IDENTIFYING COMMON FEMA CONTRAVENTIONS

MULUND CA CPE STUDY CIRCLE OF WIRC

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Transition from Foreign Exchange Regulation Act, 1973 to Foreign Exchange Management Act, 1999

- Post liberalization (i.e. New Industrial policy of 1991) there was need to remove shackles of regulatory and legal provisions.
- Need to consolidate and amend the law relating to foreign exchange with the objectives of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.
- Need to take various steps to make 'New Industrial Policy'- workable and meaningful.
- Industrial licensing was made pragmatic and objective-oriented.
- It was decided to review provisions of Foreign Exchange Regulation Act, 1973 (FERA).

Transition from Foreign Exchange Regulation Act, 1973 to Foreign Exchange Management Act, 1999

- Intention was to bring provisions of FERA in line with emerging trends of liberalization so as to remove obstacles in the inward flow of foreign exchange and foreign investment.
- Accordingly, on June 1, 2000, the Foreign Exchange Management Act, 1999 (FEMA) brought in force to replace the then existing FERA.
- It is an act to manage the foreign exchange of India as opposed to FERA which was enacted to regulate/control the foreign exchange.

Structure of FEMA

- Applies to the whole of India and all branches, offices and agencies outside India which are owned or controlled by a person resident in India.
- FEMA has 49 sections of which 9 (section 1 to 9) are substantive and the rest are procedural/ administrative
- Section 46 of FEMA grants power to Central Government to make rules to carry out the provision of FEMA
- Section 47 of FEMA grants power to RBI to make regulations to implement its provisions and the rules made there under
- RBI is entrusted with the administration and implementation of FEMA

Substantive Provisions

Section	Description
1	Application and Commencement of FEMA
2	Definitions
3 to 9	Provisions relating to Regulations and Management of Foreign Exchange
10 to 12	Provisions relating to Authorized Person
13 to 15	Provisions relating to Contraventions and Penalties
16 to 38	Provisions relating to Adjudication, Appeal and Directorate of Enforcement
39 to 49	Miscellaneous Provisions

Master Directions

- RBI has come up with Master Directions covering foreign exchange transactions.
- Master Directions consolidate instructions rules and regulations on the related subject.
- Master Directions are updated as and when there is change in rules/regulations or change in policy.
- Existing set of Master Circulars will be stand withdrawn with issue of Master Directions.
- In Jan 2016, 17 Master Directions were issued by RBI.
- https://www.rbi.org.in/scripts/FS_Notification.aspx?fn=5&fnn=2764

A.P. (Dir Series) Circulars and Master Directions

- 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 of these Circulars have been upheld in the case of Prof. Krishnaraj Goswami v. RBI, [2007 (6) Bom. CR 565]
- Court upheld the power of RBI to issue such Circulars based on powers conferred to RBI u/s. 10(4) & 11(1) & negated the contention that RBI has no jurisdiction to issue such Circulars

Current and Capital Account Transaction

- Capital Account transaction means a transaction which alters assets or liabilities including contingent liabilities outside India of person resident in India and vice-versa. It's an economic definition rather than an accounting or legal definition.
- Current Account transaction is transaction other than a capital account transaction.

Current Account transactions are freely permitted unless prohibited - they are regulated by Central Government.

Capital Account transactions are prohibited unless generally permitted - they are regulated by RBI.

Current and Capital Account Transaction

- FEMA looks transaction from Balance of payment position of Country
- Examples -
  - Import of machinery on payment of cash - Current A/c transaction
  - Machinery is purchased on hire - Capital A/c transaction. There is an obligation to make future payment to the non-resident
  - Consideration for goods & Services – Current A/c transaction
  - Transaction represents a creation or acquisition of assets, shares, loans or immovable properties – Capital A/c transaction

Capital Account Transaction

- RBI has been empowered under section 6(2) of FEMA to specify, in consultation with the Central Government, any class or classes of Capital account transactions, **involving debt instruments**, which are permissible [i.e. the transactions which are not included under section 6(2A)].
- Section 6(2A) of FEMA – Central Government is empowered to specify in consultation with RBI, the class of capital account transactions, not involving debt instruments, which are permissible.
- Every transaction listed in this section is regulated by a corresponding notification

Notifications under FEMA

- Notifications are issued by the Central Government in the Official Gazette
- Section 47 of FEMA grants power to RBI to make regulations.
- RBI had initially issued 25 notifications, covering capital account transaction prescribed in Sec 6(3) & certain miscellaneous provisions
- 15 related to capital account transactions, 1 on Export of goods and services and 9 for other regulations
- As on date, the total number of notifications issued by RBI stand at 362.
- As mentioned in earlier slide, need is felt to revisit the notifications and therefore RBI has started revising the notifications and till date has issued 12 revised notifications carrying suffix (R) for easy identification along with the year in which they are published.

