



# Comprehensive Course on Foreign Exchange Management, 1999

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FEMA, 1999  
An unexplored Opportunity

Certification and Valuation

Concurrent Audit

Structuring

Compounding Application

Advisory

# QUATERLY FACT SHEET

## FACT SHEET ON FOREIGN DIRECT INVESTMENT (FDI) FROM APRIL, 2000 to MARCH, 2020



*(Updated up to MARCH, 2020)*

### I. CUMULATIVE FDI FLOWS INTO INDIA (2000-2020):

#### A. TOTAL FDI INFLOWS (from April, 2000 to March, 2020):

1.	CUMULATIVE AMOUNT OF FDI INFLOWS (Equity inflows + 'Re-invested earnings' + 'Other capital')	-	US\$ 680,919 Million
2.	CUMULATIVE AMOUNT OF FDI EQUITY INFLOWS (excluding, amount remitted through RBI's NRI Schemes)	Rs. 2,731,911 Crore	US\$ 469,998 Million

#### B. FDI INFLOWS DURING FOURTH QUARTER OF FINANCIAL YEAR 2019-20 (JANUARY, 2020 TO MARCH, 2020):

1.	TOTAL FDI INFLOWS INTO INDIA (Equity inflows + 'Re-invested earnings' + 'Other capital') (as per RBI's Monthly bulletins)	-	US\$ 18,325 Million
2.	FDI EQUITY INFLOWS	Rs. 95,549 Crore	US\$ 13,208 Mil



# Summary of Outward Foreign Direct Investment (OFDI)

(amount in USD million)				
Month	Equity	Loan	Guarantee Issued	Total Financial Commitment
	1	2	3	1+2+3
April 2020	230.81	586.42	201.21	1,018.44
May 2020	400.18	212.07	679.60	1,291.85
Month	Equity	Loan	Guarantee Issued	Total Financial Commitment
	1	2	3	1+2+3
May 2019	510.80	546.78	4,310.54	5,368.12
May 2020	400.18	212.07	679.60	1,291.85



# **FEMA – An Overview**

**Framework**

**Definitions**

**Capital & Current Account**

**Transactions**

**Accounts under FEMA**

# **Topics of Discussion**





# The History



the Foreign Exchange  
Regulation Act, 1947

Foreign Exchange  
Management Act, 1999

Foreign Exchange Regulation  
Act, 1973



# FERA to FEMA

## • The Foreign Exchange Regulation Act, 1973 (FERA)

- Criminal offence
- Severe penal provisions
- All acts controlled and regulated
- Applied to Indian Citizens in/outside India and Foreign Citizens in India.
- Blanket powers of search, seizure, imprisonment, etc.
- Presumption of Mens-rea

## • The Foreign Exchange Management Act 1999 (FEMA)

- Civil law
- Only specified transactions fully regulated [capital account transactions ]
- Citizenship not relevant - Residence criteria emphasized
- Restricted power of search, seizure, etc.
- No presumption of Mens-rea
- Contravention attracts penalty / fine and not imprisonment (except in some cases)
- Provision for compounding





FEMA, 1999

**A paradigm shift**

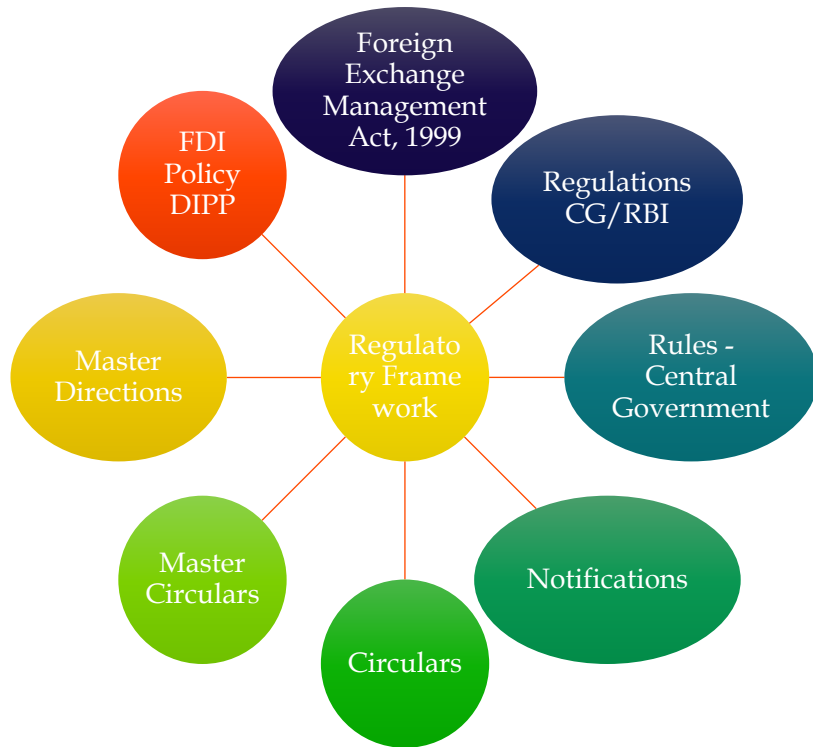
*“facilitating external trade and payment and for promoting the orderly development and maintenance of foreign exchange markets in India.”*



# Framework of the Act



# Framework of FEMA || The Act



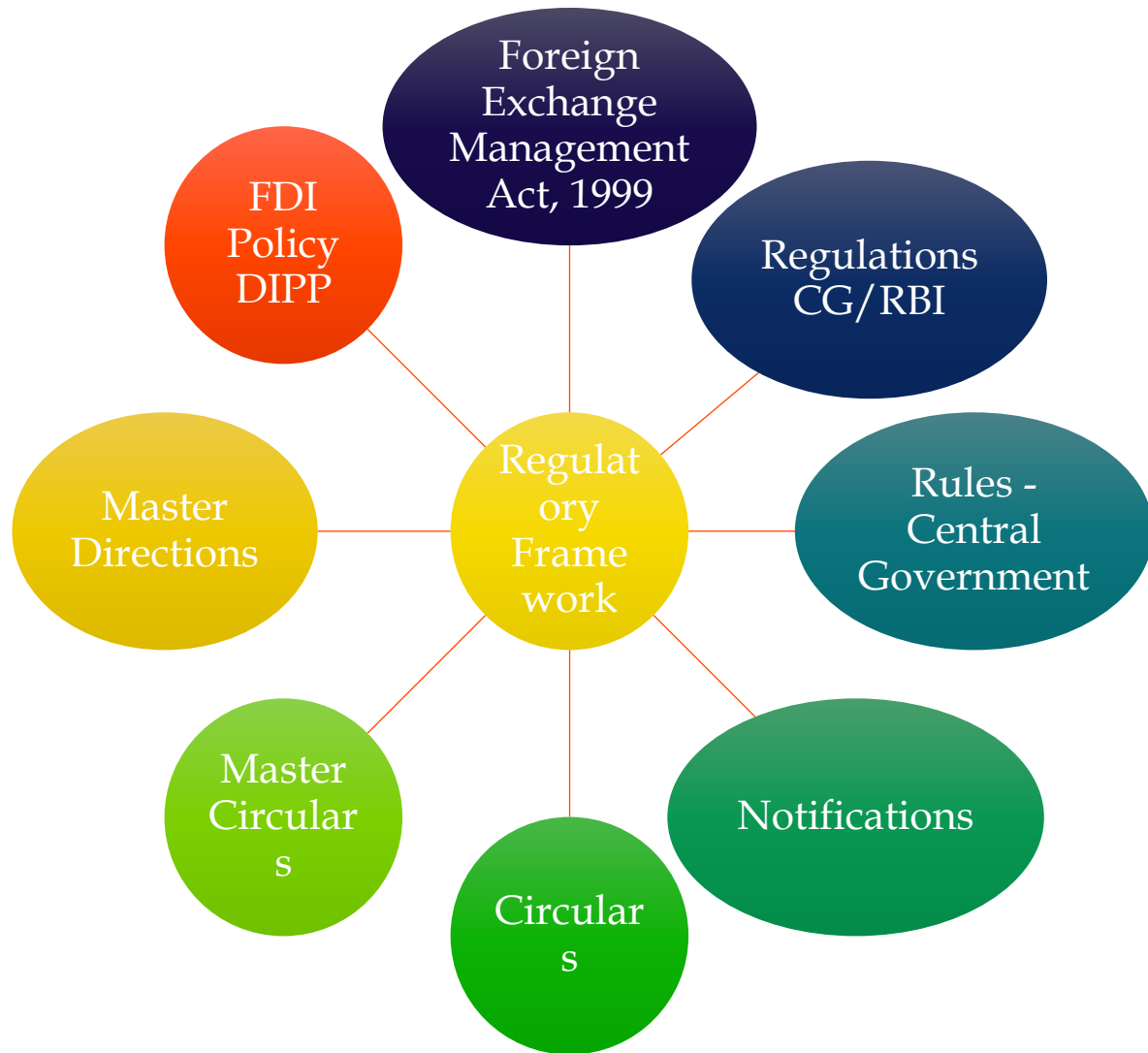
## ▪ Scheme of the Act

Chapters	Matters	Sections
I	▪ Preliminary, Preamble and Definitions	1 to 2
II	▪ Regulation and management of Foreign Exchange	3 to 9
III	▪ Authorised Person	10 to 12
IV	▪ Contravention and Penalties	13 to 15
V	▪ Adjudication and procedure for appeal	16 to 35
VI	▪ Directorate of Enforcement	36 to 38
VII	▪ Miscellaneous Provisions	39 to 49





# Framework of FEMA || Notifications

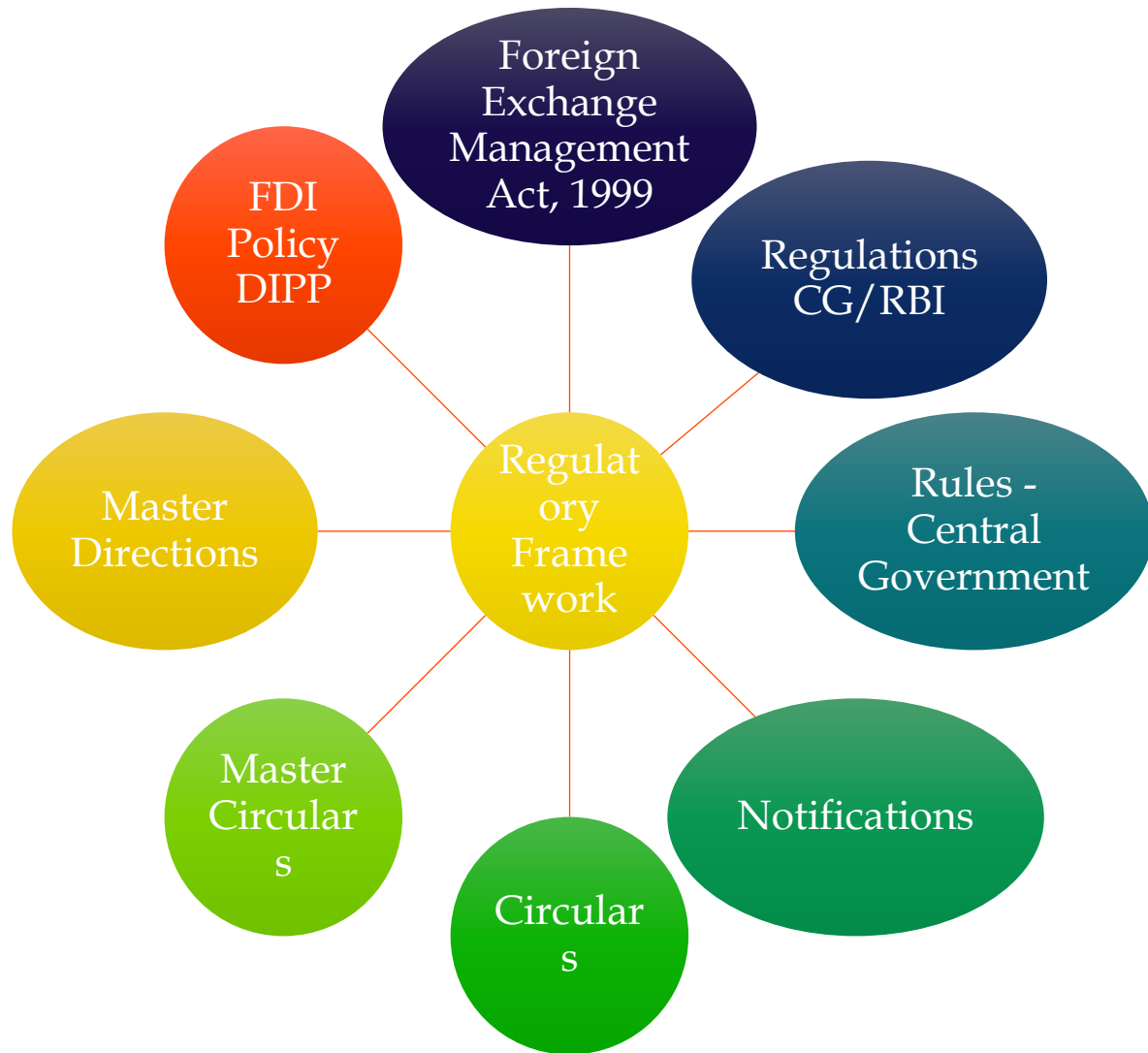


- RBI has initially issued 25 notifications, covering capital account transaction prescribed in section 6(3) & certain miscellaneous provisions
- 15 related to capital account transactions, 1 on export of goods and services and 9 for other regulations
- Since original notifications have undergone many changes, RBI has started revising the notifications and till date has issued 15 revised notifications [ 3(R), 5(R), 6(R), 7(R), 9(R), 10(R), 11(R), 12(R), 13(R), 14(R), 15(R), 18(R), 22(R), 23(R)] carrying suffix (R) for easy identification along with the year in which they are published





