

# The Foreign Exchange Management Act, 1999

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## 1. Introduction

### Need for the Act

The change in the economic scenario, globalisation of capital, free trade across the globe, necessitated the need for managing foreign exchange in the country in an orderly manner. To facilitate cross border trade and cross border capital flows, exchange control law was required. Foreign exchange control led to introduction of exchange control law through Defense of India rules by the Britishers in 1939. Subsequently, Foreign Exchange Regulation Act (FERA) was enacted in 1947 which was later replaced with 'the Foreign Exchange Regulation Act, 1973' (FERA).



Government through the introduction of process of liberalisation of Indian economy in 1991, permitted Foreign Investment in various sectors. This increased flow of foreign exchange to India and foreign exchange reserves increased substantially. As of today, FERA has been repealed and FEMA (Foreign Exchange Management Act) has been passed. The Act has been made effective from 1st June, 2000. This Act enables management of foreign exchange reserves for the country.

**Salient Features of the Act:** It provides for-

- Regulation of transactions between residents and non-residents
- Investments in India by non-residents and overseas investments by Indian residents
- Freely permissible transactions on current account subject to reasonable restrictions that may be imposed
- RBI control over capital account transactions
- Requirement for realisation of export proceeds and repatriation to India
- Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/Money Changer/Off-shore banking unit
- Adjudication and Compounding of Offences

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- Investigation of offences by Directorate of Enforcement
- Appeal provisions including Special Director (Appeals) and Appellate Tribunal.

**Enforcement of FEMA** - Though RBI exercises overall control over foreign exchange transactions, enforcement of FEMA has been entrusted to a separate 'Directorate of Enforcement' formed for this purpose. [Section 36].

### Broad Structure of FEMA

Now let us have a glance at the broad structure the Act. The Act consists of 7 Chapters dealing with following areas:

Chapters	Matters	Sections
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## 2. Preamble, Extent, Application and Commencement of FEMA, 1999

**(A) Preamble:** This Act aims to consolidate and amend the law relating to foreign exchange with the objective of —

- (i) facilitating external trade and payments and
- (ii) for promoting the orderly development and maintenance of foreign exchange market in India.

**(B) Extent and Application [Sections 1]:** FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

Accordingly, FEMA does not apply to citizens of India who are outside India unless they are resident of India. The scope of the Act has been further extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words "Owned or Controlled". Even contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.

**(C) Commencement:** The Act, 1999 came into force with effect from 1<sup>st</sup> June, 2000 vide Notification G.S.R. 371(E), dated 1.5.2000.

### 3. Definitions [Section 2]

In this Act, unless the context otherwise requires:

- (a) “*Adjudicating Authority*” means an officer authorised under sub-section (1) of section 16(1); [Section 2(a)]
- (b) “*Appellate Tribunal*” means the Appellate Tribunal for Foreign Exchange established under section 18; [Section 2(b)]
- (c) “*Authorised person*” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under section 10(1) to deal in foreign exchange or foreign securities; [Section 2(c)]
- (d) “*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 liability in India of persons resident outside India, and includes transactions referred to in Section 6(3); [Section 2(e)]
- (e) “*Currency*” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank. [Section 2(h)]
- (f) “*Currency Notes*” means and includes cash in the form of coins and bank notes; [Section 2(i)]
- (g) “*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; [Section 2(j)]
- (h) “*Export*”, with its grammatical variations and cognate expressions means;
  - (i) the taking out of India to a place outside India any goods.
  - (ii) provision of services from India to any person outside India; [Section 2(l)]
- (i) “*Foreign Currency*” means any currency other than Indian currency; [Section 2(m)]
- (j) “*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,

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- (iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; [Section 2(n)]
- (k) “*Foreign Security*” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency; [Section 2(o)]
- (l) “*Import*”, with its grammatical variations and cognate expressions, means bringing into India any goods or services; [Section 2(p)]
- (m) “*Person*” includes:
  - (i) an individual,
  - (ii) a Hindu undivided family,
  - (iii) a company,
  - (iv) a firm,
  - (v) an association of persons or a body of individuals, whether incorporated or not,
  - (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
  - (vii) any agency, office or branch owned or controlled by such person; [Section 2(u)]
- (n) “*Person resident in India*” means:
  - (i) a person residing in India for more than 182 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;
  - (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; [Section 2(v)]

- (o) “*Person Resident Outside India*” means a person who is not resident in India; [Section 2(w)]
- (p) “*Repatriate to India*” means bringing into India the realised foreign exchange and
  - (i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or
  - (ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank.

It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly; [Section 2(y)]

- (q) “*Security*” means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 , savings certificates to which the Government Saving Certificates Act, 1959 applies, deposit receipts in respect of deposit of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act; [Section 2(za)]
- (r) “*Service*” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service; [Section 2(zb)]
- (s) “*Transfer*” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. [Section 2(ze)]

#### **4. Analysis of Important Definitions**

**(A) Authorised Person:** Earlier there were two separate categories of persons namely authorised dealers and money changers who were licensed to deal in foreign exchange. Under FEMA, 1999 these terms have been clubbed together under the definition of the authorised person, which shall also include off-shore banking unit. An offshore banking unit can be appointed as 'Authorised Agent'. Offshore banking units can be set up in Special Economic Zones (SEZ), as per Foreign Exchange Management (Offshore Banking Unit) Regulations, 2002. The OBU would be virtually foreign branches of Indian Banks but located in India.

**(B) Capital and Current account transactions:** The definitions of “Capital Account Transactions” and its counterpart “current account transactions are contained in clauses (e) and (j) of Section 2. The regulations under FEMA regulate a transaction based on whether the transaction is “Capital Account Transaction” or a “Current Account Transaction”.

**Capital Account Transactions 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 would be a capital account transaction.” Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible. Capital and current account transactions are intended to be mutually exclusive. Also the concept of capital account transaction means differently for residents and non-residents. A transaction which alters the asset or liabilities in India of non-residents fall under the category of capital account. However, as far as residents are concerned transactions which alter the contingent liabilities outside India are also capital transactions. The Reserve Bank of India may by regulations place restrictions on various specified transactions for transactions deemed to be considered as capital in nature. In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets across borders are Capital Account Transactions.

**Current Account Transaction** means a transaction other than a capital account transaction. In other words, the current account transactions are the counterpart of capital account transactions and those transactions that are capital account in nature are not current account transactions and vice-versa. All transactions undertaken by a resident that do not alter his / her assets or liabilities, including contingent liabilities, outside India are current account transactions. In simple terms, cross border transactions pertaining to business, personal transactions such as travel, education, maintenance of family members, are Current Account Transactions.

Therefore, Capital account transactions are deemed to be prohibited unless permitted while current account transactions are deemed to be permitted unless prohibited.

The meaning of these terms is different from the meaning of terms such as “capital expenditure”, “capital receipt” or “capital assets” in accounts, company law or income-tax act. These are explained below.

**Examples:**

(1) An Indian resident imports machinery from a vendor in UK for installing in his factory. As per accounts and income-tax law, machinery is a “capital expenditure”. However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence it is a Current Account Transaction.

(2) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], “short-term banking and credit facilities in the ordinary course of business” are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

**What if the credit period is 12 months?** Under Master Directions for imports, payment has to be made within 6 months. If the credit period is in excess of 6 months, then it is a loan. There

are separate rules for loan. If the transactions falls within the loan rules, then it is permitted. Short term loan by and large means 6 months. For exports, the period for realisation of proceeds, is 9 months.

(3) An Indian resident transfers US\$ 1,000 to his NRI brother in New York as “gift”. The funds are sent from resident’s Indian bank account to the NRI brother’s bank account in New York. Under accounts and income-tax law, gift is a “capital receipt”. However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

If gift is a current account transaction, why is there a restriction under Current Account regulations? It is because while there is no restriction on Current Account transactions, some reasonable restrictions can be imposed. Otherwise people may transfer funds abroad under the garb of current account transactions.

If however the resident gives him a gift in India in Indian currency, for the NRI it is funds lying in India (alteration of Indian asset). For Indian resident, there is no asset or a liability. As this transaction creates an Indian asset for the NRI, it is a Capital Account transaction. (Under separate rules, giving a gift in India to an NRI is permitted subject to certain rules.)

In a similar manner, if an NRI gives a gift to an Indian resident by remitting funds in India, there is no restriction. However, if the NRI gives the funds abroad, the resident cannot keep it abroad. He has to bring it to India.

**(C) ‘Person’ and ‘Person resident in India’:** The definition of “person” is similar to the definition contained in the Income-tax Act, 1961. The term ‘**person**’ includes entities such as companies, firms, individuals, HUF, Association of Persons (AOP), artificial juridical persons agencies, offices and branches. Agencies, offices and branches do not have independent status separate from its owner. Yet these have been considered as persons. The reasons are discussed later.

As far as the definition of the term ‘**person resident in India**’ is concerned, it defines the status for individuals, entities incorporated or registered in India, and agencies, offices and branches. A “person resident outside India” (i.e. a non-resident) means a person who is - not a resident.

**Individuals:** To be considered as “resident”, the person should have resided in India in the preceding financial year for more than 182 days. Citizenship is not the criteria for determining whether or not a person is resident in India.

There are 3 limbs in the definition. The first limb prescribes the number of days stay. Then there are two limbs which are exceptions to the first limb.

**First limb** – It states that a person who is in India for more than 182 days in the “preceding year” will be an Indian resident. Thus to start with, one has to consider the period of stay in the preceding year. If for **example** a person is in India for more than 182 days in FY 2018-19, from 1<sup>st</sup> April 2019, the person will be an Indian resident. For FY 2018-19, one will have to start with FY 2017-18.

