

FEMA & FDI in Real Estate and Related Issues

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Modes of Investment into India

Modes of Investment in Real Estate

Investment
into
Immovable
Property
Directly
Notification
No. FEMA
21(R)/2018-RB

Investment
through Direct
Capital
Notification
No. FEMA
20(R)/2017-RB

- a) Schedule 1
- b) Schedule 4
- c) Schedule 5
- d) Schedule 8

Investment
through
Direct Debt

Notification
No. FEMA
4/2000-RB

Notification
No. FEMA
5(R)/2016-RB

Investment in Immovable Property Directly

Notification No. FEMA 21(R)/2018-RB

Investment in Immovable Property

Applicable to NRI/OCI:

Particulars	NRI/OCI
<u>Acquisition</u>	
Purchase (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI/ OCI [Reg. 3(a)]
Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI/ OCI who is a relative [Reg. 3(b)]
<u>Inheritance</u>	
Acquire (any IP) as inheritance from	a) Any <u>person resident outside</u> who has acquired it under laws in force [Reg. 3(c)] b) Resident [Reg. 3(c)]
<u>Sale</u>	
Sell (other than agricultural land / farmhouse / plantation etc) to	Resident/ NRI/ OCI [Reg. 3(d) & Reg. 3(e)]
Sell (agricultural land / farmhouse / plantation etc) to	Resident [Reg. 3(d)]
<u>Gift</u>	
Gift (other than agricultural land / farmhouse / plantation etc) to	Resident/ NRI/ OCI [Reg. 3(d) & Reg. 3(e)]
Gift (agricultural land / farmhouse / plantation etc) to	Resident [Reg. 3(d)]

Investment in Immovable Property

I] By NRI/OCI:

- No restriction on number of properties for investment
- NRI / OCI can acquire residential as well as commercial property
- NRI / OCI can give the property on rent & repatriate funds abroad after payment of due taxes
- NRI / OCI cannot purchase any agricultural land / farm house / plantation property in India. They can only inherit such properties
- Investment can be made by way of inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account. **Not by way of foreign currency notes or travellers cheque or other modes such as PayPal, Transferwise, etc**
- Sale proceeds can be credited to NRE/ FCNR(B) upto the amount of initial investment cost of properties for 2 properties lifetime. Excess needs to be credited to NRO a/c. Alternatively, entire sale proceeds can be credited to NRO a/c
- Spouse of NRI / OCI can jointly acquire immovable property in India if he / she does not hold an OCI card (subject to conditions) - **Newly inserted**
- Continuous churning of properties may amount to conduct of real estate business by a proprietary concern and would be prohibited in terms of Reg. 4(b)(iv) of FEMA Notf. 1/2000 dated 03/05/2000

Investment in Immovable Property

III] By PROI having branch office or any other place of business in India:

- Liaison Office not permitted
- Allowed to
 - a) Acquire any immovable property necessary for or incidental to carrying on activity
 - b) Transfer by way of mortgage to AD bank as a security for any borrowing (provided immovable property to be acquired as per (a) above
- Reporting: Form IPI declaration to be filed with RBI within 90 days from acquisition
- PROI from Pakistan / Bangladesh / Sri Lanka / Afghanistan / China / Iran / Hong Kong / Macau / Nepal / Bhutan / Democratic People's Republic of Korea (DPRK) can acquire only on lease not exceeding five years, otherwise RBI approval required

Investment in Immovable Property

III] By Foreign Nationals:

- Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong or Democratic People's Republic of Korea (DPRK), irrespective of their residential status, **cannot**, without prior permission of the Reserve Bank, acquire or transfer immovable property in India, other than on lease, not exceeding five years. **This prohibition shall not be applicable to an OCI card holder**
- Foreign nationals of non-Indian origin **resident in India** (except 11 countries listed at above) **can acquire** immovable property in India. (Non-OCI)
- Foreign nationals of non-Indian origin **resident outside India** can acquire/ transfer immovable property in India, (Non-OCI)
 - i. **on lease not exceeding five years**
 - ii. by way of inheritance from a resident

Press Release by GOI dated February 1 2009 – Residence of 182 days + intention to stay for an uncertain period to be considered. Supporting documents establish intention to include type of Indian visa granted etc.

This Press Release is because it came to the notice of CG that foreign nationals were buying IP illegally in some parts of the country, particularly in Goa. CG observed that foreign nationals came to India and stayed beyond 182 days on a tourist or other visa meant for a certain period and illegally acquired IP in India in violation of FEMA

Definition of “Real Estate Business”

Definition of “Real Estate Business”

Notf.
FEMA
20(R)

- In Regulation 16 -:
- “‘Real estate business’ means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships;
- Explanation:
 - a. Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of “real estate business”.
 - b. Earning of rent income on lease of the property, not amounting to transfer will not amount to real estate business.