# Framework of FEMA || Rules

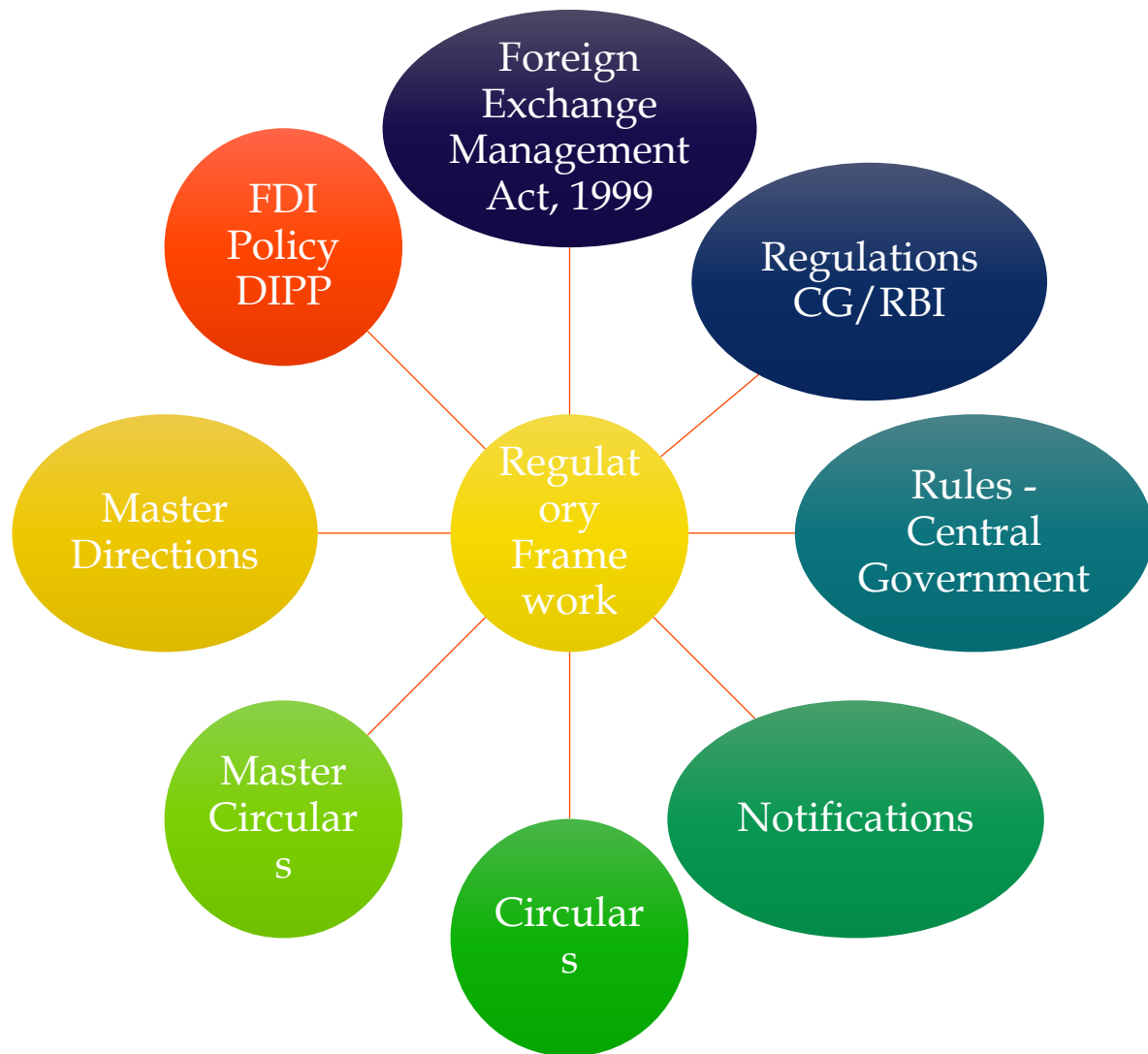


The Central Government has notified following rules as given below:

- ❖ FEM (Encashment of Draft Cheque, Instrument and Payment of Interest) Rules, 2000
- ❖ FEM (Authentication of Documents) Rules, 2000
- ❖ FEM (Current Account Transactions) Rules, 2000
- ❖ FEM (Adjudication Proceedings and Appeal) Rules, 2000
- ❖ FEM (Compounding Proceedings) Rules, 2000
- ❖ The recent :
  - ❖ NDI Rules



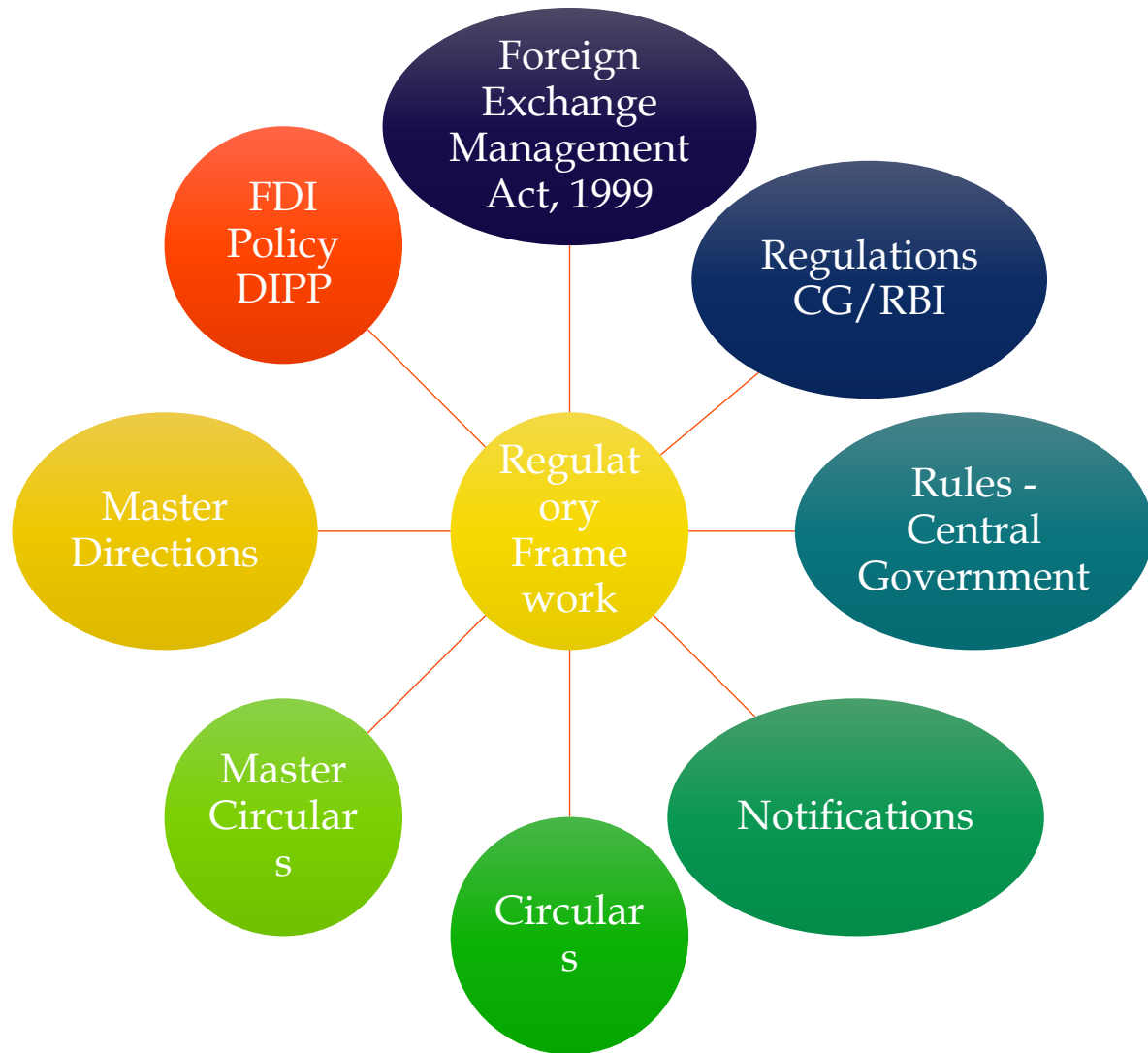
# Framework of FEMA || Circular



- Authorized Persons Directions issued by RBI u/s. 10(4) and 11 (1) of FEMA to Authorized Persons (AP)
- These directions are called- A.P. (DIR Series) CIRCULARS
- APs are authorized dealers, money, changers and banks who are authorized to deal in Foreign Exchange
- These Circulars are operational instructions to AP by RBI. Legal validity - Prof. Krishnaraj Goswami v. RBI [2007 (6) Bcom CR 565]



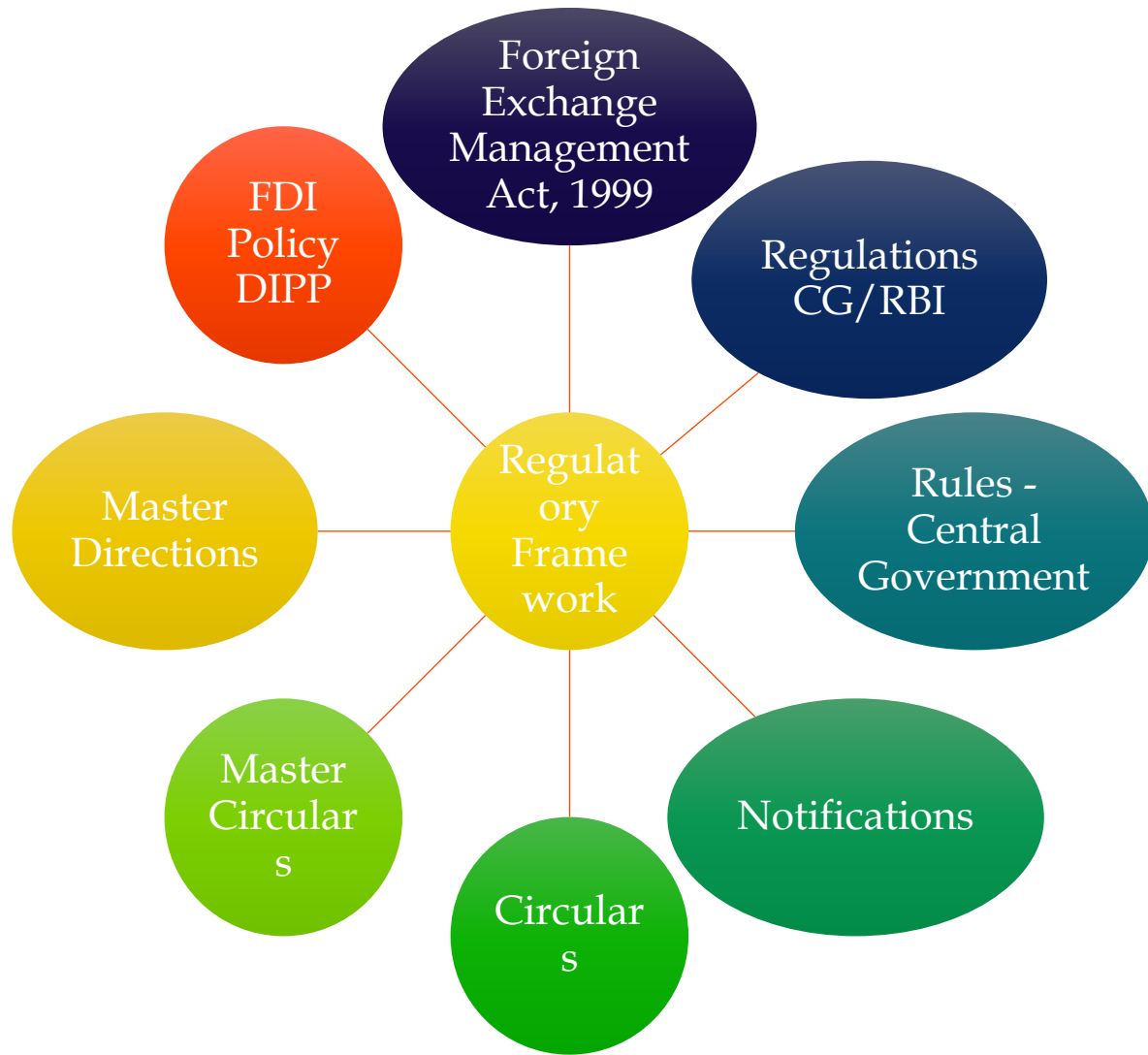
# Framework of FEMA || Master Directions



- RBI has come up with Master Directions covering Foreign Transactions
- Master Directions consolidate instructions, rules and regulations on the related subject
- Master Directions are updated as and when there is change in rules and regulations or change in policy
- Erstwhile Master Circulars thus have been withdrawn with issue of Master Directions
- Till date, 19 Master Directions have been issued by RBI



# Framework of FEMA || Master Directions



Sr. No	Circulars	Effective from
1	Circular 1 of 2010	April 1, 2010
2	Circular 2 of 2010	October 1, 2010
3	Circular 1 of 2011	April 1, 2011
4	Circular 2 of 2011	October 1, 2011
5	Circular 1 of 2012	April 10, 2012
6	Circular 1 of 2013	April 5, 2013
7	Consolidated FDI Policy Circular of 2014	April 17, 2014
8	Consolidated FDI Policy Circular of 2015	May 12, 2015
9	Consolidated FDI Policy Circular of 2016	June 07, 2016
10	Consolidated FDI Policy Circular of 2016	August 28, 2017





