

Investment into India by Non-Resident Indians on Non-Repatriation Basis



Significant amendments have been legislated over the past couple of years under the exchange control regulations and FDI Policy for amending the definition of NRIs and for clarifying that investments made by NRIs on non-repatriation basis shall be treated at par with domestic investments. The purpose of this article is to summarise the amendments and capture the latest position prevailing as on date with respect to such investments into India by NRIs. Read on to know more....



CA. Divya Ashta

(The author is a member of the Institute. She can be reached at divya.ashta7@gmail.com)

Introduction

Significant amendments have been legislated over the past couple of years for amending the definition of Non Resident Indians (NRIs) under the provisions of Foreign Direct Investment Policy (FDI Policy) and Foreign Exchange Management Act, 1999 (FEMA)

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and for clarifying that investments made by NRIs/OCIs on non-repatriation basis shall be treated at par with domestic investments.

The amendments were made by way of Press Note No. 7 (2015 Series) dated June 3, 2015 and Press Note No. 12 (2015 Series) dated November 24, 2015 issued by the Department of Industrial Policy and Promotion (DIPP) and FEMA Notification No. 361/2016-RB dated February 15, 2016 and Notification No. FEMA 20(R)/ 2017-RB dated November 7, 2017 issued by Reserve Bank of India (RBI) (together referred to as 'the Amendments').

We have summarised below the Amendments and captured the latest position prevailing as on date with respect to such investments into India by NRIs/OCIs on non-repatriation basis.

Amendment of Definition of "Non Resident Indian"

Originally, the Indian diaspora was regarded either as Persons of Indian Origin (PIO) or Overseas Citizens of India (OCI). The said categorisation was premised upon the person having some lineage or connection with India. While both schemes were aimed to promote easier entry and stay within India for the Indian diaspora around the world, there was a fine differentiation between the two categories.

The PIO Scheme was formulated in the year 1999 and subsequently revised in 2002. PIO card holders were granted specific benefits including entitlement to visit India without a visa for 15 years from the date of issue of the PIO card and exemption from registration at Foreigner Regional Registration Office (FRRO) in case their stay in India did not exceed 180 days.

In line with the amendment to the Citizenship Act, the definition of NRIs was modified under the Foreign Exchange Management (Transfer or Issue of Security to a Person Resident Outside India) Regulations, 2000 (TISPRO Regulations) to cover non-residents who are either Indian citizens or OCI card holders within the meaning of Section 7(A) of the Citizenship Act, 1955. This change brought about the much required consistency between the exchange control regulations and the relevant provisions of the Citizenship Act.

In the year 2003, The Citizenship Act, 1955 (Citizenship Act) was amended to include provisions to cater to OCIs. OCI card holders are entitled to a multipurpose, multiple entry, lifelong visa allowing them to visit India at any time, for any length of time and for any purpose. They are also exempted from police reporting irrespective of their duration of stay in the country.

Subsequently, in October 2014, PIO card holders were granted lifetime entry in India and dispensation from reporting formalities i.e. benefits similar to those extended to OCI cardholders. Owing to the simultaneous existence of PIO and OCI Schemes, there was lack of clarity with regard to their respective eligibility and other criteria. Therefore, in order to streamline the immigration norms, the PIO and OCI cards were clubbed together and subsequently, a single OCI Card with enhanced benefits was introduced.

On January 6, 2015, the Citizenship (Amendment) Ordinance, 2015 was promulgated in order to amend the Citizenship Act. Subsequently, the corresponding amendments vide the Citizenship (Amendment) Act, 2015 were notified in the Official Gazette on January 9, 2015, pursuant to which the PIO Scheme ceased to be effective and all the existing PIO Cardholders were deemed to be OCI Card holders.

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Investments by NRIs/OCIs on non-repatriation basis deemed at par with domestic investment

Investments by NRIs/OCIs on non-repatriation basis are dealt with under Schedule 4 of the TISPRO Regulations. Under the erstwhile TISPRO Regulations, there was ambiguity on whether such investments by NRIs/OCIs on non-repatriation basis were subject to the applicable sectoral caps and pricing guidelines. However, post the Amendments, it has become amply clear that such investments

¹ An 'Investment Vehicle' has been defined to include Real Estate Investment Trusts, Infrastructure Investment Trusts and Alternative Investment Funds governed by the relevant SEBI regulations.

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shall be deemed to be domestic investment at par with investment made by residents and accordingly the above stated restrictions shall not be applicable.

The Amendments have extended the abovementioned liberalisation not only to investments made by NRIs/OCIs but also to investments made by a company, a trust and a partnership firm incorporated outside India, which is owned and controlled by NRIs/OCIs (Eligible Investor).

Further, in addition to investments made by way of capital instruments (i.e. equity shares, convertible shares and convertible debentures and share warrants), investments by way of units of an Investment Vehicle¹, convertible notes of a startup company and contribution to the capital of a partnership/proprietary firm and a Limited Liability Partnership have also been included within the purview of investments made on non-repatriation basis under Schedule 4 of the TISPRO Regulations.

Investments made under Schedule 4 of the TISPRO Regulations are permissible in virtually all sectors as domestic investment barring a few prohibited sectors which include: a) Nidhi Company b) agricultural/ plantation activities c) real estate business d) Construction of farm houses e) dealing in Transfer of Development Rights.

