	15%
Philippines	Both	15% if at least 10% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	10% if interest is received by a financial institution or insurance company; 15% in other cases	Both	15% if it is payable in pursuance of any collaboration agreement approved by the Government of India	—	—
Poland	Both	15%	Both	15% [Note 2]	Both	22.5%	Both	22.5%
Portuguese Republic	Both	10%	Both	10%	Both	10%	Both	10%
Quatar	Both	5%-10%	Both	10% [Note 2]	Both	10%	Both	10%
Romania	Both	15% if at least 25% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	15% [Note 2]	Both	22.5%	Both	22.5%
Russian Federation	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Saudi Arabia	Both	5%	Both	10%	Both	10%	No separate provision	
Serbia	Both	5% (if recipient is company and holds 25% shares) otherwise 15%	Both	10%	Both	10%	Both	10%
Singapore	Both	10% if at least 25% of the shares of the company paying the dividend is held by the recipient; 15% in other cases	Both	10% if loan is granted by a bank/ similar institute including an insurance company; 15% for others	Both	10%	Both	10%

	Dividend [not being covered by section 115-O]		Interest		Royalty		Fees for technical service	
	Right of State to tax	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*	*Right of State to tax*	*Tax rate*
Slovenia	Both	5-15%	Both	10%	Both	10%	Both	10%
South Africa	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Spain	Both	15%	Both	15% [Note 2]	Both	[Note 4]	Both	[Note 4]
Sri Lanka	Both	15%	Both	10% [Note 2]	Both	10%	Both	10%
Sudan	Both	10%	Both	10%	Both	10%	No separate provision	
Sweden	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Swiss	Both	10%	Both	10% [Note 5]	Both	10%	Both	10%
Syrian Arab Republic	Both	10% (5% if shareholder is a company holding at least 10% shares)	Both	10%	Both	10%	No separate provision	
Tajikistan	Both	10% (5% if shareholder is a company and holds 25% shares)	Both	10%	Both	10%	No separate provision	
Tanzania	Both	10% if at least 10% of the shares of the company paying the dividend is held for a period of at least 6 months prior to the date of payment of the dividend; 15% in other cases	Both	12.5%	Both	20%	No separate provision	
Thailand	Both	15% if dividend is paid by an industrial com-pany and at least 10% of capital of such company is held by the reci-pient; 20% in other cases	Both	10% for finan-cial institu-tions and insurance company; 20% for others [Note 2]	Both	15%	No separate provision	
Trinidad and Tobago	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Turkey	Both	15%	Both	10% if reci-pient is bank, etc.; 15% in other cases [Note 2]	Both	15%	Both	15%
Turkme-nistan	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Uganda	Both	10%	Both	10%	Both	10%	Both	10%
Ukraine	Both	10%-15%	Both	10% [Note 2]	Both	10%	Both	10%
United Arab Emirates	Both	5% if at least 10% of the capital of the company paying dividend is held by the recipient; 15% in other cases	Both	5% if loan is granted by a bank/similar financial institute; 12.5% for others	Both	10%	No separate provision	

	Dividend [not being covered by section 115-O]		Interest		Royalty		Fees for technical service	
	Right of State to tax	Tax rate	Right of State to tax	Tax rate	Right of State to tax	Tax rate	Right of State to tax	Tax rate
United Arab Republic	Source	10%	Source	20%	Source	30%	No separate provision	
United Kingdom	Both	15%	Both	10% if interest is paid to a bank; 15% for others [Note 2]	Both	[Note 3]	Both	[Note 3]
United Mexican States	Both	10%	Both	10%	Both	10%	Both	10%
United States	Both	15% if at least 10% of the voting stock of the company paying the dividend is held by the recipient; 20% in other cases	Both	10% if loan is granted by a bank/ similar institute including insurance company; 15% for others	Source	[Note 3]	Source	[Note 3]
Uzbekistan	Both	15%	Both	15% [Note 2]	Both	15%	Both	15%
Vietnam	Both	10%	Both	10% [Note 2]	Both	10%	Both	10%
Zambia	Both	5% if at least 25% of the shares of the company paying the dividend is held for a period of at least 6 months prior to the date of payment of the dividend; 15% in other cases	Both	10% [Note 2]	Both	10%	No separate provision	

1. 10 per cent of the gross amount of the interest on loans made or guaranteed by a bank or other financial institution carrying on *bona fide* banking or financing business or by an enterprise which holds directly or indirectly at least 10 per cent of the capital of the company paying the interest.
2. Dividend/interest earned by the Government and certain institutions like the Reserve Bank of India is exempt from taxation in the country of source.
3. Royalties and fees for technical services would be taxable in the country of source at the following rates :
    a. 10 per cent in case of rental of equipment and services provided along with know-how and technical services ;
    b. any other case—
        i. during first five years of the agreement [6] —
            - 15 per cent if the payer is Government or specified organisation;
            - 20 per cent in other cases;
        ii. subsequent years, 15% in all cases.

    Income of Government and certain institutions will be exempt from taxation in the country of source.
4. Royalties and fees for technical services would be taxable in the country of source at the following rates :
    a. 10 per cent in case of royalties relating to the payments for the use of, or the right to use, industrial, commercial or scientific equipment;
    b. 20 per cent in case of fees for technical services and other royalties.
5. 10 per cent of the gross amount of the interest on loans made or guaranteed by a bank or other financial institution carrying on *bona fide* banking or financing business or by an enterprise which holds directly or indirectly at least 20 per cent of the capital of the company paying the interest.
6. As the five-year time-limit is now over, point (*i*) does not have any practical utility in the present context.

DISCLAIMER

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