# Framework of FEMA, 1999

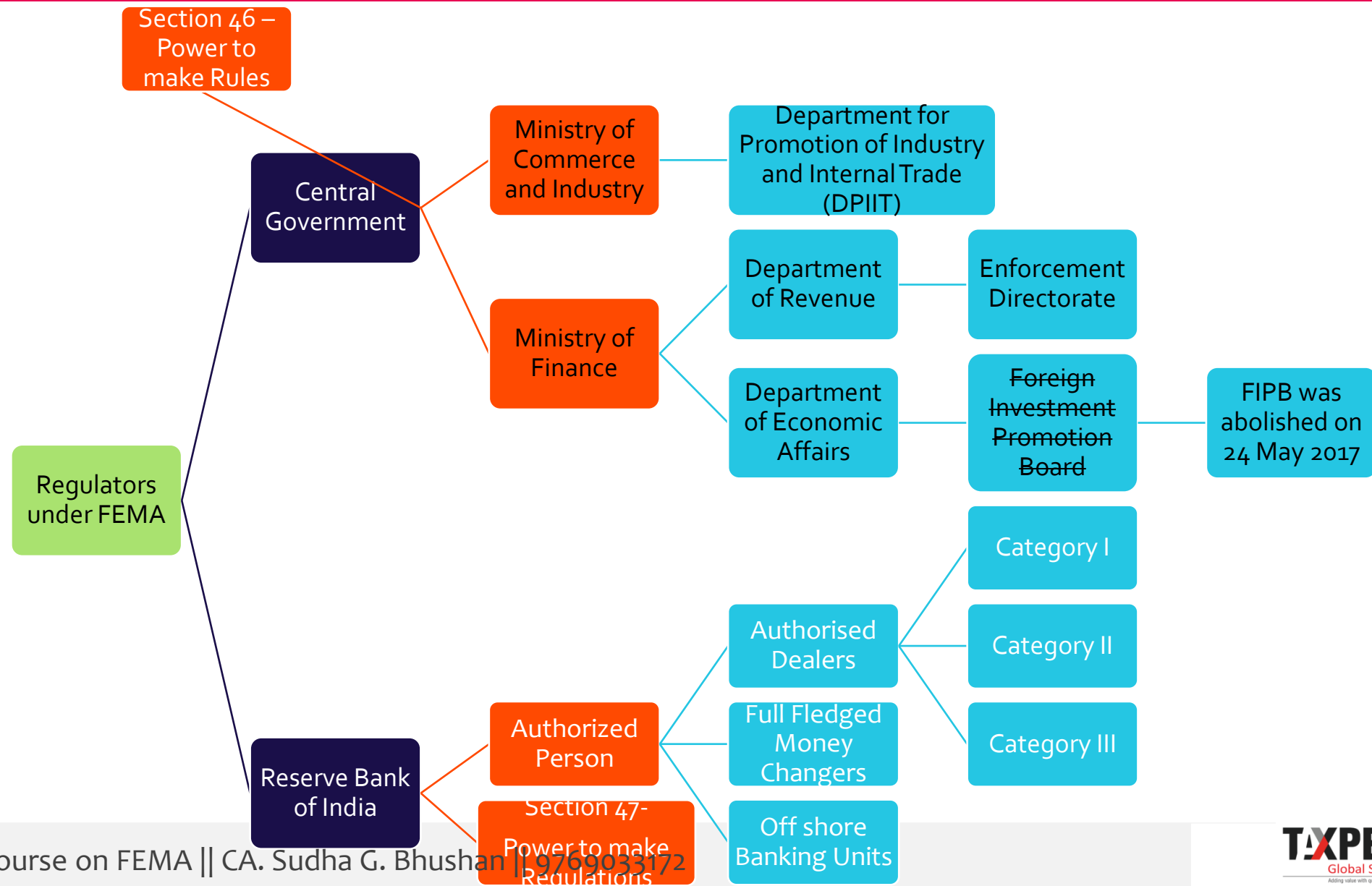




# Regulators under FEMA, 1999



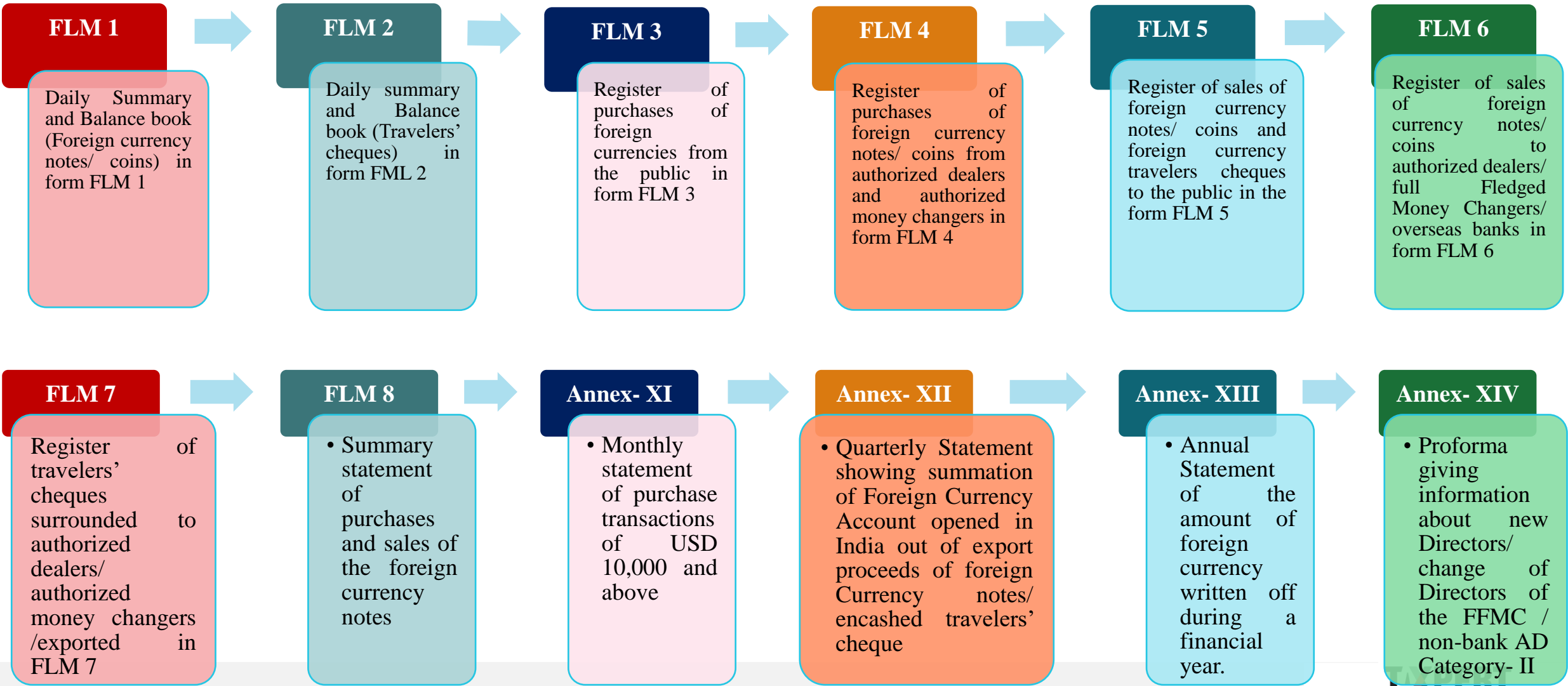
# Regulators under FEMA







# Registers in respect of the money-changing transactions to be maintained by AMC's







# Section 46

Section 46 Power to make rules.— (1) The Central Government may, by notification, make rules to carry out the provisions of this Act. —

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act."

(2) without prejudice to the generality of the foregoing power, such rules may provide for,—

(a) the imposition of reasonable restrictions on current account transactions under section 5;

**(aa) the instruments which are determined to be debt instruments under sub-section (7) of section 6;**

**(ab) the permissible classes of capital account transactions in accordance with sub-section (2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;”;**

(b) the manner in which the contravention may be compounded under sub-section (1) of section 15;

(c) the manner of holding an inquiry by the Adjudicating Authorities under sub-section (1) of section 16;

(d) the form of appeal and fee for filing such appeal under sections 17 and 19;

(e) the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal and the Special Director (Appeals) under section 23;

(f) the salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal and the office of the Special Director (Appeals) under sub-section (3) of section 27;

(g) the additional matters in respect of which the Appellate Tribunal and the Special Director (Appeals) may exercise the powers of a civil court under clause (i) of sub-section (2) of section 28;

**(gg) the aggregate value of foreign exchange referred to in sub-section (1) of section 37A**

(h) the authority or person and the manner in which any document may be authenticated under clause (ii) of section 39; and

(i) any other matter which is required to be, or may be, prescribed.



# Amendment by Finance Act, 2015 || Section 46

• **Section 46 Power to make rules.—** (1) The Central Government may, by notification, make rules to carry out the provisions of this Act. —

(1) without prejudice to the generality of the foregoing power, such rules may provide for,—

(a) the imposition of reasonable restrictions on current account transactions under section 5;

(aa) the instruments which are determined to be debt instruments under sub-section (7) of section 6;

(ab) the permissible classes of capital account transactions in accordance with sub-section (2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;

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(gg) the aggregate value of foreign exchange referred to in sub-section (1) of section 37A



# Section 47

*(1) The Reserve Bank may, by notification, make regulations to carry out the provisions of this Act and the rules made there under*

*(2) Without prejudice to the generality of the foregoing power, such regulations may provide for,-*

*[(a)the permissible classes of capital account transactions involving debt instruments determined under sub-section (7) of section 6, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of such capital account transactions under section 6;]*

*(b)the manner and the form in which the declaration is to be furnished under clause (a) of sub-section (1) of section 7;*

*(c)the period within which and the manner of repatriation of foreign exchange under section 8;*

*(d)the limit up to which any person may possess foreign currency or foreign coins under clause (a) of section 9;*

*(e)the class of persons and the limit up to which foreign currency account may be held or operated under clause (b) of section 9;*

*(f)the limit up to which foreign exchange acquired may be exempted under clause (d) of section 9;*

*(g)the limit up to which foreign exchange acquired may be retained under clause (e) of section 9;*

*[(ga) export, import or holding of currency or currency notes;]*

*any other matter which is required to be, or may be, specified.*

*[(3) All regulations made by the Reserve Bank before the date on which the provisions of this section are notified under section 6 and section 47 of this Act on capital account transactions, the regulation making power in respect of which now vests with the Central Government, shall continue to be valid, until amended or rescinded by the Central Government.]*

Subs. by Finance Act, 2015 (20 of 2015), dated 14-05-2015 and effective from 9th day of September, 2015, prior to substitution it read as:

“(a) the permissible classes of capital account transactions, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of certain capital account transactions under section 6;”

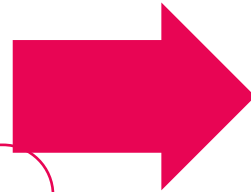


# Amendment by Finance Act, 2015 || Section 47

Section 47 of FEMA Act, 1999 which empowered RBI to make regulations has been amended to the extent that all regulations made by RBI till date under Section 6 and Section 47 on capital account transactions, the regulation making power in respect of which now vests with the Central Government, shall continue to be valid, until amended or rescinded by the Central Government

## Previous

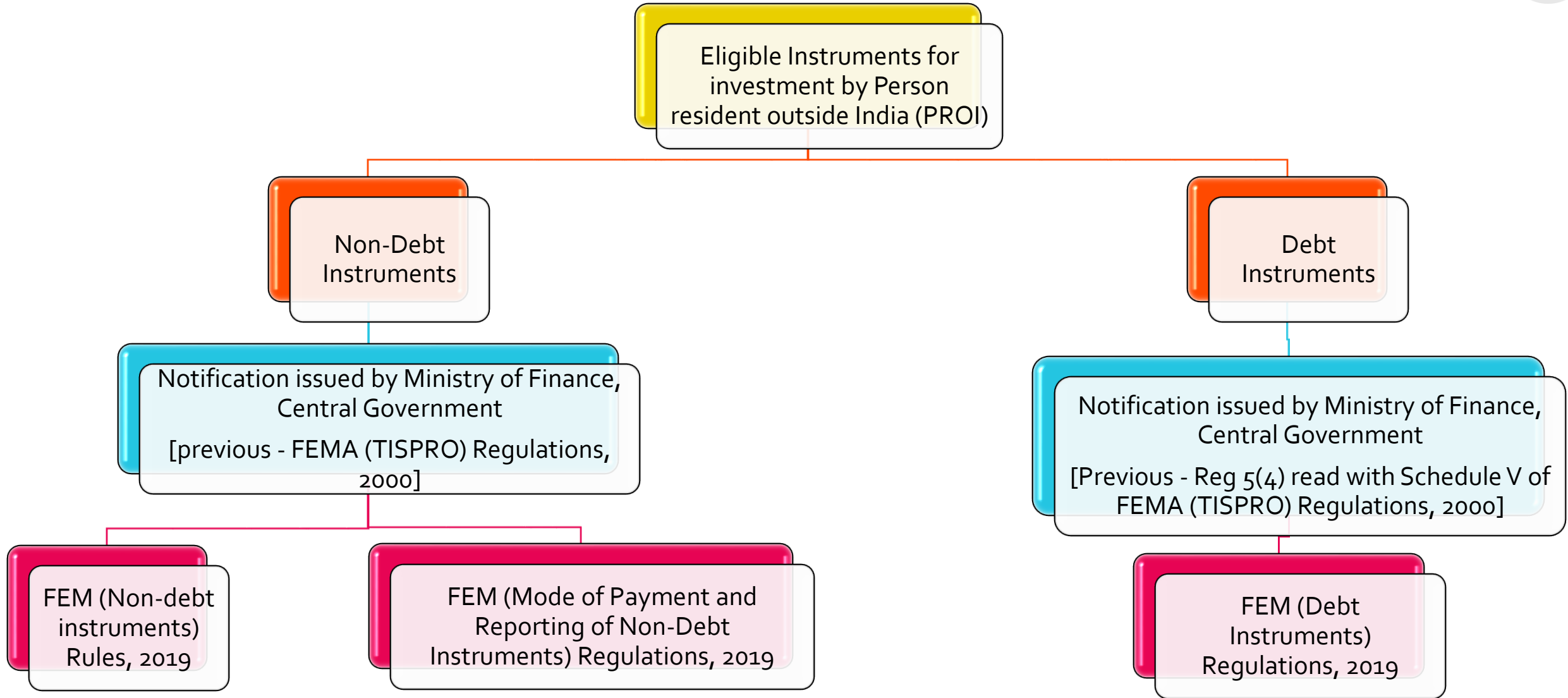
- *“(a) the permissible classes of capital account transactions, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of certain capital account transactions under section 6;”*



## After Amendment

- *[[a) the permissible classes of capital account transactions **involving debt instruments** determined under sub-section (7) of section 6, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of such capital account transactions under section 6;]*







Ministry of Finance, Vide notification dated 16<sup>th</sup> Oct 2019

Non –Debt Instruments

All investment in equity in incorporated entities (public, private, listed and unlisted)

Capital participation in Limited Liability partnership (LLP)

All instruments of investment as recognized in the FDI policy as notified from time to time

Investment in units of alternative Investment Funds (AFIs) and Real Estate Investment Trust (REITs) and infrastructure investment Trust (InVITs)

Investment in units of mutual funds and Exchange traded Funds (EITs) which invest more than 50% in equity.