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Then there are two exceptions provided in clauses (A) and (B). Clause (A) is for persons going out of India. Clause (B) is for persons coming into India. Exception means that even if a person is an Indian resident based on the test provided in first limb, the person will be a “non-resident” if he falls within limb (A) or limb (B).

**Clause (A) – second limb** – It states that if a person leaves India in any of the three situations, he will not be an Indian resident. Thus he will be a non-resident. The three situations are - where a person leaves India for:

- (i) taking up employment outside India.
- (ii) doing any business outside India.
- (iii) staying in circumstances which indicate his intention to stay outside India for an uncertain period.

Thus in the example given for the first limb above, if a person leaves India on 1<sup>st</sup> November 2019, he will be a non-resident from 2<sup>nd</sup> November 2019 – even though his number of days in India was more than 182 days in FY 2018-19. Similarly, if a person goes and stays out of India for doing business, he will be a non-resident from that date. For FY 2019-20, the person will be an Indian resident till 1<sup>st</sup> November 2019. He will then become a non-resident. From 1<sup>st</sup> April 2020, the person will continue to be a non-resident as he stays out of India for employment.

In case of clause (iii), an example can be of a person who has a green card of USA. The green card entitles a person to stay in USA and eventually become a US citizen. If a person goes abroad and starts staying in USA, he will be a non-resident from that date as his stay abroad indicate that he is going to stay there for an uncertain period.

**Clause (B) – third limb** – This is a complex clause as first limb read with third limb has two exceptions. Limb one uses the phrase “but does not include”. Third limb uses the phrase “otherwise than”. Use of two exceptions make it complex reading.

It states that if a person has come to India for any reason other than for - employment, business or circumstances which indicate his intention to stay for uncertain period – he will be a non-resident. This will be so even if the person has stayed in India for more than 182 days in the preceding year.

For example, if a person comes to India on 1<sup>st</sup> June 2019 for visiting his parents. However his parents fall sick and he stays till 31<sup>st</sup> March 2020. Thereafter he continues to stay in India. It is however certain that he will leave India in next 6 months when his parents will recover. His stay in India is neither for employment, nor for business, nor for circumstances which show that he will stay in India for uncertain period. In such a case, even if he is India for more than 182 days in FY 2019-20, he will continue to be a non-resident from 1<sup>st</sup> April 2020 also. In FY 2019-20, he is of course a non-resident as he was not in India (less than 183 days) in FY 2018-19.

If a person comes in India on 1<sup>st</sup> June 2019 for employment, business or circumstances which indicate his intention to stay in India for an uncertain period, he will be a resident from 1<sup>st</sup> June 2019.

Residential status is not for a year. It is from a particular date that a person will be a resident or a non-resident. This is different from income-tax law. Under income-tax law, a person has to

pay tax. Even if his status is known at the end of the year, it will only affect his tax. It will not affect his transactions. FEMA is a regulatory law. One has to know the person's status at the time of undertaking a transaction. If for **example**, a person comes to India for employment, and if his status can be known only when the year is completed, how will he and people do transactions with each other? If he is considered as a non-resident till the year is over, then people will not be able to do transactions with him. This is the reason why the residential status is not for a year but from particular date.

It is understood that this condition applies only to individuals. It will not apply to HUF, AOP or artificial juridical person as they cannot get employed, cannot go out of India or come to India. Hence they do not come within the ambit of this portion of the definition. These entities like HUF and AOP are not required to be registered or incorporated like corporate entities nor the definition can be far stretched to cover by applying the criteria of 'owned or controlled'. Hence legally the definition for HUF, AOP, BOI fail. Practically if the HUF, AOP etc. are in India, they will be considered as Indian residents.

**Person or Body corporate:** Any person or body corporate registered or incorporated in India, will be considered as Indian resident. This definition again does not apply to AOP, BOI etc.

**Office, branch or agency:** Any agency, branch or agency outside India but **owned or controlled by Indian resident** will be considered as resident in India. Thus one cannot set up a branch outside and escape FEMA provisions.

Any agency, branch or agency in India but **owned or controlled by a non-resident** will be considered as resident in India. This is relevant as Indian residents can deal with such branch in India without considering FEMA. If such branch is considered as non-resident, then it will be difficult to undertake several transactions.

### Examples

(1) Mr. A had resided in India during the financial year 2015-2016 for less than 182 days. He had come to India again on April 1, 2016 for employment. What would be his residential status during the financial year 2016-2017?

**Answer:** Mr. A had come to India for taking up employment. During the financial year 2015-2016, he was in India for less than 182 days. Since, he has not fulfilled the condition of staying in India for more than 182 days, Mr. A will not be considered as a residential person for the financial year 2016-2017. Here, as he come to India on 1<sup>st</sup> April, 2016, so he may primarily cannot be considered as person resident in India from 1<sup>st</sup> April 2016. However as he has come for employment, he will be considered as Indian resident from 1<sup>st</sup> April 2016.

(2) Mr. X had resided in India during the financial year 2015-2016 for less than 182 days. He had come to India on April 1, 2016 for business. He intends to leave the business on April 30, 2017 and leave India on June 30, 2017. What would be his residential status during the financial year 2016-2017 and during 2017-2018 up to the date of his departure?

**Answer:** As explained in the above example, Mr. X will be considered 'as person resident in India' from 1<sup>st</sup> April 2016. As regards, financial year 2017-2018, Mr. X would continue to be an Indian resident from 1<sup>st</sup> April 2017.

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If he leaves India for the purpose of taking up employment or for 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. It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any these purposes, he would be considered, 'person resident in India' during the financial year 2017-2018. Thus it will depend on the purpose of leaving India which will decide his status from 1<sup>st</sup> July 2017.

(3) Mr. Z had resided in India during the financial year 2015-2016. He left India on 1st August, 2016 for United States for pursuing higher studies for 3 years. What would be his residential status during financial year 2016-2017 and during 2017-2018?

**Answer:** Mr. Z had resided in India during financial year 2015-2016 for more than 182 days. After that he has gone to USA for higher studies. In other words, he has not gone out of, or stayed outside India for or on taking up employment, or for carrying a business or any other purpose, in not circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2016-2017. RBI has however clarified in its AP circular no. 45 dated 8<sup>th</sup> December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2017-2018, he would not have been in India in the preceding financial year (2016-2017) for period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2017-2018.

(4) Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?

**Answer:** Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

However, robotic unit in Mumbai, though not 'owned' controls Singapore branch, which is a person resident in India. Hence *prima facie*, it may be possible to hold a view that the Singapore branch is 'person resident in India'.

(5) Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the airways are headquartered. However, for security considerations,

she was based on Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

**Answer:** Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v)(B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be an Indian resident.

If however she has been employed in Mumbai branch of British Airways, then she will be considered as Indian resident.

## 5. Regulation and Management of Foreign Exchange

### ❖ Dealing in foreign exchange, etc. [Section 3]

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

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

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

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

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

This section imposes blanket restrictions on the specified transactions. This section applies to residents and non-residents. **Consider following examples:**

- (i) **Example pertaining to clause (a)** -Dealing in foreign exchange – A non-resident comes to India and would like to sell US\$ 1,000 to his friend who is resident in India. The friend offers him a rate better than the banks. This cannot be done as it would amount to dealing in foreign exchange.

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(ii) **Example pertaining to clause (b)** – NRI brother has an insurance policy in India. He requests his Indian brother to pay insurance premium. This will amount to payment for the credit of non-resident. This is not permitted.

(iii) **Example pertaining to clause (c)** – A foreign tourist comes to India and he takes food at a restaurant. He would like to pay US\$ 20 in cash to the restaurant. The restaurant cannot accept cash as it will be a receipt otherwise than through Authorised Person. The restaurant will have to take a money changers license to accept foreign currency.

(iv) **Example pertaining to clause (d)** – Transactions covered by this sub-section are known as Hawala transactions. An Indian resident gives Rs. 70,000 in cash to an Indian dealer. For this transaction, the brother in Dubai will get US\$ 1,000 from a Dubai dealer. The two dealers may settle the transactions later. However for the two brothers this transaction is not permitted.

### ❖ Holding of foreign exchange [Section 4]

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

This section prevents Indian residents to acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property abroad. Then through separate notifications, acquisition of these assets has been permitted subject to certain conditions and compliance rules.

**Example**, if an Indian resident receives bank balance of US\$ 10,000 from his NRI uncle in London, the Indian resident cannot hold on to the foreign funds. He is supposed to bring back the funds as provided in section 8.

### ❖ Current account transactions [Section 5]

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

From the section, the intention is to permit receipts and payments freely on current account, though the Central Government may impose reasonable restrictions. On further analysis of the Section 5 two aspects have to be considered:

1. the section states that any person may sell or draw foreign exchange to or from an authorised person,
2. They may do so if such sale or drawal is a current account transaction. However, the Central Government may impose reasonable restrictions.

The wording implies that the section does not intend to permit a person to carry out a current account transaction freely. If a current account transaction involves dealing with foreign exchange and other provisions of the Act also get attracted, then the concerned person has to take necessary approvals under the Rules and Regulations etc.

As per Current account regulation, drawal of foreign exchange for certain current account transactions is prohibited, a few need permission of appropriate Govt. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling. The three categories are:

**I. SCHEDULE I**

*<sup>1</sup>Transactions for which drawal of foreign exchange is prohibited:*

- (i) Remittance out of lottery winnings.
- (ii) Remittance of income from racing/riding, etc., or any other hobby.
- (iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- (iv) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- (v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- (vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (vii) Payment related to “Call Back Services” of telephones.
- (viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

**II. SCHEDULE II**

*<sup>2</sup>Transactions, which require prior approval of the Government of India for drawal of foreign exchange:*

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport (Chartering Wing)

<sup>1</sup> Schedule I (Transactions which are prohibited)- Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time.