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section of FEMA
1	Permissible Capital Account Transactions	No. 1	Sec 6(2) read with Sec 47 (2)
2	Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India	No. 2	Sec 6(3)(c) read with Sec 47(2)
3	Any borrowing or lending in foreign exchange in whatever form or by whatever name called	No. 3	Sec 6(3)(d) read with Sec 47(2)
4	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	No. 4	Sec 6(3)(e) read with Sec 47(2)
5	Deposits between persons resident in India and persons resident outside India	No. 5(R) dated 01.04.2016	6(3)(f) read with Sec 47(2)

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section of FEMA
6	Export, import or holding of currency or currency notes	No. 6(R) dated 29.12.2015	Sec 6(3)(g) read with Sec 47(2)
7	Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India	No. 7(R) dated 21.01.2016	Sec 6(3)(h) read with Sec 47(2)
8	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 (ii) by a person resident outside India	No. 8	Sec 6(3)(j) read with Sec 47(2)
9	Insurance	No. 12(R) dated 29.12.2015	Sec 47(2)

Capital Account Transaction

Sr. No.	Transactions	Corresponding Notification	Corresponding Section
10	Remittance of Assets	No. 13 (R) dated 01.04.2016	Sec 47
11	Transfer or issue of any Foreign Security	No. 120 dated July 07, 2004 -	Sec 6(3)(a) read with Sec 47
12	Transfer or issue of any security by a person resident outside India	No. 20	Sec 6(3)(b) read with Sec 47
13	Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India	No. 21	Sec 6(3)(i) read with Sec 47(2)
14	Establishment in India of Branch or Office or other place of business	No. 22 (R) dated 31.03.2016	Sec 6(6)
15	Investment in Firm or Proprietary Concern in India	No. 24	6(3)(h) read with Sec 47(2)

Probable Contraventions – Current Account Rules

- Schedule 1 of Current Account Rules, 2000 - Drawal of foreign exchange for following purposes which are prohibited:
  - Remittance out of lottery winnings
  - Remittance of income from racing/riding etc.
  - Payment of commission on exports against which equity shares of JV/WOS are issued.
  - Payment of commission on exports under rupee state credit route. Commission up to 10% of invoice value of exports of tea and tobacco is permitted.
  - Remittance of interest income on funds held in Non-resident Special Rupee Scheme
- Drawal of foreign exchange for travel to Nepal or Bhutan or transaction with a person resident in Nepal or Bhutan is prohibited.
- For all above cases even payment made out of RFC account is not permitted.

Probable Contraventions – Current Account Rules (Contd…)

- Schedule II of Current Account Rules, 2000 - Drawal of foreign exchange for following transactions without obtaining prior approval of Central Government:
  - Cultural tours
  - Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping
  - Advertisement in foreign print media for purpose other than promotion of tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public sector undertaking
  - Remittance of freight of vessel charted by PSU
  - Payment of import by govt. dept or PSU on CIF basis (through ocean transport)
  - Multi modal transport operators making remittance to their agents abroad
  - Remittance for membership of P & I club
  - Remittance of price money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies if amount exceeds USD 1,00,000

Probable Contraventions – Current Account Rules (Contd…)

- Schedule III of Current Account Rules, 2000 - Drawal of foreign exchange by resident individuals for following transactions in excess of LRS limit of USD 2,50,000 without obtaining prior approval of Reserve Bank of India:

i. Private visits to any country (except Nepal and Bhutan)

ii. Gift or donation

iii. Going abroad for employment

iv. Emigration

v. Maintenance of close relatives abroad

vi. Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check up abroad, or for accompanying as attendant to a patient gong abroad for medical treatment/check up.

vii. Expenses in connection with medical treatment abroad

viii. Studies abroad

ix. Any other current account transaction.

- For transactions at (iv), (vii) and (viii) foreign exchange may be drawn in excess of USD 2,50,000 if it is so required.