Non –Debt Instruments

The junior most layer(i.e. equity tranche) of securitization structure

Acquisition, sale or dealing directly immovable property.

Contribution to trusts

Depository receipts issued against equity instruments



Ministry of Finance, Vide  
notification dated 16<sup>th</sup> Oct 2019

All other documents which are not Non debt instruments shall be deemed as debt instruments

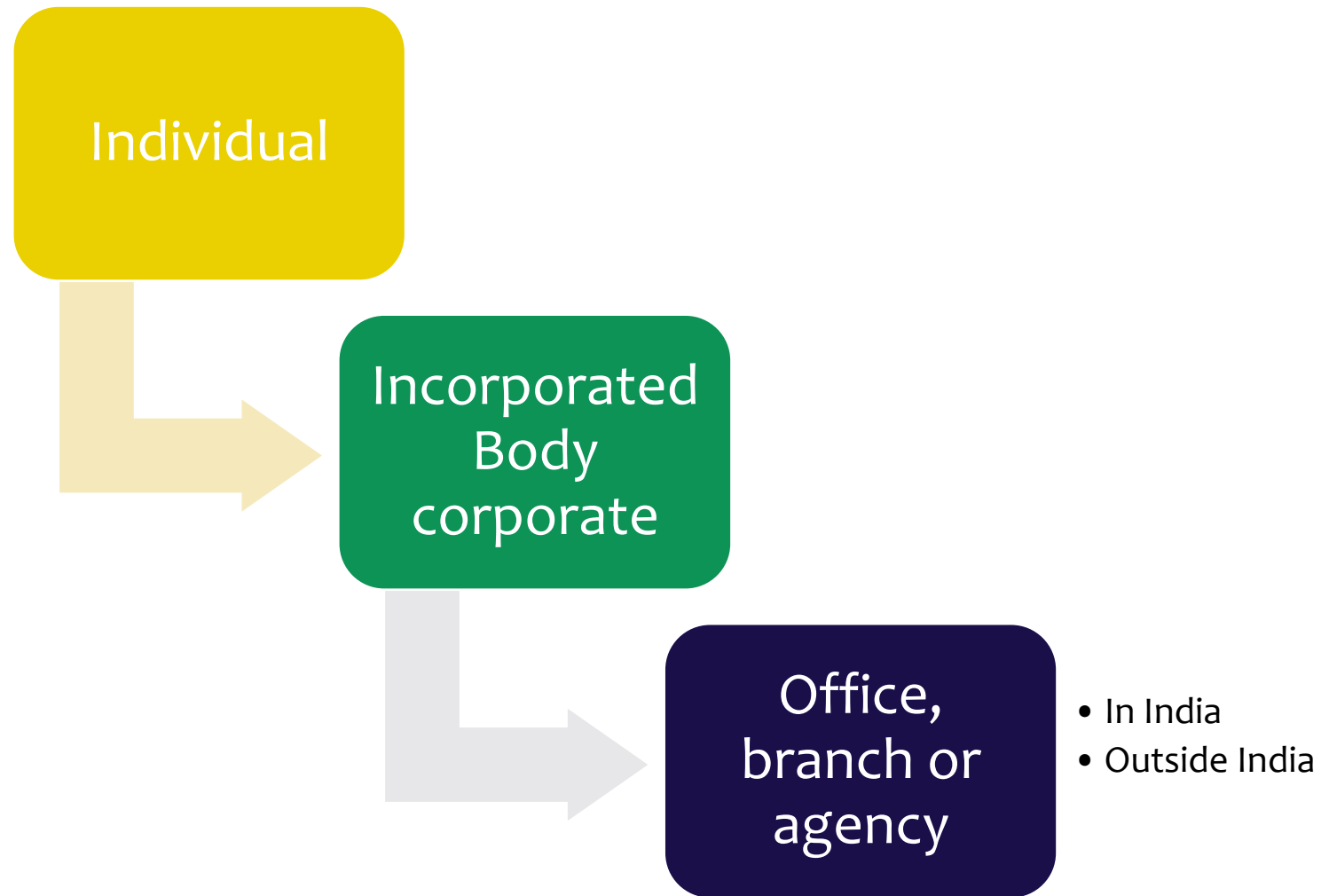




# Residential Status



# Residential Status under FEMA





# Residential Status under FEMA || Person Resident In India || Sec. 2(v)(i)

PERSON RESIDENT IN INDIA Sec. 2(v)(i) of FEMA:

Residing in India for > 182 days during the course of preceding F.Y. but doesn't include

(A) going out of India or staying outside India

- for taking up employment

- for carrying business or vocation

- for any other purpose in such circumstances as would indicate his intention to stay outside India for uncertain period

(B) coming to India or staying in India otherwise than

- for taking up employment

- for carrying business or vocation

- for any other purpose in such circumstances as would indicate his intention to stay outside India for uncertain period





# Residential Status under FEMA || Person Resident In India || Sec. 2(v)(i)

## First Limb

- More than 182 days in the preceding year

## Second Limb - Leaving India

- Taking employment
- Doing any business
- Stay for uncertain period

## Third Limb – Coming to India except for

- Taking employment
- Doing any business
- Stay for uncertain period

Exceptions to period of stay

Non resident even when he has stayed in India for more than 182 days in preceding F.Y

Non resident even when he has stayed in India for more than 182 days in preceding F.Y





# Person Resident In India || Sec. 2(v)(i) || Example

- Skhan 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?



# Person Resident In India || Sec. 2(v)(i) || Example

- Skhan 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?
- Skhan 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, Skhan will not be considered as a residential person for the financial year 2016-2017.
- Here, as he come to India on 1st April, 2016, so he may primarily not be able to be considered as person resident in India from 1st April 2016.
- However as he has come for employment, he will be considered as Indian resident from 1st April 2016.



# Person Resident In India || Sec. 2(v)(i) || Example

- Mr. 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?



# Person Resident In India || Sec. 2(v)(i) || Example

- **Mr. 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?**

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

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 1st July 2017





# Person Resident In India || Sec. 2(v)(i) || Example

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?



# Person Resident In India || Sec. 2(v)(i) || Example

**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 8th 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.



# Person Resident In India || Sec. 2(v)(i) || Example

Miss Ann 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?

Miss Ann stayed in India at Mumbai base' for more than 182 days in the preceding financial year.



# Person Resident In India || Sec. 2(v)(i) || Example

Miss Ann 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?

Miss Ann 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 Ann 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.



- Foreigner national deputed to India for employment:
- Does he become Resident in India?
- If so can he buy immovable property in India?

Press Release of Ministry of Finance dated 1st February 2009 - Government advice on acquiring land by persons resident outside India.

In case of foreign nationals, physical condition to stay for more than 182 days is mandatory for buying of Immovable Property.

Along with period of stay intention also needs to be established.

Travel related documents and nature of Visa can establish intention of a person.





# Residential Status under FEMA

## Section 2(v) Person resident in India means (cont'd.)

(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(w) - Person resident outside India (PROI)

Person resident outside India means a person who is not resident in India.



# Person Resident In India || Sec. 2(v)(i) || Example

- Tooo 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?



# Person Resident In India || Sec. 2(v)(i) || Example

- **Tooo 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:** Toooo 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.



# Residential Status under FEMA

## Not permanently resident in India

### As per Regulation 5 of FOREIGN EXCHANGE MANAGEMENT (REMITTANCE OF ASSETS) REGULATIONS

Not permanently resident means a person resident in India for employment of a specified duration (irrespective of length) or for a specific job duration which does not exceed three years.

### Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015

'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.



# Residential Status under FEMA

- **Possession of foreign currency**

- A person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

- **Remittance of salary**

- 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.

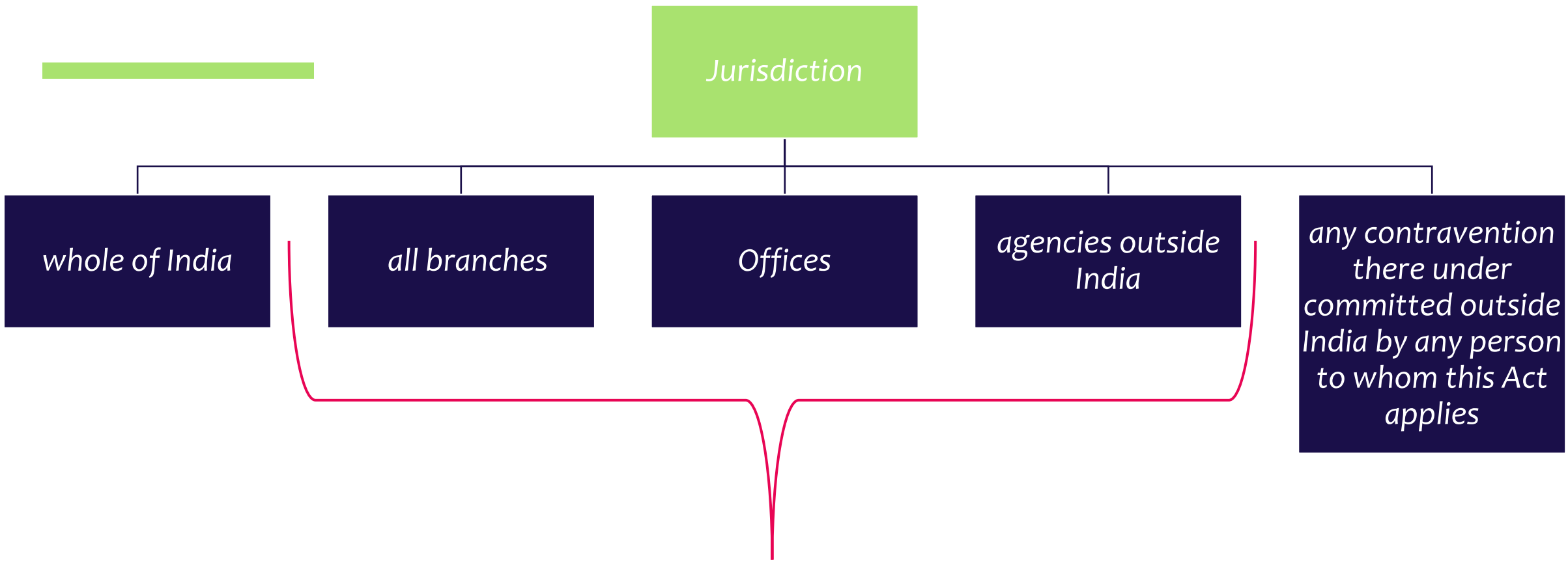




# The Act



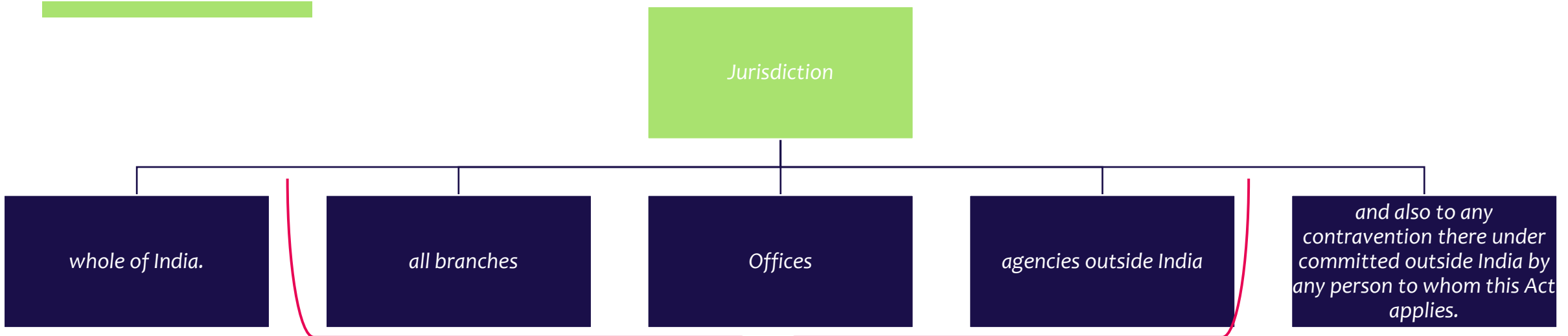
# Framework of FEMA



**Owned or controlled by a person resident in India**



# Framework of FEMA



**Owned or controlled by a person resident in India**

**Extra Territorial Jurisdiction**



# Person Resident In India || Sec. 2(v)(i) || Example

**A Private Limited, a person resident in India, is the sole shareholder of a company X newly incorporated company in Germany.**

Since A Private Limited is the sole owner and director so the entity X in Germany will be owned and controlled by A prt. Ltd.