<sup>2</sup> Schedule II (Transactions which require prior approval of the Central Government)- Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time

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Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport (Chartering Wing)
Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders by (a) TV Channels (b) Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology.
Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)

### <sup>3</sup>Transactions which require RBI's prior approval for drawal of foreign exchange:

#### SCHEDULE III

1. **Facilities for individuals**—Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.
  - (i) Private visits to any country (except Nepal and Bhutan)
  - (ii) Gift or donation.
  - (iii) Going abroad for employment
  - (iv) Emigration
  - (v) Maintenance of close relatives abroad
  - (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
  - (vii) Expenses in connection with medical treatment abroad
  - (viii) Studies abroad

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<sup>3</sup> Schedule III- Notification no G.S.R. 426(E) dated 26th May 2015

(ix) Any other current account transaction

However, for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (here in after referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further, that for 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 of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

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 assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

Further, a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

**2. Facilities for persons other than individual**—The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
  - a. creation of Chairs in reputed educational institutes,
  - b. contribution to funds (not being an investment fund) promoted by educational institutes; and
  - c. contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

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*Explanation*—For the purposes of this sub-paragraph, the expression ‘infrastructure’ shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

(iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

**3. Procedure**—The procedure for drawal or remit of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

If the transaction is not listed in any of the above three schedules, it can be freely undertaken.

**Exemption for remittance from RFC Account** – If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from RFC account, then no approval is required.

**Exemption for remittance from EEFC Account** – If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from EEFC account, then also no approval is required. However if payment has to be made for the following transactions, approval is required even if payment is from EEFC account:

- Remittance for membership of P & I Club.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

**Exemption for payment by International Credit Card while on a visit abroad** – If a person is on a visit abroad, he can incur expenditure stated in Schedule III if he incurs it through International credit card.

As per the Notification no. RBI/2014-15/620 A.P. (DIR Series) Circular No. 106, dated 1st June 2015, Authorised Dealer banks may now allow remittances by a resident individual up to USD 250,000 per financial year for any permitted current or capital account transaction or a combination of both. If an individual has already remitted any amount under the Liberalised Remittance Scheme, then the applicable limit for such an individual would be reduced from the present limit of USD 250,000 for the financial year by the amount already remitted.

**Import of Goods and Services:** Import of Goods and Services into India is being allowed in terms of Section 5 of the Foreign Exchange Management Act 1999, read with Notification No. G.S.R. 381(E) dated May 3, 2000 viz. Foreign Exchange Management (Current Account Transaction) Rules, 2000.

As per the section I of the Master Direction 17, Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of

Commerce, Government of India. Authorised Dealer Category – I banks should ensure that the imports into India are in conformity with the Foreign Trade Policy in force and Foreign Exchange Management (Current Account Transactions) Rules, 2000 and the Directions issued by Reserve Bank under Foreign Exchange Management Act, 1999 from time to time.

### **General Guidelines for Imports**

**(1) General Guidelines:** Rules and regulations to be followed by the Authorised Dealer (AD) from the foreign exchange angle while undertaking import payment transactions on behalf of their clients are given in this para of the Section II of the Master direction. Where specific regulations do not exist, AD may be governed by normal trade practices and it may particularly adhere to "Know Your Customer" (KYC) guidelines (issued by Reserve Bank) in all their dealings.

**(2) Remittances for Import Payments:** AD may allow remittance for making payments for imports into India, after ensuring that all the requisite details are made available by the importer and the remittance is for bona fide trade transactions as per applicable laws in force.

**(3) Obligation of Purchaser of Foreign Exchange:** Following are the obligation of the purchaser to be complied with:

(i) **Utilization of acquired Foreign Exchange for the said purpose:** In terms of Section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA), any person acquiring foreign exchange is permitted to use it either for the purpose mentioned in the declaration made by him to an Authorised or for any other purpose for which acquisition of foreign exchange is permissible under the said Act or Rules or Regulations framed there under.

(ii) **Evidence of import:** Where foreign exchange acquired has been utilised for import of goods into India, the AD should ensure that the importer furnishes evidence of import viz., as in IDPMS, Postal Appraisal Form or Customs Assessment Certificate, etc., and satisfy himself that goods equivalent to the value of remittance have been imported. AD should ensure that all import remittances outstanding on the notified date of IDPMS are uploaded in IDPMS (Import Data Processing and Monitoring System).

(iii) **Mode of payment:** A person resident in India may make payment for import of goods in foreign exchange through-

- an international card held by him/in rupees from international credit card/ debit card through the credit/debit card servicing bank in India against the charge slip signed by the importer, or
- as prescribed by Reserve Bank from time to time,

provided that the transaction is in conformity with the extant provisions and the import is in conformity with the Foreign Trade Policy in force.

(iv) **Other mode:** Any person resident in India may also make payment as under :

- (a) **In 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;

- (b) **By means of a crossed cheque or a draft** as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under the Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for the time being in force;
- (c) **A company or resident in India may make payment in rupees** to its non-whole time director who is resident outside India and is on a visit to India for the company's work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company's Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirement of any law, rules, regulations, directions applicable for making such payments are duly complied with.

**(4) Time Limit for Settlement of Import Payments:**

**(i) Time limit for Normal Imports:**

- (a) In terms of the extant regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.
- (b) AD may permit settlement of import dues delayed due to disputes, financial difficulties, etc. However, interest if any, on such delayed payments, usance bills (a bill of exchange which allows the drawee to have period of credit or term) or overdue interest is payable only for a period of up to three years from the date of shipment at the rate prescribed for trade credit from time to time.

- (ii) Time Limit for Deferred Payment Arrangements:** Deferred payment arrangements (including suppliers' and buyers' credit) upto five years, are treated as trade credits for which the procedural guidelines as laid down in the Master Circular for External Commercial Borrowings and Trade Credits may be followed.

**(5) Extension of Time:**

- (i) **limit of extension:** AD can consider granting extension of time for settlement of import dues up to a period of six months at a time (maximum up to the period of three years) irrespective of the invoice value for delays on account of disputes about quantity or quality or non-fulfilment of terms of contract; financial difficulties and cases where importer has filed suit against the seller. In cases where sector specific guidelines have been issued by Reserve Bank of India for extension of time (i.e. rough, cut and polished diamonds), the same will be applicable.
- (ii) **Circumstances:** While granting extension of time, AD must ensure that:
  - a. The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;
  - b. While considering extension beyond one year from the date of remittance, the

total outstanding of the importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower; and

- c. Where extension of time has been granted by the AD, the date up to which extension has been granted may be indicated in the 'Remarks' column.

(iii) **In exceptional cases:** Cases not covered by the above instructions / beyond the above limits, may be referred to the concerned Regional Office of Reserve Bank of India.

(iv) **Noting of the extension:** The above extension period shall be reported in IDPMS as per message "Bill of Entry Extension" and the date up to which extension is granted will be indicated in "Extension Date" column.

**(6) Import of Foreign Exchange / Indian Rupees:**

- (i) Except as otherwise provided in the Regulations, no person shall, without the general or special permission of the Reserve Bank, import or bring into India, any foreign currency. Import of foreign currency, including cheques, is governed by Section 6(3)(g) of the Foreign Exchange Management Act, 1999, and the Foreign Exchange Management (Export and Import of Currency) Regulations 2000.
- (ii) Reserve Bank may allow a person to bring into India currency notes of Government of India and / or of Reserve Bank subject to such terms and conditions as the Reserve Bank may stipulate.

**(7) Import of Foreign Exchange into India:** A person may–

- (i) **Send into India**, without limit, foreign exchange in any form (other than currency notes, bank notes and travellers cheques);
- (ii) **Bring into India** from any place outside India, without limit, foreign exchange (other than unissued notes), subject to the condition that such person makes, on arrival in India, a declaration to the Custom Authorities at the Airport in the Currency Declaration Form (CDF) annexed to these Regulations;

Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers cheques brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes (cash portion) alone brought in by such person at any one time does not exceed USD 5,000 (US Dollars five thousand) or its equivalent.

**(8) Import of Indian Currency and Currency Notes**

- (i) Any person resident in India who had 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 from Nepal and Bhutan**), currency notes of Government of India and Reserve Bank of India notes up to an amount not exceeding Rs. 25,000 (Rupees twenty five thousand only).

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- (ii) **A person may bring into India from Nepal or Bhutan**, currency notes of Government of India and Reserve Bank of India for any amount in denominations up to Rs.100/-.

### (9) Issue of Guarantees by an Authorised Dealer:

- (i) An authorised dealer may give a guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owned to a person resident outside India, as an importer, in respect of import on deferred payment terms in accordance with the approval by the Reserve Bank of India for import on such terms.
- (ii) An authorised dealer may give guarantee, Letter of Undertaking or Letter of Comfort in respect of any debt, obligation or other liability incurred by a person resident in India and owned to a person resident outside India (being an overseas supplier of goods, bank or a financial institution), for import of goods, as permitted under the Foreign Trade Policy announced by Government of India from time to time and subject to such terms and conditions as may be specified by Reserve Bank of India from time to time.
- (iii) An authorised dealer may, **in the ordinary course of his business**, give a guarantee in favour of a non-resident service provider, on behalf of a resident customer who is a service importer, subject to such terms and conditions as stipulated by Reserve Bank of India from time to time:

Limit of providing guarantee:

Service importer	Amount of guarantee
Where a service importer is other than a Public Sector Company or a Department / Undertaking of the Government of India / State Government:	no guarantee for an amount exceeding USD 500,000 or its equivalent shall be issued
Where the service importer is a Public Sector Company or a Department / Undertaking of the Government of India / State Government	no guarantee for an amount exceeding USD 100,000 or its equivalent shall be issued without the prior approval of the Ministry of Finance, Government of India.