Definition of “Real Estate Business”

Notf. FEMA
20(R)

- c. Transfer in relation to real estate includes,
 - (i) the sale, exchange or relinquishment of the asset; or
 - (ii) the extinguishment of any rights therein; or
 - (iii) the compulsory acquisition thereof under any law; or
 - (iv) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
 - (v) any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Definition of “Real Estate Business”

Notf. FEMA 1

- Regulation 4(b) -
- “real estate business” 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

Notf. FEMA 120

- Regulation 2(p)-
- Real estate business' means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges

Investment through Direct Capital

Notification No. FEMA 20(R)/2017-RB

Foreign Investment through Capital

FEMA 20(R)/2017-RB - Schedule 1 - Investment on Repatriable Basis

❖ In Prohibited Activities - Regulation 15:

- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of Farm Houses

Explanation: For the purpose of this regulation, “real estate business” 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

❖ Regulation 16 : An Indian company may issue capital instruments to a person resident outside India subject to entry routes, sectoral caps and attendant conditionalities specified therein

❖ Relevant Sector for Real Estate: **Construction Development: Townships, Housing, Built-up infrastructure** (Sector explained in detail on subsequent slides)

Foreign Investment through Capital

FEMA 20(R)/2017-RB - Schedule 1 - Investment on Repatriable Basis

Construction Development: Townships, Housing, Built-up infrastructure

- ❖ Permitted : **100% Automatic Route** in Construction-Development Projects
- ❖ Includes development of townships, construction of residential/ commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure and township
- ❖ Conditions:
 - **Each phase** of the construction development project would be considered as a **separate project**
 - The investor permitted to exit only on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage. **Completion of the project will be determined as per the local bye-laws/ rules and other regulations of State Governments.**
 - The project to conform to the norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/ Local Body concerned.
 - The Indian investee company permitted to **sell only developed plots**. For the purposes of this policy **"developed plots" will mean plots where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.**

Foreign Investment through Capital

FEMA 20(R)/2017-RB - Schedule 1 - Investment on Repatriable Basis

Construction Development: Townships, Housing, Built-up infrastructure

❖ Conditions (Cont..):

- The Indian investee company is responsible for **obtaining all necessary approvals**, including those of the building/ layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/ bye-Laws/ regulations of the State Government/ Municipal/ Local Body concerned
- The **State Government/ Municipal/ Local Body** concerned, which approves the building/ development plans, **will monitor compliance** of the above conditions by the developer

❖ **Mode of Payment** → Inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ Escrow account

❖ **Remittance of sale proceeds** → Sale proceeds (net of taxes) of the capital instruments may be remitted outside India or may be credited to the NRE/ FCNR(B) [i.e. Repatriable]

Issues - Investment under Schedule 1

Issues:

- How does one interpret the term “phase”?
- What if trunk infrastructure is pre-existing? Would that make exit simpler for investor?
- When is the project considered to have been completed?
- Should “developed plots” also include completed premises built thereupon?
- Activity of Leasing of property is not considered as ‘real estate business’. Can an investor invest into a pure leasing company?
- Leasing of Property should not amount to transfer. However transfer includes any agreement or arrangement enabling enjoyment of property?

Foreign Investment through Capital

FEMA 20(R)/2017-RB - Schedule 4 - Investment on Non-repatriable Basis

❖ Non-repatriable means -

- ❖ Only Dividend / Interest can be sent back abroad
- ❖ Principal + Gains cannot be repatriated

A. Purchase/ sale of capital instruments or convertible notes or units or contribution to the capital of an LLP

❖ Eligible Investor:

- NRI
- OCI

a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs [*Owned & Controlled not defined in Sch.4, therefore as per Reg.14 Ownership shall mean beneficial holding of 50% + of Share Capital / LLP and major profit share Control shall mean right to appoint majority of Directors / Partners / DPs with NRIs*]

❖ Investment in:

- Capital instruments i.e. shares / CDs / warrants etc without any limit either on the stock exchange or outside it
- Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.
- The capital of a Limited Liability Partnership without any limit.
- Convertible notes issued by a startup company in accordance with these Regulations.

Foreign Investment through Capital

FEMA 20(R)/2017-RB - Schedule 4 - Investment on Non-repatriable Basis (Cont..)

- ❖ Investment deemed to be domestic investment at par with the investment made by residents
- ❖ Shall not invest in capital instruments or units of a Nidhi or company engaged in agricultural/ plantation activities or Real Estate Business or Construction of Farm Houses or dealing in TDRs.
 - ❖ Real Estate Business means Dealing in land to earn profits but **excludes Leasing of property / Investment in REIT units / earning of rent income**
- ❖ **Mode of Payment** → inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account
- ❖ **Sale/ maturity proceeds** →
 - ❖ Credited **only to the NRO account** of the investor, irrespective of the type of account from which the consideration was paid
 - ❖ Amount invested + capital appreciation shall not be allowed to be repatriated abroad [**NRI may avail USD \$ 1 Million scheme**]

Foreign Investment through Capital

FEMA 20(R)/2017-RB – Schedule 4 – Investment on Non-repatriable Basis (Cont..)