So according to the definition of PRI this co. X will be deemed as PRI only.

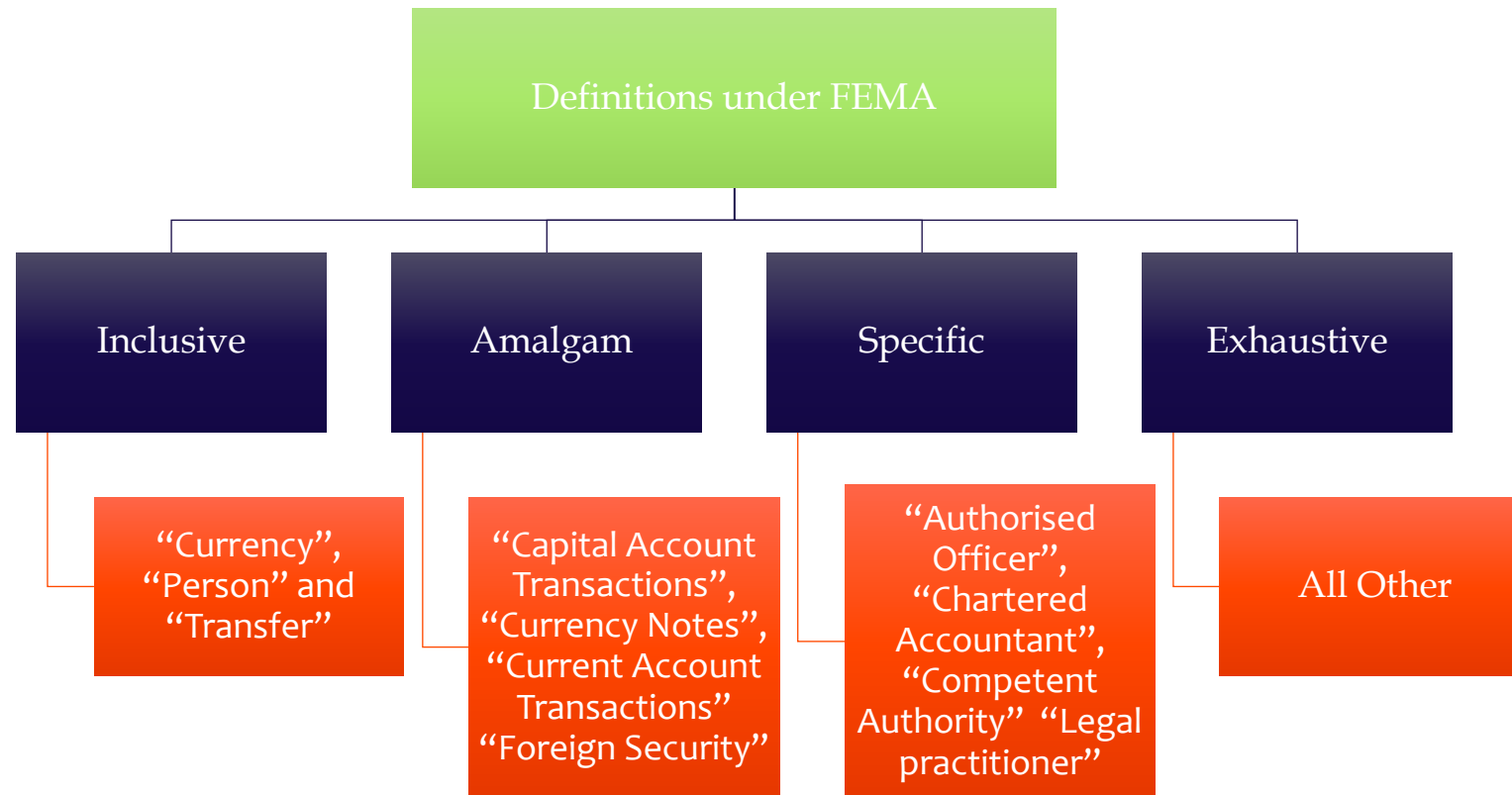
In such case if Mr. A remit any funds to the bank account of Co. X then it will not be a foreign remittance ??

He can do that without any limit. ???





# Framework of FEMA || Definitions







# Section 3 – Dealing in Foreign Exchange, etc.

*Dealing in foreign exchange, etc.- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-*

## Section 3(a)

- deal in
- transfer
- any foreign exchange or foreign security
- to any person not being an authorized person;

## Section 3(b)

- make any payment to
- for the credit
- of any person resident outside India in any manner;

## Section 3(c)

- receive
- otherwise through an authorized person,
- any payment
- by order or on behalf
- of any person resident outside India in any manner.

## Section 3(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.



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## Section 3 – Dealing in Foreign Exchange, etc.

*Dealing in foreign exchange, etc.- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-*

**Section 3(a) deal in transfer any foreign exchange or foreign security to any person not being an authorized person;**

- one of the party to the foreign exchange should be an Authorised person
- Deal in is a wide term and should include- purchase, acquire, borrow, sell or otherwise transfer or lend or to exchange with (FERA's corresponding section 8(1) had wide meaning with specifically included all these types of transactions)
- contravention under clause (a) of section 3 cannot be compounded by RBI but only by Directorate of Enforcement.



## Section 3 – Dealing in Foreign Exchange, etc.

- Mr. Pradeep Kumar Awasthi, an NRI comes to India
- and would like to sell US\$ 2000 to his friend, Mr. Daga who is resident in India .
- Mr. Daga offers him the better rate than the banks.

Can this transaction be undertaken?



## Section 3 – Dealing in Foreign Exchange, etc.

- Mr. Pradeep Kumar Awasthi, an NRI comes to India
- and would like to sell US\$ 2000 to his friend, Mr. Daga who is resident in India .
- Mr. Daga offers him the better rate than the banks.

This cannot be done as this will amount to dealing in Forex.



## Section 3 – Dealing in Foreign Exchange, etc.

*Dealing in foreign exchange, etc.- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-*

Section 3(b) make any payment to for the credit of any person resident outside India in any manner

- To the credit of NR / For the credit of NR (on behalf of NR)
- Intention is to prohibit fulfilment of foreign exchange obligation of a NR by third party. Such third party could be Resident or Non resident





## Section 3 – Dealing in Foreign Exchange, etc.

- Pradeep is an NRI.
- His brother Shyam is in India.
- Pradeep has to pay to Geeta for buying an immovable property from her.
- Pradeep ask Shyam to make the payment.
- Shyam makes the payment.

If this transaction can be done?



# Exceptions to Section 3(b)

## Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016

Regulation 6(2) any person resident in India can make payment in rupees:

(i) 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;

(ii) 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;

(iii) 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 by 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.



# Exceptions to Section 3(b)

## Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016

Regulation 6(2) any person resident in India can make payment in rupees:

(iv) by credit to SNRR account maintained by a person resident outside India (overseas seller) with an Authorised Dealer or an Authorised Bank in India for imports into India, as specified in Foreign Exchange Management (Deposit) Regulations, 2016

(v) in rupees to SNRR account of the person resident outside India after ensuring that the underlying transactions are in conformity with the provisions of the Foreign Exchange Management Act, 1999 and the rules, regulations and directions issued thereunder.



## Section 3 – Dealing in Foreign Exchange, etc.

*Dealing in foreign exchange, etc.- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-*

**Section 3(c) receive otherwise through an authorized 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 authorized 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 authorized person;*



## Section 3 – Dealing in Foreign Exchange, etc.

- Mr. Reddy, an NRI comes to India.
- He goes to shop in Cannaught place at Delhi to buy an antique.
- He says that I don't have cash. "Please accept 200 USD".

Can the shopkeeper do that?



## Section 3 – Dealing in Foreign Exchange, etc.

*Dealing in foreign exchange, etc.- Save as otherwise provided in this Act, rules or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall-*

(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."
  - making any payment to of any person
  - making any payment for the credit of any person,
  - receiving any payment for any person,
  - receiving any payment 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."





## Section 3 – Dealing in Foreign Exchange, etc.

- Mr. Varghese, an Indian resident gives INR 200000 in cash to another Indian resident Bhanu Prasad.
- For this transaction Mr. Varghese Brother – Mr. Arpit who is in Dubai will get the same amount paid in Dubai in USD.

Whether this transaction is allowed?



## Section 3 || *Your thoughts...*

- A, an NRI, has property in UK and he wants to transfer the same to B, a Resident, and B wants to make the payment of same to the parents of A in India. Although there is payment from Resident (B) to Resident (Parent of A in India). Can this be done?
- If A is a person resident in India and is relative of B, where B is an NRI. B entered into general power of attorney with A. A sold the land of B to XYZ LTD, a company incorporated in India. B request A to receive the sale consideration of sale of land from XYZ LTD. XYZ LTD makes the payment to A on the instruction of and for the credit of B. A receives the sale consideration of sale of land by B in India.
- A, is resident. B is Non resident. A receives the money on behalf of B. C has to pay to B. Instead of B. C pays to A through Bank. A receives the payment on behalf of B. Whether doable?



# Section 4

- *"Holding of foreign exchange, etc.- Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India"*

Save as otherwise provided in this Act, resident person shall not:

- ❖ acquire
- ❖ hold
- ❖ own
- ❖ possess; or
- ❖ transfer
  - (i) any foreign exchange,
  - (ii) foreign security; or
  - (iii) any immovable property situated outside India.

If an Indian resident receives Bank balance of USD 1000 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.



## Section 4

- (n) "Foreign exchange" means foreign currency and includes,-
  - (i) Deposits, credits and balances payable in any foreign currency,
  - (ii) Drafts, traveller's cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
  - (iii) Drafts, traveller's cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;
- (o) "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 37A || Contravention of section 4

- Section 37A - Special provisions relation to assets held outside India in contravention of section 4
- “37A. (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in **contravention of section 4**, he may after recording the reasons in writing, by an order, **seize value equivalent, situated within India**, of such foreign exchange, foreign security or immovable property: Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.
- (2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.
- (3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.
- Explanation.— While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.”.





# Current and Capital Account Transactions





# Foreign Exchange Transactions



**Definition**



**Characterisation**



**Allowability**

- **Definition:** - What is meaning of both the terms i.e. Current Account Transaction and Capital Account transaction under FEMA and how is it defined in the Act.
- **Characterisation:** What is the character of transaction. Does it fall under the Current Account or does it fall under the capital Account transaction?
- **Allowability :** - Whether the transaction is allowed to be undertaken? Is yes, Whether the transaction is allowed to be undertaken with or without restrictions.



# Foreign Exchange Transactions

All the foreign exchange Transactions are divided into two categories:

(1) Current Account Transactions

(2) Capital Account Transactions

- Concept of Cap A/c & Cur A/c was not there in Foreign Exchange regulation Act, 1973
- The drawal of foreign exchange was regulated without any difference between Capital or current account
- It was introduced in FEMA, 1999 which replaced FERA, 1973
- Capital and current a/c are Economic concept and not an Accounting concept



# Current Account Transactions

## **As per s 2(j) of FEMA:**

- *“Current Account Transactions” means a transactions other than a capital account transactions and without prejudice to the generality of the foregoing such transactions 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”*



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- (iv) Expenses in connection with foreign travel, education and medical care of parents, spouse and children”*





# Case Study

An Indian resident imports machinery from a vendor in UK for installing in his factory.



# Case Study

**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.



# Case Study

**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. 2010), "**short-term banking and credit facilities in the ordinary course of business**" are considered as a Current Account Transaction.



# Case Study

**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. 2010), "**short-term banking and credit facilities in the ordinary course of business**" are considered as a Current Account Transaction.

What if the credit period is 12 months?



# Current Account Transactions

As per s 2(j) of FEMA:

*“Current Account Transactions” means a transactions other than a capital account transactions and without prejudice to the generality of the foregoing such transactions*

*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”*



# Current Account Transactions includes

- 1) Payment due in connection with
  - a) Foreign trade
  - b) Other current business
  - c) Services
  - d) Short-term banking facilities
  - e) Credit facilities in ordinary course of business
- 2) Payments due as –
  - a) Interest on loans; and
  - b) Net income from investments
- 3) Remittances for living expenses of parent, spouse and children residing abroad;
- 4) Expenses in connection with –
  - a) Foreign travel
  - b) Education
  - c) Medical care of parents, spouse and children





# Allowability

- **Section 5**

- “Any person may sell or draw foreign exchange to or from an authorized person, if such sale or drawal is a current account transaction:
- Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.”
- In exercise of the power conferred under ss 5 and 46 of FEMA, the Central Government in consultation with the Reserve Bank of India (RBI) has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000, as notified by the Government of India vide Notification No. G.S.R. 381 (E) dated 3 May 2000 (Rules). It has seven Rules.