Probable Contraventions – Current Account Rules (Contd…)

Facilities for persons other than individuals – Drawal of foreign exchange for following transactions by persons other than individuals in excess of the limits so prescribed without prior approval of RBI:

Nature of Transaction	Limits
Donations for a. Creation of chairs in reputed educational institutions b. Contribution to funds c. Contribution to a technical institute or body or association in the field of activity of the donor company	Exceeding 1% of foreign exchange earnings during three financial years or USD 5,00,000 whichever is less
Commission (per transaction) to agents abroad for sale of residential flats or commercial plots in India	Exceeding USD 25,000 or 5% of inward remittance whichever is more

Probable Contraventions – Current Account Rules (Contd…)

SETTING UP OFFICES / BRANCH ABROAD:

- FEMA Notification No. 10R – Regulation 5B
- For setting up of office – remittance towards initial expenses up to 15% of average annual sales/income or turnover during last two financial years or up to 25% of net worth (whichever is higher) is allowed.
- For recurring expenses - remittance towards initial expenses up to 10% of average annual sales/income or turnover during last two financial years may be sent for normal business operations.
- Overseas branch/office conducts normal business activity of Indian entity
- Overseas office/branch shall not create any financial liability, contingent or otherwise for head office in India.

Probable Contraventions – Current Account Rules (Contd…)

- It shall not invest surplus funds abroad without prior RBI approval.
- Surplus funds must be repatriated to India.
- Bank accounts opened overseas must be reported to AD Bank in India.
- AD Bank may allow remittance from Indian company for acquiring immovable property outside India for its business and for residential purpose of its staff.
- Overseas office/branch of software exporter may repatriate 100% of contract value of each off site contract
- In case of companies taking on site contracts, profits on such contracts to be repatriated after completion of the same.
- Audited yearly statement showing receipts under off and on site contracts undertaken by overseas, expenses and repatriation thereon may be sent to AD banks.

Liberalised Remittance Scheme (LRS) – Step towards Capital Account Convertibility

- Under LRS, AD may allow remittances by resident individuals up to USD 2,50,000 (per financial year) for any permitted current or capital account transaction or combination of both.
- The LRS limit has been revised in stages consistent with prevailing macro and micro economic conditions. During the period from February 4, 2004 till date, the LRS limit has been revised as under:

Date	Feb 4, 2004	Dec 20, 2006	May 8, 2007	Sep 26, 2007	Aug 14, 2013	Jun 3, 2014	May 26, 2015
LRS limit (USD)	25,000	50,000	1,00,000	2,00,000	75,000	1,25,000	2,50,000

LRS for resident individuals

- The scheme is available only to resident individuals including minors.
- Remittances for following Capital Account Transactions are permitted under LRS (Source- Master Direction):

  i. opening of foreign currency account abroad with a bank;

  ii. purchase of property abroad;

  iii. making investments abroad;

  iv. setting up Wholly Owned Subsidiaries and Joint Ventures (with effect from August 05, 2013) outside India (for bonafide business;

  v. extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

- Loan to non-relative third parties?

Probable Contraventions – Liberalised Remittance Scheme

- Clubbing is not permitted by family members for capital transactions such as opening bank account/investment/purchase of property, *if they are not co-owners/co-partners of overseas bank account/investment/purchase of property*.
- Resident cannot gift to **another resident** in foreign currency for the latter's foreign currency account held abroad under LRS.
- Remittance for margins or margin calls to overseas exchanges/overseas counterparty not allowed.
- Limit of USD 2,50,000 includes/subsumes remittances under Schedule III of Current Account Rules
- Remittance for purchase of FCCBs issued by Indian companies in the overseas secondary market is prohibited.

Probable Contraventions – LRS (Contd…)

- LRS not allowed for capital account remittances to countries identified by FATF as non-cooperative countries.
- Bank should not extend any kind of credit facilities to facilitate capital account remittance under LRS.
- AD Banks should ensure that payment is received out of funds belonging to the person seeking to make remittances.
- Form A2 and declaration for purchase of foreign exchange is required to be furnished by resident individual seeking to remit under LRS.
- Investor who has remitted funds under LRS can retain, reinvest the income earned on investments.