- (iv) An authorised dealer may, subject to the directions issued by the Reserve Bank of India in this behalf, permit a person resident in India to **issue corporate guarantee in favour of an overseas lessor** for financing import through operating lease effected in conformity with the Foreign Trade Policy in force and under the provisions of the Foreign exchange Management (Current Account Transactions) Rules, 2000, and the Directions issued by Reserve Bank of India under Foreign Exchange Management Act, 1999 from time to time.

❖ **4Capital account transactions [Section 6]**

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

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

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

(3) [\*\*\*]

- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9<sup>th</sup> January, 2014 has issued a clarification on section 6(4) of the Act. This circular clarifies that section 6(4) of the Act covers the following transactions:

- (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
- (ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
- (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.

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<sup>4</sup> Amendment made vide Finance Act, 2015 w.e.f. 15.10.2019

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- (iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.
- (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when he was resident in India or inherited from a person who was resident in India.
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.
- (7) For the purposes of this section, the term "debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

A capital account transaction as said earlier is a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or persons resident outside India, and includes transactions referred to in sub-section (3). The section gives a liberty by providing that any person may sell or draw foreign exchange to or from an authorised person for capital account transactions. However, the liberty to do so is subject to the provisions of sub-section (2), which states that the Reserve Bank may in consultation with the Central Government specify class or classes of capital account transactions, which are permissible, and the limit upto, which the foreign exchange shall be admissible for such transactions.

Capital account transaction is basically split into the following categories:

- (I) transaction, which are permissible in respect of persons resident in India and outside India.
- (II) transaction on which restrictions cannot be imposed; and
- (III) transactions, which are prohibited.

### I. Permissible Transactions

Under Sub-section (2) of Section 6, the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The Regulations specify the list of transaction, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II.

Further, subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

### SCHEDULE I

The list of permissible classes of transactions made by **persons resident in India** is:

- (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.
- <sup>5</sup>(k) Undertake derivative contracts

### SCHEDULE II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (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 a person 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.

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<sup>5</sup>Substituted by Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2019, w.e.f. 26-2-2019. Prior to its substitution clause (k) read as under: "(k), Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India."

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- (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.
- <sup>6</sup>(h) Undertake derivative contracts

### Transactions with no restriction

They are:

- (1) For amortisation of loan and
- (2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan instalments.

### Prohibited Transactions

On certain transactions, the Reserve Bank of India imposes prohibition.

- (a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction,

<sup>7</sup>provided that-

- (i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

- (ii) Where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 250,000 per financial year, or as decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

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<sup>6</sup> Inserted by Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2019, w.e.f. 26-2-2019.

<sup>7</sup>The Foreign Exchange Management (Permissible Capital Account Transactions) (Third Amendment) Regulations, 2015 vide Notification No. FEMA. 341/2015-RB dated May 26, 2015 substituted the existing proviso contained in Regulation 4 sub-regulation (a) of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 with the above provisos in the principal regulations.

- (b) The person resident outside India is prohibited from making investments 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; <sup>8</sup>[Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non- resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time]
  - (ii) As Nidhi company;
  - (iii) In agricultural or plantation activities;
  - (iv) In real estate business, or construction of farm houses or  
Explanation:In “real estate business” the term shall not include shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.; or
  - (v) In trading in Transferable Development Rights (TDRs).
- <sup>9</sup>[(c) No person resident in India shall undertake any capital account transaction which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs, with any person who is, a citizen of or a resident of Democratic People’s Republic of Korea, or an entity incorporated or otherwise, in Democratic People’s Republic of Korea, until further orders, unless there is specific approval from the Central Government to carry on any transaction.
- (d) The existing investment transactions, with any person who is, a citizen of or resident of Democratic People’s Republic of Korea, or an entity incorporated or otherwise in Democratic People’s Republic of Korea, or any existing representative office or other assets possessed in Democratic People’s Republic of Korea, by a person resident in India, which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs shall be closed/liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification, unless there is specific approval from the Central Government to continue beyond that period.”]

### **Repatriation of sale proceeds**

A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except

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<sup>8</sup> Vide *Notification No. FEMA. 337/2015-RB* dated 2<sup>nd</sup> March, 2015, the Reserve Bank of India, in consultation with the Central Government through the Foreign Exchange Management (Permissible Capital Account Transactions) (Second Amendment) Regulations, 2015 added a explanation with respect to the business of chit fund.

<sup>9</sup> Vide Foreign Exchange Management (Permissible Capital Account Transaction) (First Amendment) Regulations, 2019 w.e.f 7th March, 2019

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with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, 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 provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) 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.

In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB, dated 3-5-2000) a bank which is an authorised dealer may permit the overseas lender or the security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

### **Framework for raising loans through External Commercial Borrowings:**

Vide FED Master Direction No.5/2018-19, amendments have been made in the Transactions on account of External Commercial Borrowings (ECB). Here is the updated master direction – external commercial borrowings.

Within the contours of the Regulations, Reserve Bank of India also issues directions to Authorised Persons under Section 11 of the Foreign Exchange Management Act (FEMA), 1999. These directions lay down the modalities as to how the foreign exchange business has to be conducted by the Authorised Persons with their customers/constituents with a view to implementing the regulations framed.

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## 1.28 Corporate and Allied Laws

**2 Introduction:** External Commercial Borrowings are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters given below apply in totality and not on a standalone basis.

**2.1 ECB Framework:** The framework for raising loans through ECB (hereinafter referred to as the ECB Framework) comprises the following two options:

Sr.No.	Parameters	FCY denominated ECB	INR denominated ECB
i	Currency of borrowing	Any freely convertible Foreign Currency	Indian Rupee (INR)
ii	Forms of ECB	Loans including bank loans; floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; FCCBs; FCEBs and Financial Lease.	Loans including bank loans; floating/ fixed rate notes/bonds/ debentures/ preference shares (other than fully and compulsorily convertible instruments); Trade credits beyond 3 years; and Financial Lease. Also, plain vanilla Rupee denominated bonds issued overseas, which can be either placed privately or listed on exchanges as per host country regulations.
iii	Eligible borrowers	All entities eligible to receive FDI. Further, the following entities are also eligible to raise ECB: i. Port Trusts; ii. Units in SEZ; iii. SIDBI; and iv. EXIM Bank of India.	a) All entities eligible to raise FCY ECB; and b) Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/ cooperatives and Non-Government Organisations.
iv	Recognised lenders	The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECB. However, a) Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;	

		<p>b) Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and</p> <p>c) Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs).</p>															
		<p>Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.</p>															
v	Minimum Average Maturity Period (MAMP)	<p>MAMP for ECB will be 3 years. Call and put options, if any, shall not be exercisable prior to completion of minimum average maturity. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:</p> <table border="1"> <thead> <tr> <th>Sr.No.</th> <th>Category</th> <th>MAMP</th> </tr> </thead> <tbody> <tr> <td>(a)</td> <td>ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.</td> <td>1 year</td> </tr> <tr> <td>(b)</td> <td>ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans</td> <td>5 years</td> </tr> <tr> <td><sup>12</sup>(c)</td> <td>ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes</td> <td>10 years</td> </tr> <tr> <td>(d)</td> <td>ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose</td> <td>7 years</td> </tr> </tbody> </table>	Sr.No.	Category	MAMP	(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year	(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years	<sup>12</sup> (c)	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years	(d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years
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<sup>12</sup> Inserted vide A.P.(DIR Series) Circular No. 04 dated July 30, 2019.

### 1.30 Corporate and Allied Laws

		<p>(e) ECB raised for</p> <p>(i) repayment of Rupee loans availed domestically for purposes other than capital expenditure</p> <p>(ii) on-lending by NBFCs for the same purpose</p>	10 years
		<p>for the categories mentioned at (b) to (e) –</p> <p>(i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks</p> <p>(ii) the prescribed MAMP will have to be strictly complied with under all circumstances.</p>	
vi	All-in-cost ceiling per annum	Benchmark rate plus 450 bps spread.	
vii	Other costs	Prepayment charge/ Penal interest, if any, for default or breach of covenants, should not be more than 2 per cent over and above the	
		contracted rate of interest on the outstanding principal amount and will be outside the all-in-cost ceiling.	
Viii	End-uses (Negative list)	<p>The negative list, for which the ECB proceeds cannot be utilised, would include the following:</p> <p>a) Real estate activities.</p> <p>b) Investment in capital market.</p> <p>c) Equity investment.</p> <p>d) <sup>13</sup>Working capital purposes, except in case of ECB mentioned at v(b) and v(c) above.</p> <p>e) General corporate purposes, except in case of ECB mentioned at v(b) and v(c) above.</p>	

<sup>13</sup> Substituted vide A.P.(DIR Series) Circular No. 04 dated July 30, 2019. Prior to substitution it read as below:

- a) Working capital purposes except from foreign equity holder.
- b) General corporate purposes except from foreign equity holder.
- c) Repayment of Rupee loans except from foreign equity holder.
- d) On-lending to entities for the above activities.