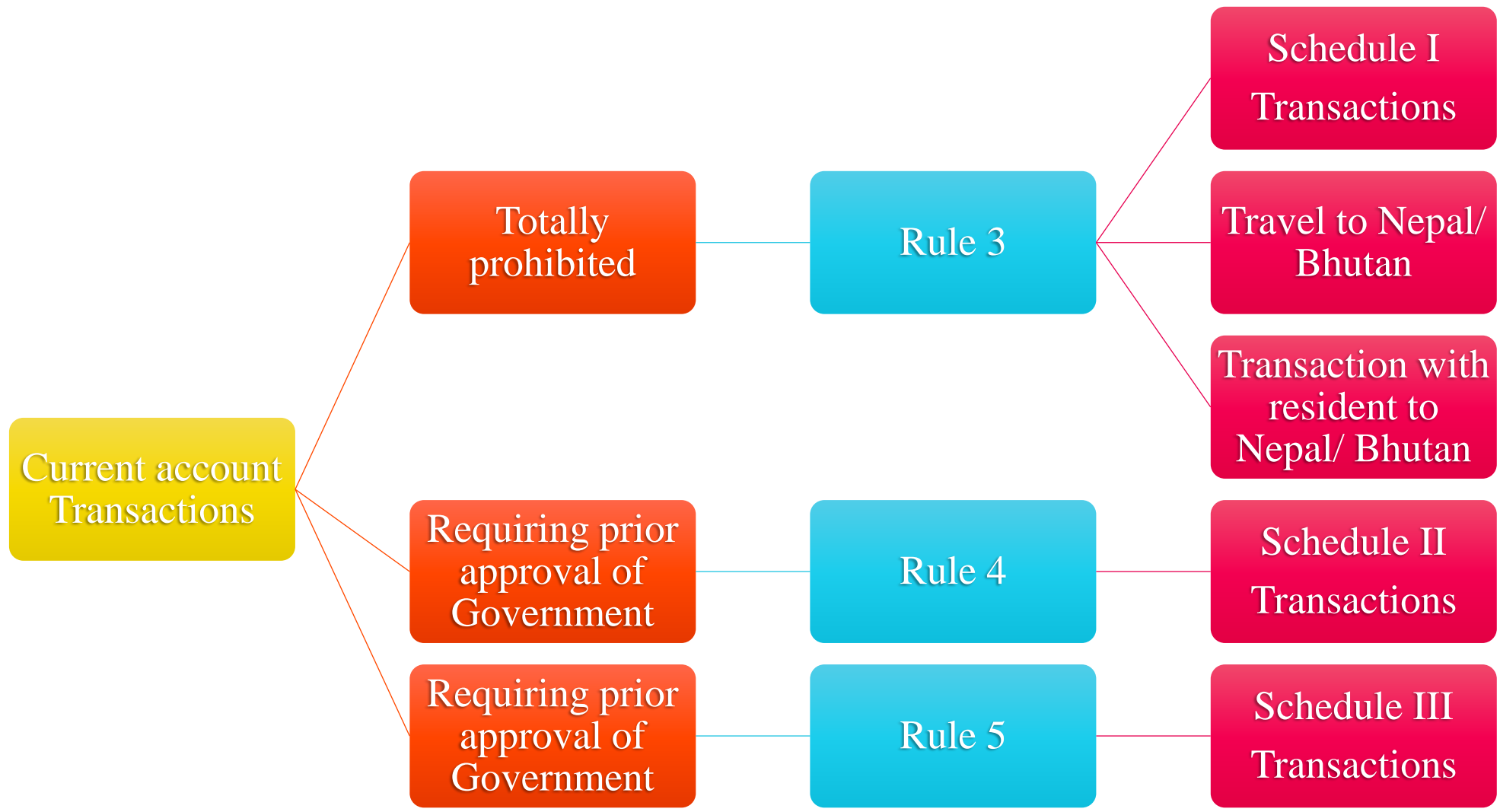
# Foreign Exchange Management (Current Account Transactions) Rules, 2000

The CAT Rules, 2000 has 7 Rules in all:

- Rule 1: Short title and commencement
- Rule 2: Definitions
- Rule 3: Prohibition on drawal of Foreign Exchange
- Rule 4: Prior approval of Government of India
- Rule 5: Prior approval of Reserve Bank
- Rule 6: Proviso to Rule 4 and Rule 5
- Rule 7: Use of International Credit Card while outside India



# Foreign Exchange Management (Current Account Transactions) Rules, 2000





# Foreign Exchange Management (Current Account Transactions) Rules, 2000

**Rule 3 : Prohibition on drawal of Foreign Exchange**||Schedule I specifies certain categories of transactions which are expressly prohibited.

**Rule 4 : Prior approval of Government of India for drawal of Foreign Exchange** || Schedule II mentions those transactions which are permitted by securing the approval from the Ministry/Department of the Government of India as specified therein.

**Rule 5: Prior approval of Reserve Bank for drawal of Foreign Exchange** || Schedule III mentions those transactions for which prior approval of the RBI is required if the amount exceeds the specified limits. The release of foreign exchange up to the threshold ceilings specified in Schedule III is delegated to the authorised dealer banks.

**Drawal Of Foreign Exchange : RULE 2 :** The scope of definition of Drawal is very vast as it not only covers the drawal by foreign exchange from an authorised person but it includes all other ways which has the effect of creating foreign exchange liability. Drawal as defined basically consists of the following

- a) *drawal of foreign exchange from an authorised person and*
- b) *includes opening of letter of credit or*
- c) *use of International credit card or*
- d) *International Debt Card or ATM card or*
- e) **any other thing by whatever name called which has the effect of creating foreign exchange liability**



# Schedules of CAT Rules, 2000



## Rule 3 Schedule 1

### Prohibited Transactions

- 1. Remittance out of lottery winnings.
- 2. Remittance of income from racing/riding, etc., or any other hobby.
- 3. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- 4. Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- 5. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- 6. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- 7. Payment related to "Call Back Services" of telephones.
- 8. Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.



# Schedules of CAT Rules, 2000

## Transactions which require approval from Central Government

Purpose of Remittance	Ministry / Department of Govt. of India whose approval is required
1. Cultural Tours	Ministry of Human Resources Development, (Department of Education and Culture)
2. Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public Sector Undertakings	Ministry of Finance, (Department of Economic Affairs)
3. Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport, (Chartering Wing)
4. 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)
5. Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
6. Remittance of hiring charges of transponders by (a)TVChannels (b) Internet Service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology
7. Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8. Omitted	
9. 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 USD 100,000.	Ministry of Human Resources Development (Department of Youth Affairs and Sports)
10. Omitted	
11. Remittance for membership of P&I Club	Ministry of Finance (Insurance Division)

## Rule 4 Schedule II





# Schedules of CAT Rules, 2000

There have been a complete change in the Rule 5 (and Schedule III) from the way it read earlier and to its present form *vide notification by MINISTRY OF FINANCE (Department of Economic Affairs) on the 26th May, 2015.*

## Old Rule 5

### **Prior approval of Reserve Bank.**

5. No person shall draw foreign exchange for a transaction included in the Schedule III without prior approval of the Reserve Bank :

**Provided** that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

## New Rule 5

“5. Prior approval of Reserve Bank. —Every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein:

**Provided** that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.”



# Schedules of CAT Rules, 2000

The amended schedule 3 is divided into two parts

- As facilities for Individuals
- As facilities for other than Individuals



# Schedules of CAT Rules, 2000

## 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.

- Private visits to any country (except Nepal and Bhutan)
- Gift or donation
- Going abroad for employment
- Emigration
- Maintenance of close relatives abroad
- 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.
- Expenses in connection with medical treatment abroad
- Studies abroad
- **Any other current account transaction**

## *FAQ on Forex Facilities*

*“Any other current account transaction” as given at item no. (ix) of Rules is to cover any other current account transactions which were available to individuals in the erstwhile Schedule III to FEM (CAT) Rules, 2000 dated May 3, 2000, and which do not appear in Para 1 to Schedule III to FEM (CAT) Amendment Rules, 2015.*



# Schedules of CAT Rules, 2000 || Schedule III, Rule 5

## *For Individuals*

- **Any remittance over and above the limit of USD 250,000.**

The remittances for current account transactions (viz, private visit, gift/donation, going abroad on employment, emigration, maintenance of close relatives abroad, business trip, medical treatment abroad, studies abroad, etc) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015 are subsumed in the limit of Liberalised Remittance Scheme of USD 2,50,000. Release of foreign exchange exceeding USD 2,50,000, requires prior permission from the RBI.

**Exception to above:** There is an exception to the above limit of USD 250,000 in case of expense for emigration expenses, for expenses in connection with medical treatment abroad and studies abroad wherein individual may avail of exchange facility for an amount in excess of the limit if it is so required by a country of emigration, medical institute offering treatment or the university, respectively.



# Schedules of CAT Rules, 2000 || Schedule III, Rule 5

## 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-
  - creation of Chairs in reputed educational institutes,
  - contribution to funds (not being an investment fund) promoted by educational institutes; and
  - 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. Where “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.



# Schedules of CAT Rules, 2000 || Schedule III, Rule 5

**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.**

Q. 27. Whether the limit of USD 2,50,000 per financial year as mentioned in Para 1 of Schedule III of FEM (CAT) Amendment Rules, 2015 is also applicable to person other than individuals?

- Ans. Yes, the limit of USD 2, 50,000 is applicable to persons other than individuals (such as corporates, trusts; etc.) who wish to avail of facilities under Para 1 of Schedule III to FEM (CAT) Amendment Rules, 2015. Such entities will have to fill up the Form A2 while remitting foreign exchange.
- However, all residual current account transactions undertaken by such entities are otherwise permissible without any specified limit as hitherto. All such residual current account transactions, irrespective of the amount, are to be disposed off at the level of AD Category I bank, as hitherto. It is for the AD Category I bank to satisfy themselves about the genuineness of the transaction.

Facility or  
Restriction?



# Remittance out of RFC Account/EEFC Account



## Rule 4

- No approval of CG required if out of funds mentioned in RFC account
- No approval of CG required if out of funds mentioned in EEFC account



## Rule 5

- No approval of RBI required if out of funds mentioned in RFC account
- No approval of CG required if out of funds mentioned in EEFC account





# Remittance out of RFC Account/EEFC Account

- Exceptions to above

## Remittance out of EEFC Account can not be made for

Rule 4 : Remittance for membership of P&I Club.

Rule 5 :

- (1) Gift remittance exceeding US\$ 5,000 per financial year per remitter or donor other than resident individual.
- (2) (i) Donation exceeding US\$ 5,000 per financial year per remitter or donor other than resident individual;
  - (ii) Donations by corporate, exceeding one per cent of their foreign exchange earnings during the previous three financial years or US\$ 5,000,000, whichever is less, for, -
    - (a) creation of Chairs in reputed educational institutes;
    - (b) to funds (not being an investment fund) promoted by educational institutes; and
    - (c) to a technical institution or body or association in the field of activity of the donor company.
3. Remittances exceeding five per cent of the investment brought into India or US\$ 1,00,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.]



# Rule 7 : Use of International credit card while outside India

Use of International Credit card while outside India:

- As per Rule 7 of CAT Rule, 2000 no RBI approval is required for use of International Credit Card for making payment by a person towards meeting expense while such person is on a visit outside India.



# Capital Account Transactions

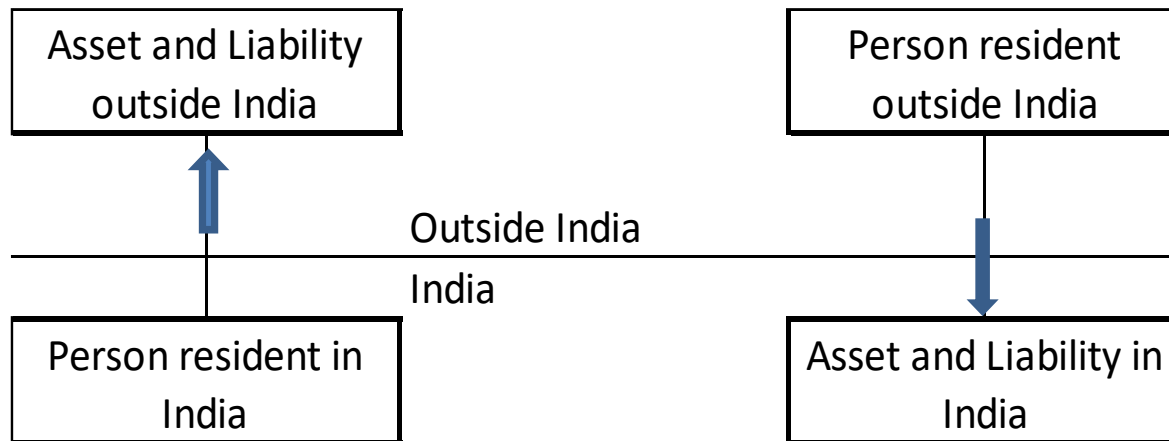




# Capital Account Transactions

As per s 2(e) of FEMA:

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



Assets or liabilities of resident person outside India;

Assets or liabilities in India of non-resident person.

including contingent liabilities

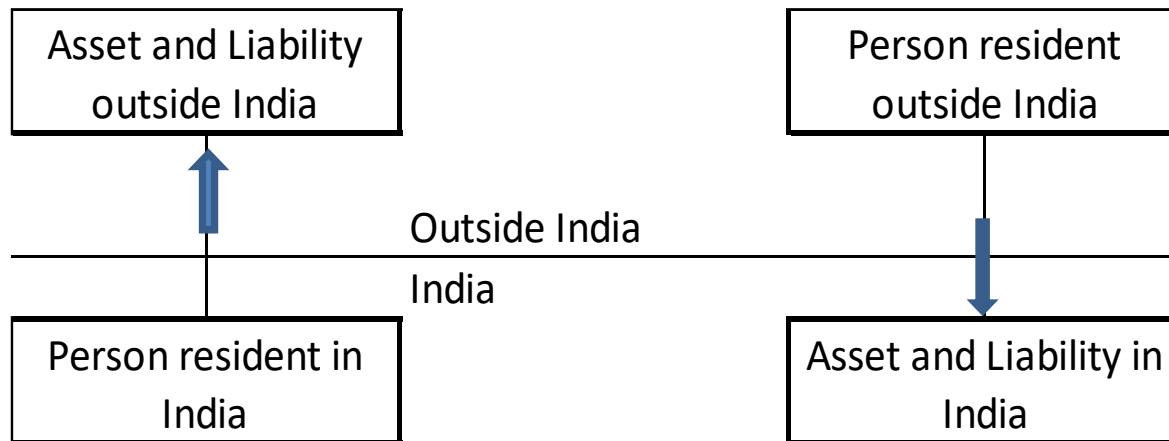
includes transactions referred to in s 6(3)