Analysis of Sec 3 of FEMA – Dealings in Foreign Exchange

- **Section 3(a) -** No person shall
  - **Deal in** or transfer any foreign exchange or foreign security to any person not being an authorised person
- Analysis of Sec 3(a):

  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 Sec 8(1) had expansive meaning which specifically included all these types of transactions)
- Only Authorised Persons can deal in or transfer any foreign exchange. Dealing in or transfer of foreign exchange by any other person will lead to contravention.
- *It must be noted that contravention under clause (a) of Section 3 cannot be compounded by RBI but only by Directorate of Enforcement.*

Analysis of Sec 3 of FEMA – Dealings in Foreign Exchange

- **Section 3(b)** - no person shall-
  - ➢ Make any payment to, or for the credit of any person resident outside India (NR) **in any manner**
- A person resident in India making payment on behalf of non-resident is a contravention. Intention is to prohibit direct and indirect payment to NR.
- There are certain exceptions under FEMA 16 read with FEMA 237:
- Regulation 2 of FEMA 16 –

A person resident in India can make any payment in rupees –

➢ towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from within India of non-resident

➢ to person resident outside India by crossed cheque or draft as consideration for purchase of gold or silver in any form imported by such person.

Analysis of Sec 3 of FEMA – Dealings in Foreign Exchange

- FEMA 237 - a resident individual may make a gift or grant loan to an NRI who is a close relative, in rupees by way of crossed cheque/electronic transfer to NRO A/c vide Notification No. 237 dated 25.09.2012 w.r.e.f. 16.09.2011

  Close relative shall have the same meaning as that of 'relative' under the Companies Act, 1956

  The amount so paid must be within the permissible limit specified under LRS

- In the case of A.V. Francis @ Francis Alukka vs. Assistant Director, Directorate of Enforcement, Cochin [2015] 56 taxmann.com 31 (Kerala) dated February 9, 2016
  - ➢ It was held that payment made by resident for customs duty payable by non-resident while importing car in India was in violation of FEMA provisions.

Analysis of Sec 3 of FEMA – Dealings in Foreign Exchange

- Section 3(c) – no person shall
  - Receive otherwise through an A.P. any payment by order or on behalf of any NR in any manner

  Expln to above – where a resident receives any payment **without corresponding inward remittance** than such payment would be regarded as having been received otherwise than through authorised person. The same will be violation of FEMA provisions.

- Section 3(d) – no person shall
  - 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

Probable Contraventions – Foreign Direct Investment (FDI)

FEMA NOTIFICATION NO. 20

- Making FDI in prohibited sectors:
  - Lottery business including government/private lottery, online lotteries etc.
  - Gambling and betting including casinos etc.
  - Chit funds
  - Nidhi company
  - Trading in Transferable Development Rights (TDRs)
  - Real Estate Business or Construction of Farm Houses
  - Manufacturing of Cigars, cheerots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.
  - Activities/sectors not open to private sector investment e.g. atomic energy, railway operations (other than permitted

Foreign Technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

Probable Contraventions – FDI (Contd…)

- Non filing of Advance Remittance Form (ARF) for intimation of receipt of consideration within 30 days of date of receipt [Para 9(1)(A) of Schedule 1]

  Care should be taken with respect to following at time of filing of Form ARF:

  - KYC of non-resident investor to be obtained from the bank of the investor
- Non filing of Form FC-GPR for allotment of shares within 30 days of date of allotment [Para 9(1)(B) of Schedule 1].
- Non allotment of capital instruments within 180 days from the date of receipt of inward remittance. [1st Proviso to Para 8 of Sch 1]
- Non-convertible, optionally or partially convertible Preference shares or Debentures shall be considered as debt and ECB guidelines will apply to the same {[2015] 50 taxmann.com 59 (Bom) IDBI Trusteeship Services Ltd. vs. Hubtown – High Court of Bombay}

Probable Contraventions – FDI (Contd…)

- Consideration not received through normal banking channels in free foreign exchange in case of NRIs in Nepal and Bhutan or citizen of Nepal and Bhutan investing.
- Price / conversion formula for convertible instruments not determined upfront at the time of issue.
- Investment made with assured return by promoter or investee company is prohibited [Regulation 5(1)(i)]
- Extension in conversion period of CCDs/CCPs beyond original tenure without RBI permission.
- Transfer of shares without obtaining prior approval of RBI in following cases:
  - NRI transferring to NR or erstwhile OCB
  - Resident to Non-resident transfer by way of sale not in compliance with pricing guidelines or involving deferred payment [Regulation 10]
  - Resident to Non-Resident (not being erstwhile OCB) by way of gift [Regulation 10]

Probable Contraventions – FDI (Contd…)

- NR to NR transfer of shares of company engaged in sectors/activities under approval route without obtaining prior government approval.
- Non reporting of transfer of shares between resident to non-resident and non-resident to resident within 60 days from date of receipt of consideration [Para 10 of Schedule 1].
- Non filing of Form FCTRS in case of acquisition of shares by non-resident or NRI through stock exchange in terms of SEBI – SAST Regulations under FDI scheme [A.P.(DIR Series) Circular No. 127 dated May 02, 2014].
- Issue of shares in following cases without obtaining government approval:
  - Issue of shares against import of capital goods/machinery/equipment (excluding second hand machinery) [Para 3(b) of Schedule 1]