		<p>f) Repayment of Rupee loans, except in case of ECB mentioned at v(d) and v(e) above.</p> <p>On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at v(c), v(d) and v(e) above.</p>	
ix	Exchange rate	<p>Change of currency of FCY ECB into INR ECB can be at the exchange rate prevailing on the date of the agreement for such change between the parties concerned or at an exchange rate, which is less than the rate prevailing on the date of the agreement, if consented to by the ECB lender.</p>	<p>For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement.</p>
x	Hedging provision	<p>The entities raising ECB are required to follow the guidelines for hedging issued, if any, by the concerned sectoral or prudential regulator in respect of foreign currency exposure.</p> <p>Infrastructure space companies shall have a Board approved risk management policy. Further, such companies are required to mandatorily hedge 70 per cent of their ECB exposure in case the average maturity of the ECB is less than 5 years. The designated AD Category-I bank shall verify that 70 per cent hedging requirement is complied with during the currency of the ECB and report the position to RBI through Form ECB 2. The following operational aspects with respect to hedging should be ensured:</p> <p><b>a. Coverage:</b> The ECB borrower will be required</p>	<p>Overseas investors are eligible to hedge their exposure in Rupee through permitted derivative products with AD Category I banks in India. The investors can also access the domestic market through branches / subsidiaries of Indian banks abroad or branches of foreign banks with Indian presence on a back to back basis.</p>

		<p>to cover the principal as well as the coupon through financial hedges. The financial hedge for all exposures on account of ECB should start from the time of each such exposure (i.e. the day the liability is created in the books of the borrower).</p> <p><b>b. Tenor and rollover:</b> A minimum tenor of one year for the financial hedge would be required with periodic rollover, duly ensuring that the exposure on account of ECB is not unhedged at any point during the currency of the ECB.</p> <p><b>c. Natural Hedge:</b> Natural hedge, in lieu of financial hedge, will be considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows. For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting any other arrangements/structures, where revenues are indexed to foreign currency will not be considered as a natural hedge.</p>	
xi	Change of currency of borrowing	Change of currency of ECB from one freely convertible foreign currency to any other	Change of currency from INR to any freely convertible foreign currency is not permitted.

		freely convertible foreign currency as well as to INR is freely permitted.	
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**Note:** The ECB framework is not applicable in respect of investments in Non-Convertible Debentures in India made by Registered Foreign Portfolio Investors.

<sup>14</sup>Lending and borrowing under the ECB framework by Indian banks and their branches/subsidiaries outside India will be subject to prudential guidelines issued by the Department of Banking Regulation of the Reserve Bank. Further, other entities raising ECB are required to follow the guidelines issued, if any, by the concerned sectoral or prudential regulator.

- 2.2. **Limit and leverage:** Under the aforesaid framework, all eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in case of FCY denominated ECB raised from direct foreign equity holder, ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt equity ratio, issued, if any, by the sectoral or prudential regulator concerned.
3. **Issuance of Guarantee, etc. by Indian banks and Financial Institutions:** Issuance of any type of guarantee by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted. Further, financial intermediaries (viz., Indian banks, All India Financial Institutions, or NBFCs) shall not invest in FCCBs/ FCEBs in any manner whatsoever.
4. **Parking of ECB proceeds:** ECB proceeds are permitted to be parked abroad as well as domestically in the manner given below:
  - 4.1 **Parking of ECB proceeds abroad:** ECB proceeds meant only for foreign currency expenditure can be parked abroad pending utilisation. Till utilisation, these funds can be invested in the following liquid assets (a) deposits or Certificate of Deposit or other products offered by banks rated not less than AA (-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's; (b) Treasury bills and other monetary instruments of one-year maturity having minimum rating as indicated above and (c) deposits with foreign branches/subsidiaries of Indian banks abroad.
  - 4.2 **Parking of ECB proceeds domestically:** ECB proceeds meant for Rupee expenditure should be repatriated immediately for credit to their Rupee accounts with AD Category I banks in India. ECB borrowers are also allowed to park ECB proceeds in term deposits with AD Category I banks in India for a maximum period of 12 months cumulatively. These term deposits should be kept in unencumbered position.
5. **Procedure of raising ECB:** All ECB can be raised under the automatic route if they conform to the parameters prescribed under this framework. For approval route cases, the

<sup>14</sup> Inserted vide A.P. (DIR Series) Circular No. 17 dated January 16, 2019.

borrowers may approach the RBI with an application in prescribed format (Form ECB) for examination through their AD Category I bank. Such cases shall be considered keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals. ECB proposals received in the Reserve Bank above certain threshold limit (refixed from time to time) would be placed before the Empowered Committee set up by the Reserve Bank. The Empowered Committee will have external as well as internal members and the Reserve Bank will take a final decision in the cases taking into account recommendation of the Empowered Committee. Entities desirous to raise ECB under the automatic route may approach an AD Category I bank with their proposal along with duly filled in Form ECB.

**6. Reporting Requirements:** Borrowings under ECB Framework are subject to following reporting requirements apart from any other specific reporting required under the framework:

**6.1 Loan Registration Number (LRN):** Any draw-down in respect of an ECB should happen only after obtaining the LRN from the Reserve Bank. To obtain the LRN, borrowers are required to submit duly certified Form ECB, which also contains terms and conditions of the ECB, in duplicate to the designated AD Category I bank. In turn, the AD Category I bank will forward one copy to the Director, Reserve Bank of India, Department of Statistics and Information Management, External Commercial Borrowings Division, Bandra-Kurla Complex, Mumbai – 400 051 (Contact numbers 022-26572513 and 022-26573612). Copies of loan agreement for raising ECB are not required to be submitted to the Reserve Bank.

**6.2 Changes in terms and conditions of ECB:** Changes in ECB parameters in consonance with the ECB norms, including reduced repayment by mutual agreement between the lender and borrower, should be reported to the DSIM through revised Form ECB at the earliest, in any case not later than 7 days from the changes effected. While submitting revised Form ECB the changes should be specifically mentioned in the communication.

**6.3 Monthly Reporting of actual transactions:** The borrowers are required to report actual ECB transactions through Form ECB 2 Return through the AD Category I bank on monthly basis so as to reach DSIM within seven working days from the close of month to which it relates.

Changes, if any, in ECB parameters should also be incorporated in Form ECB 2 Return.

**6.4 Late Submission Fee (LSF) for delay in reporting:**

**6.4.1** Any borrower, who is otherwise in compliance of ECB guidelines, can regularise the delay in reporting of drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of late submission fees as detailed in the following matrix:

Sr. No.	Type of Return /Form	Period of delay	Applicable LSF
1	Form ECB 2	Up to 30 calendar days from due date of submission	INR 5,000
2	Form ECB 2/Form ECB	Up to three years from due date of submission/date of drawdown	INR 50,000 per year
3	Form ECB 2/Form ECB	Beyond three years from due date of submission/date of drawdown	INR 100,000 per year

**6.4.2** The borrower, through its AD bank, may pay the LSF by way of demand draft in favour of "Reserve Bank of India" or any other mode specified by the Reserve Bank. Such payment should be accompanied with the requisite return(s). Form ECB and Form ECB 2 returns reporting contraventions will be treated separately. Non-payment of LSF will be treated as contravention of reporting provision and shall be subject to compounding or adjudication as provided in FEMA 1999 or regulations/rules framed thereunder.

**6.5 Standard Operating Procedure (SOP) for Untraceable Entities:** The following SOP has to be followed by designated AD Category-I banks in case of untraceable entities who are found to be in contravention of reporting provisions for ECB by failing to submit prescribed return(s) under the ECB framework, either physically or electronically, for past eight quarters or more.

- i. **Definition:** Any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:
  - a) Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
  - b) Entities have not submitted Statutory Auditor's Certificate for last two years or more;
- ii. **Action:** The followings actions are to be undertaken in respect of 'untraceable entities':
  - a) File Revised Form ECB, if required, and last Form ECB 2 Return without certification from company with 'UNTRACEABLE ENTITY' written in bold on top. The outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means;

- b) No fresh ECB application by the entity should be examined/processed by the AD bank;
- c) Directorate of Enforcement should be informed whenever any entity is designated 'UNTRACEABLE ENTITY'; and
- d) No inward remittance or debt servicing will be permitted under auto route.

**7. Powers delegated to AD Category I banks to deal with ECB cases:** The designated AD Category I banks can approve any requests from the borrowers for changes in respect of ECB, except for FCCBs/FCEBs, duly ensuring that the changed conditions, including change in name of borrower/lender, transfer of ECB and any other parameters, comply with extant ECB norms and are with the consent of lender(s). Further, the following can also be undertaken under the automatic route:

**7.1 Change of the AD Category I bank:** AD Category I bank can be changed subject to obtaining no objection certificate from the existing AD Category I bank.

**7.2 Cancellation of LRN:** The designated AD Category I banks may directly approach DSIM for cancellation of LRN for ECB contracted, subject to ensuring that no draw down against the said LRN has taken place and the monthly ECB-2 returns till date in respect of the allotted LRN have been submitted to DSIM.

**7.3 Refinancing of existing ECB:** Refinancing of existing ECB by fresh ECB provided the outstanding maturity of the original borrowing (weighted outstanding maturity in case of multiple borrowings) is not reduced and all-in-cost of fresh ECB is lower than the all-in-cost (weighted average cost in case of multiple borrowings) of existing ECB. Further, refinancing of ECB raised under the previous ECB frameworks may also be permitted, subject to additionally ensuring that the borrower is eligible to raise ECB under the extant framework. Raising of fresh ECB to part refinance the existing ECB is also permitted subject to same conditions. Indian banks are permitted to participate in refinancing of existing ECB, only for highly rated corporates (AAA) and for Maharatna/Navratna public sector undertakings.

**7.4 Conversion of ECB into equity:** Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

- (i) The activity of the borrowing company is covered under the automatic route for FDI or Government approval is received, wherever applicable, for foreign equity participation as per extant FDI policy.
- (ii) The conversion, which should be with the lender's consent and without any additional cost, should not result in contravention of eligibility and breach of applicable sector cap on the foreign equity holding under FDI policy;
- (iii) Applicable pricing guidelines for shares are complied with; iv. In case of partial or full conversion of ECB into equity, the reporting to the Reserve Bank will be as under:
  - (a) For partial conversion, the converted portion is to be reported in Form FC-GPR prescribed for reporting of FDI flows, while monthly reporting to DSIM

in Form ECB 2 Return will be with suitable remarks, viz., "ECB partially converted to equity".