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Assets or liabilities of resident person outside India;

Assets or liabilities in India of non-resident person.

including contingent liabilities

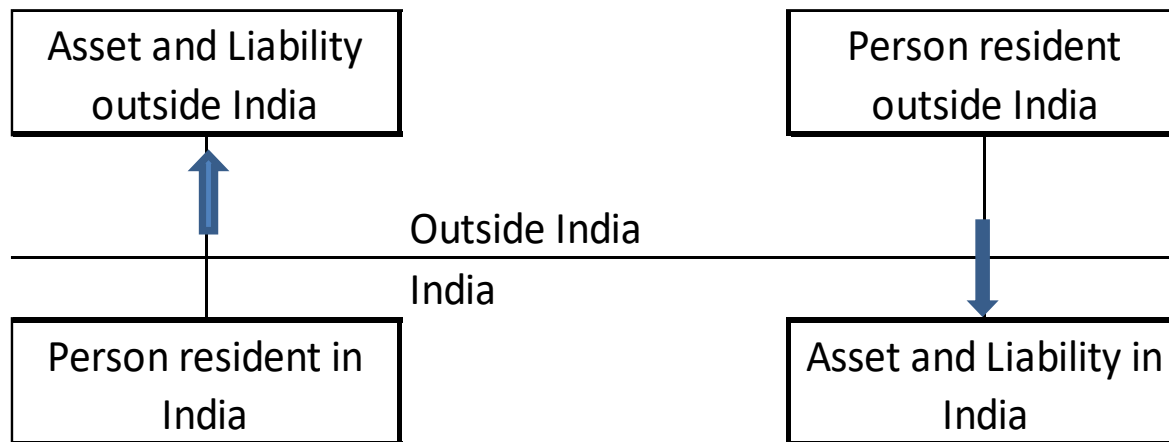
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Assets or liabilities of resident person outside India;

Assets or liabilities in India of non-resident person.

including contingent liabilities

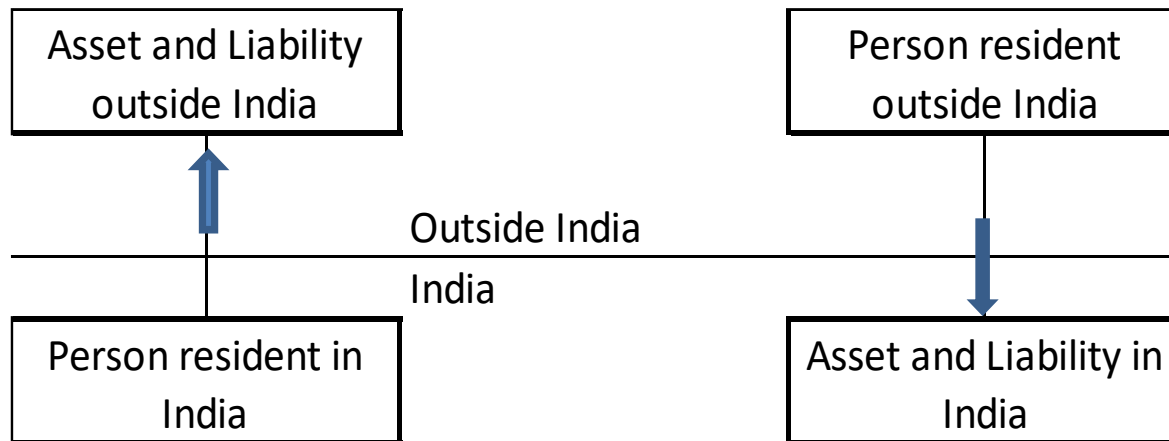
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Assets or liabilities of resident person outside India;

Assets or liabilities in India of non-resident person.

including contingent liabilities

includes transactions referred to in s 6(3)





# Capital Account Transactions || Contingent Liability

## Contingent liability by Person Resident Outside India:

- Not specifically included in the definition
- The definition of Capital account Transactions does not include contingent liability of a person resident outside India. However, Schedule II (c) to Notification 1 includes in the list of capital account transaction guarantee given by a person outside India to any person resident in India.
- There is no reporting as such for guarantee given by non- resident in respect of borrowing in rupees by resident Indian where lender is also another resident Indian
- In case of invocation of guarantee where liability is paid by non- resident, the principal debtor (i.e. Indian borrower). Can make payment to such non – resident guarantor under general permission.

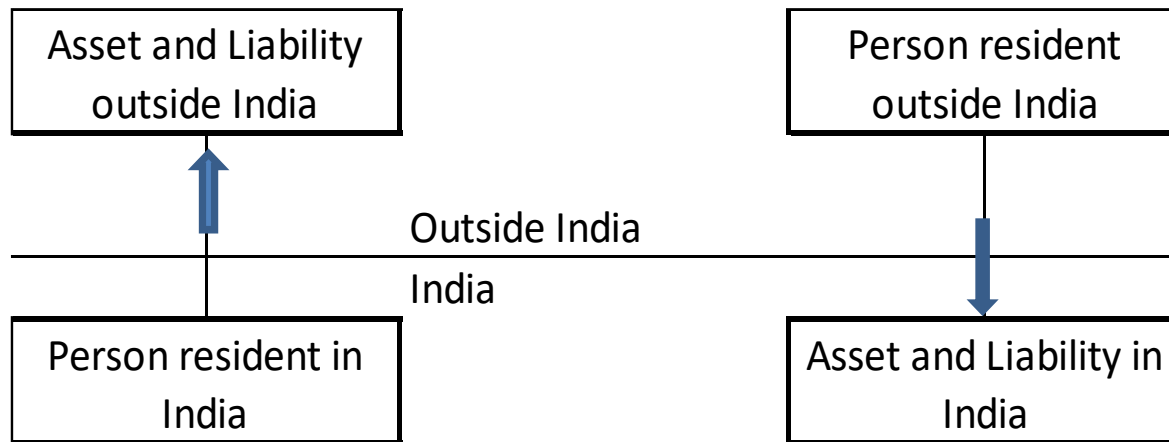
- **Contingent liability by Person Resident in India**
- Specifically included
- The person resident in India can give guarantee on behalf of person resident outside India.
- An Indian entity can give guarantee upto 400% of its net worth



# Capital Account Transactions

As per s 2(e) of FEMA:

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



Assets or liabilities of resident person outside India;

Assets or liabilities in India of non-resident person.

including contingent liabilities

includes transactions referred to in s 6(3)



# Case Study

- 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.
- 3) 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, "short-term banking and credit facilities in the ordinary course of business" are considered as a 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 TUI Tuan. I tre uansa UUNIS TANS WILTIT te luar Tures, then IL TS permeu. Short term loan by and large means 6 months. For exports, the period for realisation of proceeds, is 9 months.



# Case Study

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 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.)



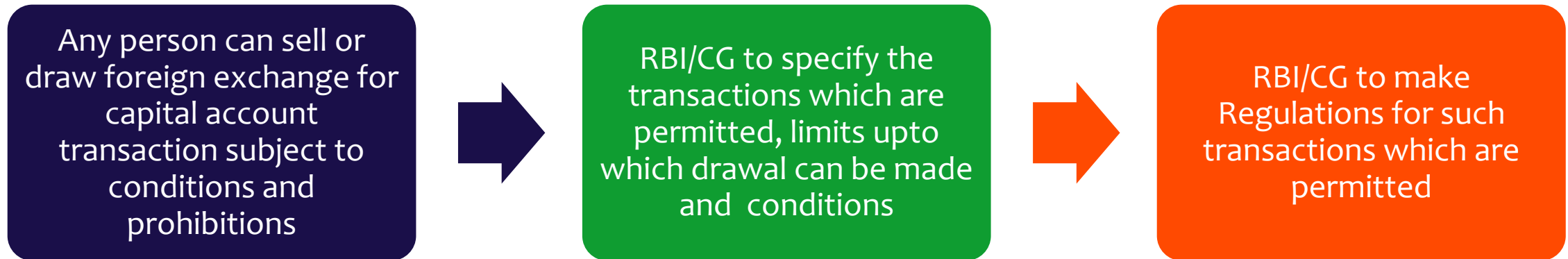
# Case Study

**What happens if an NRI gives a gift to an Indian resident by remitting Funds in India ?**

- ✓ 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.



# Capital Account Transactions





# Permissibility || 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.**

Many sell or draw subject to Sub section 2

Sub Section 2 - RBI

Sub Section 2A – Central Government

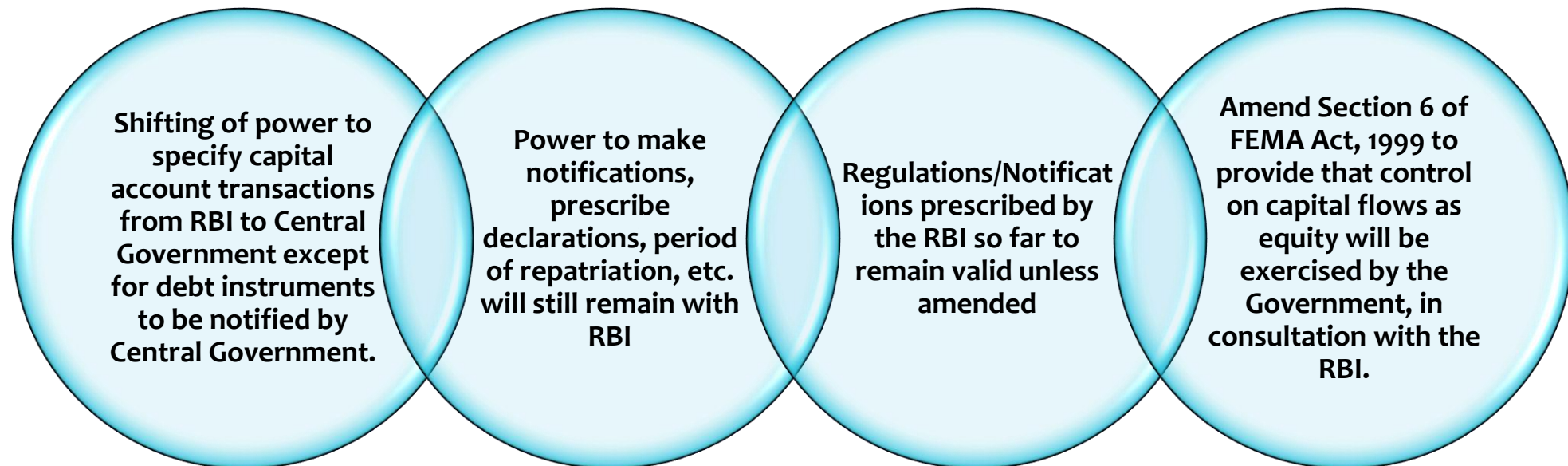
Power shifted from RBI to Central Government





# Amendment by Finance Act, 2015

*FM Mr. Arun Jaitley said “Capital Account Controls is a policy, rather than a regulatory, matter. I, therefore, propose to amend, through the Finance Bill, Section-6 of FEMA to clearly provide that control on capital flows as equity will be exercised by the Government, in consultation with the RBI”*





# Amendment by Finance Act, 2015

- The erstwhile s 6(2) gave powers to the RBI to make regulation for various capital account transactions. In place of RBI, powers have now been given to the Central Government under the newly inserted s 6(2A) to lay down the capital account transactions which are permissible under the Act.

Section 6(2A) gives power to the Central Government to prescribe in consultation with the RBI,

- ✓ (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.

The term debt instruments have been defined in s 6(7) to mean “such instruments as may be determined by the Central Government in consultation with the Reserve Bank”.



# Amendment by Finance Act, 2015 || Section 6(3)

Section 6 (3) “Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations prohibit, restrict or regulate the following, —

- (a) transfer or issue of any foreign security by a person resident in India;
- (b) transfer or issue of any security by a person resident outside India;
- (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
- (d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;
- (e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;
- (f) deposits between persons resident in India and persons resident outside India;
- (g) export, import or holding of currency or currency notes;
- (h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
- (i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
- (j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred,—
  - (i) by a person resident in India and owed to a person resident outside India; or
  - (ii) by a person resident outside India.”

Section 47 of FEMA Act, 1999 which empowered RBI to make regulations has been amended to the extent that all regulations made by RBI till date under Section 6 and Section 47 on capital account transactions, the regulation making power in respect of which now vests with the Central Government, shall continue to be valid, until amended or rescinded by the Central Government



# Foreign Exchange Management ( Permissible capital account transactions) Regulations, 2000

- In exercise of the powers conferred by sub-s (2) of s 6, and sub-s (2) of s 47 of the Foreign Exchange Management Act, 1999, the RBI has in consultation with the Central Government made the following regulations relating to capital account transactions, namely the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.
- As per the regulations, the capital account transactions are divided into two categories:
  - Transactions permissible for person resident in India specified in Schedule I; and
  - Transactions permissible for person resident outside India as specified in Schedule II.