B. Investment in a Firm or Proprietary Concern

- ❖ NRIs / OCI can investment on Non-Repatriation basis under Automatic Route
- ❖ AOP covered for first time – Permissible with RBI Permission [Reg 4 to FEMA 20(R)]
- ❖ Earlier Express Permission Now removed:
- ❖ NRIs / PIOs on Repatriation basis with RBI + GoI permission
- ❖ Other Foreign residents with RBI + GoI permission
- ❖ Restricted Sectors for NRIs/ OCI:
 - ❖ Agricultural / Plantation / Real Estate Business / Print Media
- ❖ **Mode of Payment** → inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account
- ❖ **Sale/ maturity proceeds** →
 - ❖ Credited **only to the NRO account** of the investor, irrespective of the type of account from which the consideration was paid
 - ❖ Amount invested + capital appreciation shall not be allowed to be repatriated abroad [**NRI may avail USD \$ 1 Million scheme**]

Investment through Direct Debt

Notification No. FEMA 4/2000-RB
&
Notification No. FEMA 5(R)/2016-RB

Borrowing and Lending in Rupees

FEMA 4/2000-RB - Persons Resident in India borrowing in INR from NRIs/PIOs

- ❖ Borrowing in INR by Indian companies: A Indian company may borrow in INR, on **repatriation** or **non-repatriation basis**, from NRIs/PIOs subject to following:
 - i. Borrowing company **does not and shall not**:
 - Carry on agricultural/plantation/real estate business; or
 - Trade in transferable development rights; or
 - Act as Nidhi or Chit fund company.
 - ii. Borrowing is by issuance of **NCDs** and made by **public offer**;
 - iii. The rate of interest is **not more than PLR of SBI + 3%**;
 - iv. Period of loan should **> 3 years**;
 - v. If the borrowing is on **repatriation basis**, then the **ratio of % of NCDs issued to NRIs/PIOs : total paid up value of all NCDs issued shall not > FDI ceiling** for Indian company. Further, the funds towards borrowing should be received through **inward remittance** from outside India or by **debit to NRE/FCNR (B) a/c**;
 - vi. If the borrowing is on **non-repatriation basis**, then the amount of loan should be received either by **inward remittance** from outside India or by **debit to NRE/NRO/FCNR(B) a/c**. Payment of **interest and repayment of principal** shall be made only to the **NRO a/c**.

Borrowing and Lending in Rupees

FEMA 4/2000-RB - Persons Resident in India borrowing in INR from NRIs/PIOs

- ❖ Borrowing in INR by persons **other than Indian companies**: PRI (other than India company) can borrow in INR from NRIs/PIOs subject to following:
 - Borrowing shall be only on a **non-repatriation basis**;
 - The amount of loan should be received either by **inward remittance** from outside India or by **debit to NRE/NRO/FCNR(B)** account of the lender;
 - Period of loan should be **< 3 years**;
 - Rate of interest on the loan shall not be **more than two per cent above Bank Rate** prevailing on the date of availment of loan;
 - Payment of **interest and repayment of principal** shall be made only to **NRO a/c** of lender.
- ❖ Restriction on use of borrowed funds:
 - The proceeds shall be **utilised only for the own business of the borrower** other than
 - Agricultural / plantation activities / real estate business / construction of farm houses; or
 - Trading in transferable development rights; or
 - Business of Nidhi or Chit fund company.
 - The proceeds **shall not be used for investment or for on-lending in any manner whatsoever**. RBI may, however, permit use of borrowed amount for on-lending to infrastructure sector or to keep them in fixed deposits with banks in India, pending utilisation for permissible end-uses.

Foreign currency borrowing

FEMA 5(R)/2016-RB - Schedule 7 - Deposit from NRI / PIO on Non-Repatriation Basis

- Proprietorship concern, partnership firm, Indian company (including NBFC) can accept deposits from NRI/PIO.
- In the case of a company, the deposits may be accepted under private arrangement too.
- The maturity period of deposit shall not exceed 3 years.
- Rate of interest shall not exceed ceiling rate prescribed from time to time under Companies (Acceptance of Deposit) Rules, 2014. (currently 12.5%)
- The amount of deposit shall be received by debit to NRO a/c only. Inward remittance and transfer from NRE/FCNR(B) a/c to NRO a/c is prohibited. It means that NRI should have funds present in his NRO a/c in India.
- Amount cannot be used for relending, carrying on agricultural/ plantation activities or investment in real estate or investment in any other entity engaged in above
- Repayment of deposit shall be credited only to NRO account.

Thank you



Contact Information



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