- (b) For full conversion, the entire portion is to be reported in Form FC-GPR, while reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.
- (c) For conversion of ECB into equity in phases, reporting through Form FC-GPR and Form ECB 2 Return will also be in phases.
- (iv) If the borrower concerned has availed of other credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, the applicable prudential guidelines issued by the Department of Banking Regulation of Reserve Bank, including guidelines on restructuring are complied with;
- (v) Consent of other lenders, if any, to the same borrower is available or atleast information regarding conversions is exchanged with other lenders of the borrower.
- (vi) For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

**7.5. Security for raising ECB:** AD Category I banks are permitted to allow creation/cancellation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower, subject to satisfying themselves that:

- (i) the underlying ECB is in compliance with the extant ECB guidelines,
- (ii) there exists a security clause in the Loan Agreement requiring the ECB borrower to create/cancel charge, in favour of overseas lender/security trustee, on immovable assets/movable assets/financial securities/issuance of corporate and/or personal guarantee, and
- (iii) No objection certificate, as applicable, from the existing lenders in India has been obtained in case of creation of charge.

Once the aforesaid stipulations are met, the AD Category I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, subject to the following:

- (i) **Creation of Charge on Immovable Assets:** The arrangement shall be subject to the following:

- (a) Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017, as amended from time to time.
  - (b) The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.
  - (c) In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.
- (ii) **Creation of Charge on Movable Assets:** In the event of enforcement/ invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may also be taken out of the country subject to getting 'No Objection Certificate' from domestic lender/s, if any.
- (iii) **Creation of Charge over Financial Securities:** The arrangements may be permitted subject to the following:
- (a) Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower is permitted. Pledge on other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, is also permitted.
  - (b) In addition, security interest over all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.
  - (c) In case of invocation of pledge, transfer of financial securities shall be in accordance with the extant FDI/FII policy including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, as amended from time to time.
- (iv) **Issue of Corporate or Personal Guarantee:** The arrangement shall be subject to the following:
- (a) A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.

- (b) Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
- (c) Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000, as amended from time to time.
- (d) ECB can be credit enhanced / guaranteed / insured by overseas party/ parties only if it/ they fulfil/s the criteria of recognised lender under extant ECB guidelines.

**7.6. Additional Requirements:** While exercising the delegated powers, the AD Category I banks should ensure that:

- i. The changes permitted are in conformity with the applicable ceilings / guidelines and the ECB continues to be in compliance with applicable guidelines. It should also be ensured that if the ECB borrower has availed of credit facilities from the Indian banking system, including foreign branches/subsidiaries of Indian banks, any extension of tenure of ECB (whether matured or not) shall be subject to applicable prudential guidelines issued by Department of Banking Regulation of Reserve Bank including guidelines on restructuring.
- ii. The changes in the terms and conditions of ECB allowed by the ADs under the powers delegated and / or changes approved by the Reserve Bank should be reported to the DSIM as given at paragraph 6.2 above. Further, these changes should also get reflected in the Form ECB 2 returns appropriately.

**8. Special Dispensations under the ECB framework:**

**8.1 ECB facility for Oil Marketing Companies:** Notwithstanding the provisions contained in paragraph 2.1 (viii), 2.1 (x) and 2.2 above, Public Sector Oil Marketing Companies (OMCs) can raise ECB for working capital purposes with minimum average maturity period of 3 years from all recognised lenders under the automatic route without mandatory hedging and individual limit requirements. The overall ceiling for such ECB shall be USD 10 billion or equivalent. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECB. All other provisions under the ECB framework will be applicable to such ECB.

**8.2 ECB facility for Startups:** AD Category-I banks are permitted to allow Startups to raise ECB under the automatic route as per the following framework:

- (i) **Eligibility:** An entity recognised as a Startup by the Central Government as on date of raising ECB.
- (ii) **Maturity:** Minimum average maturity period will be 3 years.
- (iii) **Recognised lender:** Lender / investor shall be a resident of a FATF compliant country. However, foreign branches/subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognised lenders under this framework.

- (iv) **Forms:** The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares.
- (v) **Currency:** The borrowing should be denominated in any freely convertible currency or in Indian Rupees (INR) or a combination thereof. In case of borrowing in INR, the nonresident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India.
- (vi) **Amount:** The borrowing per Startup will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both.
- (vii) **All-in-cost:** Shall be mutually agreed between the borrower and the lender.
- (viii) **End uses:** For any expenditure in connection with the business of the borrower.
- (ix) **Conversion into equity:** Conversion into equity is freely permitted subject to Regulations applicable for foreign investment in Startups.
- (x) **Security:** The choice of security to be provided to the lender is left to the borrowing entity. Security can be in the nature of movable, immovable, intangible assets (including patents, intellectual property rights), financial securities, etc. and shall comply with foreign direct investment / foreign portfolio investment / or any other norms applicable for foreign lenders / entities holding such securities. Further, issuance of corporate or personal guarantee is allowed. Guarantee issued by a nonresident(s) is allowed only if such parties qualify as lender under ECB for Startups. However, issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, all India Financial Institutions and NBFCs is not permitted.
- (xi) **Hedging:** The overseas lender, in case of INR denominated ECB, will be eligible to hedge its INR exposure through permitted derivative products with AD Category – I banks – I banks in India. The lender can also access the domestic market through branches/ subsidiaries of Indian banks abroad or branches of foreign bank with Indian presence on a back to back basis.

**Note:** Startups raising ECB in foreign currency, whether having natural hedge or not, are exposed to currency risk due to exchange rate movements and hence are advised to ensure that they have an appropriate risk management policy to manage potential risk arising out of ECB.
- (xii) **Conversion rate:** In case of borrowing in INR, the foreign currency - INR conversion will be at the market rate as on the date of agreement.
- (xiii) **Other Provisions:** Other provisions like parking of ECB proceeds, reporting arrangements, powers delegated to AD banks, borrowing by entities under investigation, conversion of ECB into equity will be as included in the ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will not be applicable. Further, the Start-ups as defined above [8.2. (i)] as well as other start-ups which do not comply with the aforesaid definition but are

eligible to receive FDI, can also raise ECB under the general ECB route/framework.

- 9. Borrowing by Entities under Investigation:** All entities against which investigation / adjudication / appeal by the law enforcing agencies for violation of any of the provisions of the Regulations under FEMA pending, may raise ECB as per the applicable norms, if they are otherwise eligible, notwithstanding the pending investigations / adjudications / appeals, without prejudice to the outcome of such investigations / adjudications / appeals. The borrowing entity shall inform about pendency of such investigation / adjudication / appeal to the AD Category-I bank / RBI as the case may be. Accordingly, in case of all applications where the borrowing entity has indicated about the pending investigations / adjudications / appeals, the AD Category I Banks / Reserve Bank while approving the proposal shall intimate the agencies concerned by endorsing a copy of the approval letter.
- 10. ECB by entities under restructuring/ ECB facility for refinancing stressed assets:**
- 10.1** An entity which is under a restructuring scheme/ corporate insolvency resolution process can raise ECB only if specifically permitted under the resolution plan.
- 10.2** <sup>15</sup>Eligible corporate borrowers who have availed Rupee loans domestically for capital expenditure in manufacturing and infrastructure sector and which have been classified as SMA-2 or NPA can avail ECB for repayment of these loans under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, provided, the resultant external commercial borrowing complies with all-in-cost, minimum average maturity period and other relevant norms of the ECB framework. Foreign branches/ overseas subsidiaries of Indian banks are not eligible to lend for the above purposes. The applicable MAMP will have to be strictly complied with under all circumstances.
- 10.3** Eligible borrowers under the ECB framework, who are participating in the Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 as resolution applicants, can raise ECB from all recognised lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee term loans of the target company. Such ECB will be considered under the approval route, procedure of which is given at paragraph No. 5 above.
- 11. Dissemination of information:** For providing greater transparency, information with regard to the name of the borrower, amount, purpose and maturity of ECB under both Automatic and Approval routes are put on the RBI's website, on a monthly basis, with a lag of one month to which it relates.
- 12. Compliance with the guidelines:** The primary responsibility for ensuring that the borrowing is in compliance with the applicable guidelines is that of the borrower concerned. Any contravention of the applicable provisions of ECB guidelines will invite penal action

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<sup>15</sup> Inserted vide A.P.(DIR Series) Circular No. 04 dated July 30, 2019.

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under the FEMA. The designated AD Category I bank is also expected to ensure compliance with applicable ECB guidelines by their constituents.

### **Overseas Direct Investments by resident individuals**

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs. Joint Ventures are perceived as a medium of economic and business co-operation between India and other countries.

In keeping with the spirit of liberalisation, which has become the hallmark of economic policy in general, and Foreign Exchange regulations in particular, the Reserve Bank has been progressively relaxing the rules and simplifying the procedures both for current account as well as capital account transactions.

**Relevant statutory provision:** Section 6 of the Foreign Exchange Management Act, 1999 provides powers to the Reserve Bank to specify, in consultation with the Government of India the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions. Section 6(3) of the aforesaid Act provides powers to the Reserve Bank to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations.

In exercise of the above powers conferred under the Act, the Reserve issued Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 vide Notification No. FEMA.120/RB-2004 dated July 7, 2004. The Notification seeks to regulate acquisition and transfer of a foreign security by a person resident in India i.e. investment (or financial commitment) by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.

**Relevant definitions: "Direct investment outside India"** means investments, either under the Automatic Route or the Approval Route, by way of:

- (i) contribution to the capital or subscription to the Memorandum of a foreign entity, or
- (ii) purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).

However, it does not include<sup>16</sup> Portfolio investment.

A resident individual may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. However, the limit of overseas direct investment by the resident individual is prescribed by RBI.

**"Financial Commitment"** means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance

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<sup>16</sup> **Portfolio investments** are **investments** in the form of a group (**portfolio**) of assets, including transactions in equity, securities, such as common stock, and debt securities, such as banknotes, bonds, and debentures

guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary.