# Foreign Exchange Management ( Permissible capital account transactions) Regulations, 2000





# Foreign Exchange Management ( Permissible capital account transactions) Regulations, 2000

The notification has following regulation:

- 1) Short title and commencement
- 2) Definitions
- 3) Permissible Capital Account Transaction
- 4) Prohibition
- 5) Method of payment for investment
- 6) Declaration to be furnished



# Foreign Exchange Management ( Permissible capital account transactions) Regulations, 2000 || Schedule I

Following class of capital account transactions are permitted for persons resident in India (Schedule I, Regulation 3(1)(A))

- a) Investment by a person resident in India in foreign securities
- b) Foreign currency loans raised in India and abroad by a person resident in India
- c) Transfer of immovable property outside India by a person resident in India
- d) Guarantees issued by a person resident in India in favour of a person resident outside India
- e) Export, import and holding of currency/currency notes
- f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India
- g) Maintenance of foreign currency accounts in India and outside India by a person resident in India
- h) Taking out of insurance policy by a person resident in India from an insurance company outside India
- i) Loans and overdrafts by a person resident in India to a person resident outside India
- j) Remittance outside India of capital assets of a person resident in India
- k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.





# Foreign Exchange Management ( Permissible capital account transactions) Regulations, 2000 || Schedule II

Following class of capital account transactions are permitted for persons resident outside India (Schedule II, Regulation 3(1)(B))

- a) Investment in India by a person resident outside India, that is to say,
- b) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
- c) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- d) Acquisition and transfer of immovable property in India by a person resident outside India.
- e) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- f) Import and export of currency/currency notes into/from India by a person resident outside India.
- g) Deposits between a person resident in India and a person resident outside India.
- h) Foreign currency accounts in India of a person resident outside India.
- i) Remittance outside India of capital assets in India of a person resident outside India.



# Section 6

## Section 6(4)

### **A person resident in India**

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

## Section 6(5)

### **A person resident outside India**

- ✓ may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person
- ✓ **when he was resident in India or**
- ✓ **inherited from a person who was resident in India.**



# Section 6(4)

## Section 6(4) of FEMA, 1999 covers the following transactions:

- ✓ Foreign currency accounts opened and maintained by such a person when he was resident outside India;
  - ✓ Income earned through employment or business or vocation outside India taken up or commenced while 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;
  - ✓ 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;
  - ✓ A person resident in India may freely utilise 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 therefore are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.
- Clarification issued Vide A.P. (DIR Series) Circular No. 90 dated January 9, 2014.



# Section 6(4)

- 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 therefore are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.

**Whether other Movable Assets like Jewellery, Paintings, Precious Stones etc., or Other Assets like interest in LLP or Partnership Firm outside India can also be continued in terms of Section 6(4)?**

- ✓ 6(4) only refers to specific assets viz. currency, securities and immovable property.
- ✓ However intention seems to permit resident to own all assets outside which he was owning prior to turning resident.



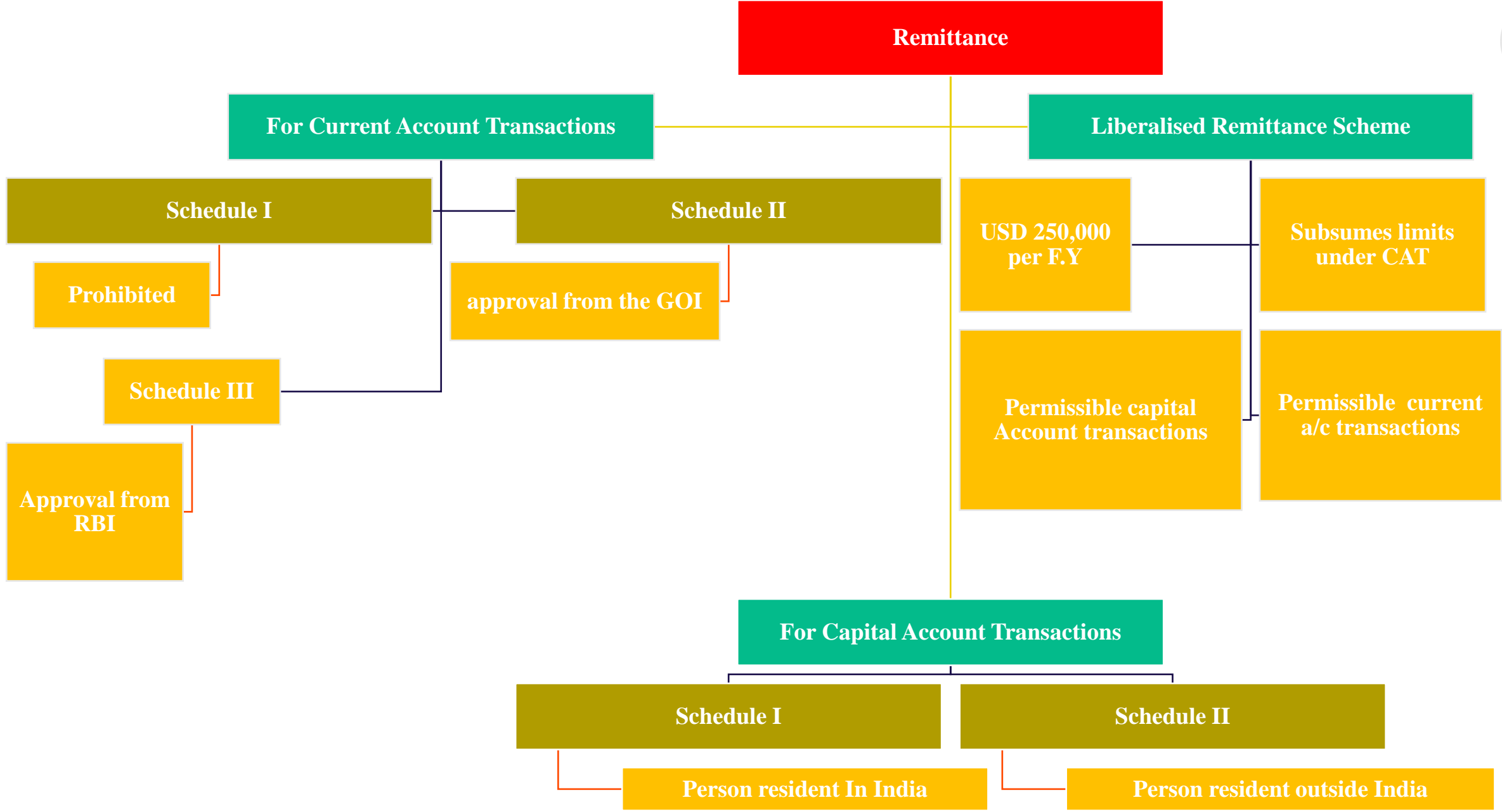
# Section 6

## Section 6(6)

- The section empowers the RBI to regulate the setting up of branch, office or other place of business in India by non-resident. The RBI has framed regulation to 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.

## Section 6(7)

- The sub-section specifies that the meaning of the term 'debt instrument' for this section shall be determined by the Central Government in consultation with the RBI.
- ✓ *Notified by Ministry of Finance, CG, vide notification vide 16<sup>th</sup> Oct 2019 as instruments other than Non debt instruments.*





# Key difference || Current and Capital Account Transactions

- Current account records the trading in goods and services in the current period. Capital Account records the movement of capital in and out the economy.
- Current Account shows the net income of the country, whereas Capital Account shows the change in the ownership of the nation's assets.
- Current Account is mainly concerned with receipts and payment of cash and non-capital items. Conversely, Capital Account is thoroughly considered the sources and application of capital.
- The key components of current account are export and import of goods and services, the investment the income and current transfers. On the other hand, foreign direct investment, portfolio investment and Loans by the government of one country to the government of another country are the key components of Capital Account.







# Alteration in nature of Transactions

From Current  
Account to Capital  
Account

From one type of  
capital account  
transaction to  
other





# Conversion of Current Account Transactions to Capital Account Transaction

- Issue of Shares against Inport of capital goods/machinery/equipment or pre-incorporation expenses. {Para 1(d) of Schedule 1 of FEMA Non Debt Instrument Rules 2019 }
- Shares can be issued against any funds payable, remittance of which does not require prior approval of RBI or government {Para 1(e) of Schedule 1 of FEMA NDI Rules, 2019}
- Any other funds payable – payments for use or acquisition of intellectual property rights, for import of goods, payment of dividends, interest payments, consultancy fees, etc. {A.P. DIR 52 dated February 11,2016}



# Change in the nature of Capital Account Transaction || Examples

## As per ECB Guidelines

- Conversion of ECB to Equity Shares
  - ✓ The activity of borrowing company should be under automatic route or approval as required must be obtained.
  - ✓ It must comply with FDI guidelines.
  - ✓ Others like reporting

## As per Overseas Direct Investment guidelines

- Conversion *subjected to conditions*
  - ✓ conversion of loan to equity {Automatic route}
  - ✓ conversion of equity to loan {Approval Route}





# Other Provisions



# Other provisions

## Section 7 – Export of goods and services

- Exporter of goods under obligation to furnish to RBI:
  - Detailed declaration of exports in prescribed form
  - Required information to ensure realization of export proceeds
  - Directions by RBI to Exporter of goods for ensuring receipt of export proceeds.
- Exporter of services obliged to furnish to RBI or other authority prescribed declaration.

## Section 8 – Realization and repatriation of foreign exchange

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





# Other provisions

- Section 9 – Exemption from realization and repatriation in certain cases:
  - Possession of foreign currency or coins up to limits
  - Specified foreign currency accounts up to limits by specified persons
  - Foreign exchange acquired before 8th July, 1947
  - Donees to hold foreign exchange up to limits
  - Foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or other legitimate means up to limits
  - Other specified foreign exchange receipts
- Section 10, 11 and 12 – Authorized Person (AP)
  - RBI to authorize persons to act as authorized dealer, money changer or off-shore banking unit or in any other manner
  - Control / Penalty on Authorized Person
  - Power of RBI to inspect AP



# Other provisions

- Section 13 – Penalties
- Section 14 – Orders of Adjudicating Authority
- Section 15 – Power to compound contravention
- Section 16 – Appointment of Adjudicating Authority
- Section 17 – Appeal to Special Director (Appeals)
- Section 19 – Appeal to Appellate Tribunal
- Section 20 to 35 – Adjudication and appeal related provisions
- Section 36 to 38 – Provisions relating to Enforcement Directorate
- Section 39 to 41 – Miscellaneous provisions
- Section 42 – Contravention by Companies – persons in charge / responsible covered
- Section 43 to 49 – Other provisions





# Other provisions

- Section 37A - Special provisions relation to assets held outside India in contravention of section 4
- “37A. (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in **contravention of section 4**, he may after recording the reasons in writing, by an order, **seize value equivalent, situated within India**, of such foreign exchange, foreign security or immovable property: Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.
- (2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.
- (3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.
- Explanation.— While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.”.



# Few Examples





# Practical Questions

- Is payment of Royalty a capital Account transaction or capital Account transaction? Are there any restrictions on % of Royalty amount for use of technology or trademark?





# Practical Questions

- Payment of Royalty is Current account transaction. No there is no restriction on % of the royalty for use of technology or trademark. There was restriction on % of Royalty earlier, which had been removed in 2010.
- • Vide press note 8 of 2009 Government did away with any restriction on payment of royalty. See the press note: [http://dipp.nic.in/English/policy/changes/pn8\\_2009.pdf](http://dipp.nic.in/English/policy/changes/pn8_2009.pdf).
- • RBI vide A. P. (DIR Series) Circular No. 52 dated May 13, 2010 did away with restriction on payment of Royalty.
- Relevant extracts from the circular is produced below:
  - *“2. In terms of Rule 4 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, prior approval of the Ministry of Commerce and Industry, Government of India, is required for drawing foreign exchange for remittances under technical collaboration agreements where payment of royalty exceeds 5% on local sales and 8% on exports and lump-sum payment exceeds USD 2 million [item 8 of Schedule II to the Foreign Exchange Management (Current Account Transactions) Rules, 2000]. The Government of India has reviewed the extant policy with regard to liberalization of foreign technology agreement and it was decided to omit item number 8 of Schedule II to the Foreign Exchange Management (Current Account Transaction) Rules, 2000, and the entry relating thereto.*
  - *3. Accordingly, AD Category-I banks may permit drawal of foreign exchange by persons for payment of royalty and lump-sum payment under technical collaboration agreements without the approval of Ministry of Commerce and Industry, Government of India.”*



# Practical Questions

- Can payment for ESOP be considered as Current Account Transaction (CAT)?





# Practical Questions

- Payment for ESOP is Capital Account Transaction and is governed by Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, notified by the Reserve Bank vide Notification No. FEMA. 20/2000-RB dated 3rd May 2000, as amended from time to time.



# Practical Questions

- Whether remittance abroad to a consultant for setting up a company is a Current Account Transaction or a capital account transaction as ultimately that amount will be capitalised in the books in the books of both the entities?







# Practical Questions

- Yes, it is Current Account Transaction. A transaction may be capital account transaction for accounting purpose but it may be treated as current account transaction still. Treatment in Books of accounts does not determine the distinction between the Current Account Transaction or a capital account transaction under FEMA. The distinction between Current Account Transaction or a capital account transaction is determined from the Balance of Payment of country.
- For example, import of machinery on payment of cash or on normal credit terms of the vendor will be regarded as a current account transaction. The importer may capitalise it in his account books and claim depreciation thereon. As far as the country is concerned, it is a trade transaction. However, if the same machinery is imported on deferred credit basis or is funded out of ECB, etc, then the credit beyond twelve months (as less than 12 months again would fall within the definition of 'Current Account Transactions') would result in the creation of the long-term liability outside India and therefore, be termed as a capital account transaction.



# Practical Questions

**Will advance given to subsidiary outside India for purchases be considered as Current account transaction?**

- Advance given to Subsidiary for any purpose: - Capital Account Transaction
- Advance given to subsidiary for purchase of raw material/import: - Current Account Transaction. Advance Payment is subjected to AD approval.





# Questions ??