Under Schedule 4 of the TISPRO Regulations, "Real estate business" has been defined to mean "*dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships*". An explanation has also been inserted that "*earning of rental income on lease of property not amounting to transfer will not constitute real estate business*".

Based on the above, since the business of leasing property does not constitute "real estate business", investments by NRIs/OCIs under Schedule 4 of the TISPRO Regulations in the business of earning of rental income on lease of property have been made freely permissible.

It is also significant to note that vide the Amendments, investments made by way of capital instruments over the stock exchange on non-repatriation basis (earlier covered under Schedule 3 of the TISPRO Regulations) have also been included under Schedule 4 of the TISPRO Regulations and deemed at par with domestic investments.



Accordingly, the individual and aggregate caps of 5% and 10% respectively which were earlier applicable to investments under the Portfolio Investment Scheme made on non-repatriation basis under Schedule 3 of the TISPRO Regulations have ceased to apply to such investments.

Transfer of investment held by NRIs/ OCIs on non-repatriation basis

Vide FEMA Notification No. FEMA 20(R)/ 2017-RB dated November 7, 2017, detailed regulations have also been prescribed for transfer of investments held by NRIs/OCIs and eligible investors on non-repatriation basis under Schedule 4 of the TISPRO Regulations. The same have been discussed below.

Transfer by way of Sale

An NRI/OCI or an eligible investor holding capital instruments or units of an Indian company on a non-repatriation basis under Schedule 4 of the TISPRO Regulations has been permitted to transfer the same by way of sale -

- *To a Non-Resident:* Subject to the adherence to entry routes, sectoral caps/investment limits, pricing guidelines and other conditions as applicable for investment by a non-resident. The documentation and reporting requirements for such transfers as specified by RBI would need to be complied with.
- *To another NRI/OCI or an eligible investor on non-repatriable basis:* Under the automatic route. In such a case, the entry routes, sectoral caps/investment limits, pricing guidelines and other conditions shall not be applicable.

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Transfer by way of Gift

An NRI/OCI or an eligible investor holding capital instruments or units of an Indian company on a non-repatriation basis under Schedule 4 of the TISPRO Regulations has been permitted to transfer the same by way of gift-

- *To a Non-Resident:* With prior RBI approval subject to satisfaction of prescribed conditions *inter alia* including that the (i) donee is eligible to hold such security under the TISPRO Regulations (ii) the gift does not exceed 5 percent of the paid up capital of the Indian company (iii) The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50,000/-
- *To an NRI/OCI or an eligible investor on non-repatriable basis:* Under the automatic route without applicability of any conditions.

NRI investment in firm or proprietary concern in India on non-repatriation basis

NRI/OCI investment on non-repatriation basis into the capital of a partnership or a proprietary concern has also been included in Schedule 4 of the TISPRO Regulations and accordingly such investments are treated at par with domestic investment and allowable without any limit.

Here, it is important to note that prior to recent introduction of FEMA Notification No. FEMA 20(R)/2017-RB dated November 7, 2017, such investments while being included in Schedule 4 of the TISPRO Regulations, simultaneously continued to be governed by The Foreign Exchange Management (Investment in firm or proprietary concern in India) Regulations, 2000 (IFPCI Regulations).

Under the IFPCI Regulations, an NRI or PIO resident outside India was permitted to invest by way of contribution to the capital in a firm or a proprietary concern or any association of persons in India on a non-repatriation basis, provided that *inter alia* a) the firm or the proprietary concern was not engaged in a) any real estate business i.e. dealing in land and immovable property with a view to earning profit or earning income therefrom; b) print media.

Since the definition of "real estate business" was different under the IFPCI and TISPRO Regulations, the erstwhile Schedule 4 of the TISPRO Regulations and IFPCI Regulations both read together, resulted in ambiguity on a couple of aspects. In case an NRI

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proposed to invest in a company which was engaged in the business of earning income from lease of property or print media, such investment was permissible under Schedule 4 of the TISPRO Regulations, however not under the IFPCI Regulations.

Also, the amended definition of NRI as contemplated under the TISPRO Regulations had not been adopted for the purpose of the IFPCI Regulations, thereby resulting in inconsistency between the TISPRO Regulations and IFPCI Regulations.

Vide introduction of FEMA Notification No. FEMA 20(R)/ 2017-RB dated November 7, 2017, the above ambiguity has been put to rest. This notification supercedes both the erstwhile TISPRO Regulations and IFPCI Regulations and permits an NRI/ OCI and an eligible investor under Schedule 4 to invest under the non-repatriation route in a firm/ proprietary concern which is not engaged in any agricultural/ plantation activity or print media or real estate business, the term "real estate business" having the same meaning as discussed above under the TISPRO Regulations.

Conclusion

The Amendments discussed above were intended to provide NRIs/OCIs an incentive to bring funds into India without repatriation rights at a time when foreign exchange reserves were limited and capital inflows were modest.

The amended regulations have been instrumental in facilitating such investments by NRIs/ OCIs into the country, across sectors without being subject to any of the conditionalities associated with foreign direct investment. Also, the amended regulations allow NRIs/ OCIs to have the required flexibility for investing through different entity structures depending on commercial and strategic considerations, administrative convenience, tax efficiency etc. ■