**'Joint Venture'** means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian Party makes a direct investment.

**"Wholly Owned Subsidiary (WOS)"** means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by 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, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008, making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank. When more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party".

**"Host country"** means the country in which the foreign entity receiving the direct investment from an Indian Party is registered or incorporated.

**Mode of direct investment outside India:**

**(1) Automatic route for direct investment or financial commitment outside India:** As per the Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

**Limit permissible:** The total financial commitment of the Indian Party in all the Joint Ventures/ Wholly Owned Subsidiaries shall comprise of the following:

- a. 100% of the amount of equity shares and/ or Compulsorily Convertible Preference Shares (CCPS);
- b. 100% of the amount of other preference shares;
- c. 100% of the amount of loan;
- d. 100% of the amount of guarantee (other than performance guarantee) issued by the Indian Party;
- e. 100% of the amount of bank guarantee issued by a resident bank on behalf of JV or WOS of the Indian Party provided the bank guarantee is backed by a counter guarantee / collateral by the Indian Party.

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- f. 50% of the amount of performance guarantee issued by the Indian Party provided that if the outflow on account of invocation of performance guarantee results in the breach of the limit of the financial commitment in force, prior permission of the Reserve Bank is to be obtained before executing remittance beyond the limit prescribed for the financial commitment.

**Requirements for investments/ financial commitments:** The criteria for overseas direct investment under the Automatic Route is as under:

- i. The Indian Party can invest up to the prescribed limit of its net worth (as per the last audited Balance Sheet) in JV / WOS for any bonafide activity permitted as per the law of the host country. The prescribed limit vis-a-vis the net worth will not be applicable where the investment is made out of balances held in the EEFC account of the Indian party or out of funds raised through ADRs/GDRs;
- ii. The Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system published/ circulated by the Credit Information Bureau of India Ltd. (CIBIL) /RBI or any other credit information company as approved by the Reserve Bank or under investigation by the Directorate of Enforcement or any investigative agency or regulatory authority; and
- iii. The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorised dealer to be designated by the Indian Party.

**Process:** The Indian Party should approach an Authorized Dealer with an application in Form ODI and the prescribed enclosures / documents for effecting the remittances towards such investments.

Investments (or financial commitment) in JV/WOS abroad by Indian Parties through the medium of a Special Purpose Vehicle (SPV) are also permitted under the Automatic Route if the Indian Party is not appearing in the Reserve Bank's caution list or is under investigation by the Directorate of Enforcement or included in the list of defaulters to the banking system circulated by the Reserve Bank/any other Credit Information company as approved by the Reserve Bank.

#### **(2) Approval route for direct investment or financial commitment outside India**

- (i) Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.
- (ii) Reserve Bank would, inter alia, take into account the following factors while considering such applications:
  - a) Prima facie viability of the JV / WOS outside India;
  - b) Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);
  - c) Financial position and business track record of the Indian Party and the foreign entity; and
  - d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

**Overseas Direct Investments by resident individuals:** With effect from August 05, 2013, a resident individual (single or in association with another resident individual or with an 'Indian Party' as defined in the Notification) satisfying the criteria as per Schedule V of the Notification, may make overseas direct investment in the equity shares and compulsorily convertible preference shares of a Joint Venture (JV) or Wholly Owned Subsidiary (WOS) outside India. The limit of overseas direct investment by the resident individual shall be within the overall limit prescribed by the Reserve Bank of India under the provisions of Liberalised Remittance Scheme, as prescribed by the Reserve Bank from time to time.

**Prohibitions on direct investment in abroad by an Indian party:**

- (a) Indian Parties are prohibited from making investment (or financial commitment) in foreign entity engaged in real estate (meaning 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) or banking business, without the prior approval of the Reserve Bank.
- (b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank.

**General Permission:** General permission has been granted to persons residents in India for purchase / acquisition of securities in the following manner:

- (a) out of the funds held in RFC account;
- (b) as bonus shares on existing holding of foreign currency shares; and
- (c) when not permanently resident in India, out of their foreign currency resources outside India.

General permission is also available to sell the shares so purchased or acquired.

❖ **Export of goods and services (Section 7)**

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

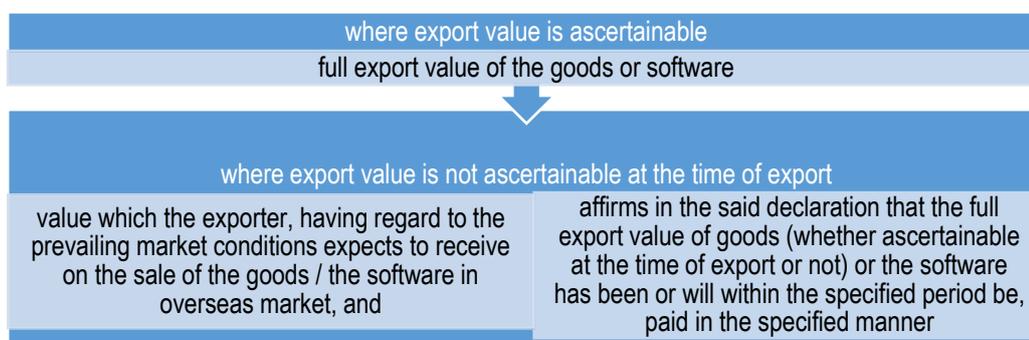
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- (2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct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

### Regulations:

1. **Short title and commencement:** These Regulations may be called the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 w.e.f. 12-1-2016.
2. **Definitions:- Some definitions:** In these Regulations, unless the context requires otherwise, -
  - (i) 'export' includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;
  - (ii) 'export value' in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;
  - (iii) 'form' means form annexed to these Regulations;
  - (iv) 'software' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium;
  - (v) 'specified authority' means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;
3. **Declaration of exports: In case of exports taking place through Customs manual ports:** every exporter of goods or software in physical or any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority- a declaration in the forms set out in the Schedule with the support of evidence containing true and correct material particulars including the amount representing –



**In respect of export of services to which none of the Forms specified in these Regulations apply:** the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due / accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

**Realization of export proceeds** in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

- 4. Exemptions:** Export of goods / software may be made without furnishing the declaration in the following cases, namely:
- (a) trade samples of goods and publicity material supplied free of payment;
  - (b) personal effects of travellers, whether accompanied or unaccompanied;
  - (c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
  - (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
  - (e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
  - (f) goods imported free of cost on re-export basis;
  - (g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:
    - (1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
    - (2) goods imported from foreign suppliers/collaborators on loan basis;
    - (3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.
  - (ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs
  - (h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.
  - (i) goods sent outside India for testing subject to re-import into India;

- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.
- (k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

**5. Indication of importer-exporter code number:** The importer-exporter code number (allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992) shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and shall be used in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

**6. Authority to whom declaration is to be furnished and the manner of dealing with the declaration:**

<b>Declaration in Form EDF</b>	<ul style="list-style-type: none"> <li>(i) It shall be submitted in duplicate to the Commissioner of Customs.</li> <li>(ii) After verification and authentication of the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank, and</li> <li>(iii) hand over the duplicate form to the exporter for being submitted to the authorised dealer.</li> </ul>
<b>Declaration in Form SOFTEX</b>	<ul style="list-style-type: none"> <li>(i) It shall be, in respect of export of computer software and audio/video/ television software, submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.</li> <li>(ii) After certifying all three copies of the SOFTEX form, the designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter.</li> <li>(iii) The triplicate shall be retained by the designated official for record.</li> </ul>

**Duplicate Declaration Forms to be retained with Authorised Dealers:** On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

7. **Evidence in support of declaration:-** The Commissioner of Customs / the postal authority / the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –
- (a) the exporter is a person resident in India and has a place of business in India;
  - (b) the destination stated on the declaration is the final place of the destination of the goods exported;
  - (c) the value stated in the declaration represents –
    - (i) the full export value of the goods or software; or
    - (ii) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

*Explanation*—For the purpose of this regulation, 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

8. **Manner of payment of export value of goods:** Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

*Explanation*—For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made under Regulation 3, shall be deemed to be realisation of full export value of such goods.

9. **Period within which export value of goods/software/ services to be realised:-**

- (1) **In ordinary case:** The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India **within nine months from the date of export.**

However, **where the goods are exported to a warehouse established outside India** with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case **within fifteen months from the date of shipment of goods;**

**Extension of period:** Further the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause, extend the period of nine months or fifteen months, as the case may be.

- (2) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

**Extension of period:** Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by above sub-regulation (2). Such a direction shall be given only when the unit has been given a reasonable opportunity to make a representation in the matter.

On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.

For the purpose of this regulation, the “date of export” in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

- 10. Submission of export documents:** The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorised dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

- 11. Transfer of documents:** An authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3):

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall –

- (a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or
- (b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of

the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

**12. Payment for the Export:** In respect of export of any goods / software for which a declaration is required to be furnished, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

- (i) that the payment for the goods or software is made otherwise than in the specified manner; or
- (ii) that the payment is delayed beyond the period specified under these Regulations; or
- (iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

- (iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

**13. Certain Exports requiring prior approval:** Exports under trade agreement/rupee credit etc.

- (i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.
- (ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

**14. Delay in Receipt of Payment:** Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

- (a) the payment therefor if the goods or software has been sold and

- (b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

**15. Advance payment against exports:**

- (1) **Where an exporter receives advance payment (with or without interest), from a buyer / third party** named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
  - (i) **the shipment of goods is made within one year** from the date of receipt of advance payment;
  - (ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
  - (iii) the documents covering the **shipment are routed through the authorised dealer** through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

- (2) **Exemption:** Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

**16. Issue of directions by Reserve Bank in certain cases:**

- (1) In relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters, the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely ;
  - (a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order;
  - (b) that any declaration to be furnished to the specified authority shall be submitted

to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.

- (c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.
- (2) **Exception:** No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

**17. Project exports:**

- (1) **Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract,** the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.
- (2) **In case a guarantee is required to be given prior to post award approval,** the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements. Explanation:

For the purpose of this Regulation, 'approving authority' means the EXIM Bank of India or the authorised dealer.

❖ **Realisation and repatriation of foreign exchange [Section 8]**

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

**Exemption from realisation and repatriation in certain cases [Section 9]**

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

- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify
- (b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify

- (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
- (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising therefrom;
- (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.

## 6 Authorised Person [Section 10]

- (1) The Reserve Bank may, on an application made to it in this behalf, authorize any person to be known as authorized person to deal in foreign exchange or in foreign securities, as an authorized dealer, money changer or off-shre banking unit or in any other manner as it deems fit.[Sub-section(1)].
- (2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein [Sub-section (2)].
- (3) An authorisation granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that:
  - (a) it is in public interest so to do; or
  - (b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction order made thereunder;

**Provided** that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

- (4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.
- (5) An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonable satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory

compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

- (6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provision of the Act for the purpose of this section.

❖ **Reserve Bank's powers to issue directions to authorised person [Section 11]**

- (1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.
- (2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification direction or order made thereunder, direct any authorised person to furnish such information, in such manner, as it deems fit.
- (3) Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

❖ **Power of Reserve Bank to inspect authorised person [Section 12]**

- (1) The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary or expedient for the purpose of:
- (a) verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;
  - (b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;
  - (c) securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.
- (2) It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and other documents in his custody or power and to furnish any statement or information

relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.

## 7. Contraventions and Penalties in Brief

Section No.	Contravention	Quantum of Penalty
<b>Section 11</b>	Authorised person contravenes any direction by RBI or failure to file any return as directed by RBI	<ul style="list-style-type: none"> <li>➤ Upto ₹ 10,000.</li> <li>➤ If continuing offence additional penalty upto ₹ 2,000 per day.</li> </ul>
<b>Section 13</b>	Of any provision of the Act, or any rule, regulation, notification, direction or order or of any condition subject to which an authorisation issued	<ul style="list-style-type: none"> <li>➤ Upto three times, the sum involved, if it is quantifiable.</li> <li>➤ If not quantifiable upto ₹ 2 lacs.</li> <li>➤ If continuing, further penalty upto ₹ 5,000 per day after first day.</li> </ul>
<b>Section 13(1A) and 13(1C)</b>	Acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A	<ul style="list-style-type: none"> <li>➤ Upto three times, the sum involved.</li> <li>➤ confiscation of the value equivalent of foreign assets involved in contravention, situated in India.</li> <li>➤ Imprisonment upto 5 years with a fine if the amount of contravention exceeds the threshold prescribed under the proviso to sub-section (1) of section 37A.</li> </ul>
<b>Section 14</b>	Failure to pay penalty as above <ul style="list-style-type: none"> <li>– where demand is of an amount exceeding ₹ 1 crore.</li> <li>– in any other case</li> </ul>	Civil imprisonment. <ul style="list-style-type: none"> <li>➤ Upto 3 years</li> <li>➤ Upto 6 months.</li> </ul>

If any Adjudicating Authority adjudging any contravention under section 13(1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the person committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with directions made in this behalf.

*Explanation:* For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include:

- (a) deposits in a bank, where the said property is converted into such deposits;

- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property, which has resulted out of the conversion of that property.

❖ **Enforcement of the orders of Adjudicating Authority [Section 14]**

- (1) **In case of failure to make full payment of the penalty:** 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.
- (2) **Order of arrest and detention in civil prison:** No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied:
  - (a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred concealed, or removed any part of his property, or
  - (b) that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to do so.
- (3) **Issue of warrant for the arrest of the defaulter:** a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.
- (4) **In case of absence pursuant to the notice served:** Where appearance is not made pursuant to a notice issued and served, the Adjudicating Authority may issue a warrant for the arrest of the defaulter.
- (5) Every person arrested in pursuance of a warrant of arrest shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey);  
Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.  
**In case if HUF is a defaulter:** where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.
- (6) Where a defaulter appears before the Adjudicating Authority pursuant to a notice, the Adjudicating Authority shall give the defaulter an opportunity showing cause when he should not be committed to the civil prison.
- (7) **In case of pending of an inquiry:** the adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority

may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.

- (8) **Upon the conclusion of the inquiry:** the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:
- (9) **Upon satisfaction of arrears: Provided** that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the adjudicating authority for his appearance at the expiration of the specified period if the arrears are not satisfied.
- (10) **order of release:** When the Adjudicating Authority does not make an order of detention, he shall, if the defaulter is under arrest, direct his release.
- (11) Every person detained in the civil prison in execution of the certificate may be so detained:
- (a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and
  - (b) in any other case, up to six months:
- Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.
- (12) **Defaulter liable for payment of arrears:** A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.
- (13) **Execution of detention order:** A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973.

❖ **Power of recover arrears of penalty [Section 14A]**

- (1) The Adjudicating Authority may, by order in writing, authorise an officer of Enforcement (not below the rank of Assistant Director) to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.
- (2) The officer of Enforcement, shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the procedure laid down under the Second Schedule to the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.

## 8. Compounding of Offences

**Compounding Authority:** Persons authorized by Central Government under section 15 i.e. classes of officers of the Enforcement Directorate and classes of officers of the RBI can act as Compounding Authority.

**According to section 15:**

- (1) **Period of compounding of an offence:** Any contravention under section 13 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 by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as prescribed under the Foreign Exchange (Compounding Proceedings) Rules, 2000.
- (2) **In case of compounding, no proceeding may be initiated:** Where a contravention has been compounded, no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

## 9. Adjudication and Appeal

### Time limits

Section No.	Obligation	Time Limit
Section 14	Full penalty to be paid	Within 90 days from the date on which notice for payment of penalty is served.
Section 15	Compounding of Contravention under section 13	Within 180 days of receipt of application by Directorate of Enforcement or RBI
Section 16	Complaint under section 16(1) to be dealt by Adjudicated Authority	Within 1 year of receipt of complaint.
Section 17	Appeal to Special Director (Appeals)	Within 45 days from receipt of order.
Section 19	Appeal to Appellate Tribunal	Within 45 days from receipt of order.
Section 19(5)	Appeal to be dealt with by Appellate Tribunal	Will try to dispose off the appeal within 180 days from receipt of appeal.
Section 35	Appeal to High Court	Within 60 days of communication of order or decision.

❖ **Appointment of Adjudicating Authority**

For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. [Section 16 (1)]

Every Adjudicating Authority shall deal with the complaint as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period. [Section 16 (6)]

❖ **Appeal to Special Director (Appeals)**

- (1) The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction. [Section 17(1)]
- (2) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal of the Special Director (Appeals). [Section 17(2)]
- (3) Every appeal shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. [Section 17(3)]
- (4) The Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period.

❖ **Appeal to Appellate Tribunal [Section 18]**

The Appellate Tribunal constituted under section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act. [Section 18].

The Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal [Section 19(1)]. Every appeal shall

be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government. [Section 19(2)]. Where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period. [Section 19(5)]

❖ **Appeal to High Court (Section 35)**

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

*Explanation:* In this section “High Court” means:

- (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

## 10. Directorate of Enforcement

❖ **Directorate of Enforcement (Section 36)**

- (1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.
- (2) the Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.
- (3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

**Power of search and seizure:** The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13. [Section 37(1)]

❖ **Empowering other officers (Section 38)**

- (1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to

exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.

- (2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961, subject to such conditions and limitations as the Central Government may impose.

## 11. Miscellaneous

### ❖ Presentation as to documents in certain cases [Section 39]

Where any document:

- (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or
- (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person, such document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall:
- (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
- (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
- (c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.

### ❖ Suspension of operation of this Act [Section 40]

- (1) If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expending so to do in public interest, the Central Government may, by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act.
- (2) Where the operation of any provision of this Act has under sub-section (1) been suspended or relaxed indefinitely, such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification.

- (3) Every notification issued under this section shall be laid, as soon as may be after it issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall there after have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

❖ **Power of Central Government to give directions [Section 41]**

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve bank such general or special directions as it thinks fit, and the Reserve bank shall, in the discharge of its functions under this Act, comply with any such directions.

❖ **Contravention by companies [Section 42]**

- (1) **of Where a person committing a contravention any of the provisions of this Act or of any rule, direction or order made thereunder is a company**, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly [Sub-section (1)].

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

- (2) **Where contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company** and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceed against and punished accordingly.

*Explanation:* For the purpose of this Section—

- (i) “Company” means any body corporate and includes a firm or other association of individuals; and  
(ii) “Director” in relation to a firm, means a partner in the firm.

❖ **Death or insolvency in certain cases [Section 43]**

Any right, obligation, liability, proceedings or appeal arising in relation to the provision of section 13 shall not abate by reason of death or insolvency of the person liable under that section and upon such death or insolvency such rights and obligations shall devolve on the legal representative of such person or the official receiver or the official assignee, as the case may be:

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Provided that a legal representative of the deceased shall be liable only to the extent of the inheritance or estate of the deceased.

### ❖ Bar Legal proceedings [Section 44]

No suit, prosecution or other legal proceeding shall lie against the Central Government or the Reserve Bank or any officer of that Government or of the Reserve Bank or other person exercising any power or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule, regulation, notification, direction or order made thereunder.

**Students may note that though they are not expected to know the details of all the Rules/Regulations/Clarifications/Notifications issued by various authorities from time to time. However, they should familiarise with such Notifications and other significant rules/regulations having a bearing on such provisions of the Act and which are covered as part of the Study Material and Revision Test Papers published from time to time.**