Probable Contraventions – FDI (Contd…)

- Issue of shares against pre-operative / pre-incorporation expenses (including rent payments) without obtaining approval of government [Para 3(e) of Schedule 1].
- Even if approval is obtained the challenge is to satisfy the condition that payments should be made by the foreign investor to the company directly.
- If Indian company does not want to issue shares against pre-operative/pre-incorporation expenses to its overseas parent, the same can be reimbursed to the extent of five percent of investment brought into India or USD 1,00,000 whichever is higher [Point 2(iv) of Schedule III of Current Account Transaction Rules, 2000].
- If the remittance exceeds the said limits, prior approval of RBI is must.
- Shares can be issued against any other funds payable (legitimate dues) by the investee company, remittance of which does not require prior permission of government or RBI [A.P.(DIR Series) Circular No. 31 dated September 17, 2014 and Para 2(4)(iv) of Schedule 1]

Probable Contraventions – FDI (Contd…)

- Issue of right shares to erstwhile OCBs without obtaining prior RBI approval.
- FDI in company engaged in the activity of investment in other company without obtaining prior government approval.
- Non intimation of downstream investment to FIPB within 30 days of such investment [Regulation 14(6)(i)].
- Indian companies making downstream investments shall not use borrowed funds. The requisite funds are to be brought from abroad [Regulation 14(6)(ii)(d)].
- Changes in conditions of FIPB approval such as change in NR investor etc requires, amendment application under the category of Amendment Cases and is to be filed with FIPB.
- FDI in LLPs operating in sectors/activities with FDI linked performance conditions and under government approval route is prohibited [Para 4(i) of Schedule 9]. (say construction sector)

Probable Contraventions – FDI (Contd…)

- Non filing of Annual return by 15th July on Foreign Liabilities and Assets by companies having FDI [Para 9(2) of Schedule 1].
- Pledge of shares by promoters in favor of non-residents is not allowed [Regulation 12].
- FDI in an Existing pharma company will be deemed to be brown field investment and prior FIPB approval will be required.
- Company having FDI should avoid acquiring agricultural land for expansion. If such land is not used for expansion, issues may arise at the time of sale of such unused agricultural land.
- Non reporting of investments made by NRIs on repatriation basis.
- A company issuing right shares or bonus shares or warrants shall report to RBI in Form FC-GPR as stipulated in Para 9(1)(B) of Schedule 1 [Regulation 6B]

Probable Contraventions – FDI (Contd…)

- No need for reporting of investments in following cases:
  - Investment by Foreign Institutional Investors (FIIs) under Schedule 2 by subscribing to IPO as the same is not made under FDI Scheme.

    RBI may ask for declaration whether investment by FII is under Schedule 1 or not.
  - Investment by SEBI registered FVCI in terms of Schedule 6.
  - Investment by NRIs or company / trust / partnership firm incorporated outside India and owned and controlled by non-resident Indians under Schedule 4 will be deemed to be domestic investment at par with the investment made by residents.

Probable Contraventions – Overseas Direct Investment (ODI)

FEMA NOTIFICATION NO. 120

- Investment in foreign entities engaged in real estate business (mere buying and selling) or banking without obtaining prior RBI approval [Regulation 5(2)].
- Investment by Indian Party in excess of 400% of net worth [Regulation 6(2)(i)].
- Financial commitment in excess of USD 1 billion in a financial year without RBI approval even if investment is within limits of 400% of net worth.
- Investment in loan or guarantee without first investing in equity capital of the overseas entity without prior RBI approval [Regulation 6(4)(i)].
- Post 2012 investment in CCPS is treated at par with equity investment [Regulation 6(4)(v) and A.P.(DIR Series) Circular No. 96 dated March 28, 2012].
- Investment made by Indian Party which is under RBI's caution list / defaulters list or is under investigation of any agency [Regulation 6(2)(iii)].

Probable Contraventions – ODI (Contd…)

- Routing of transactions pertaining to a particular JV/WOS through different Authorised Dealer (AD) Banks [Regulation 6(2)(v)].
- Issue of corporate guarantee to second generation or subsequent level step down without prior approval. However, in such case Indian Party should indirectly hold 51% or more stake in overseas subsidiary for which guarantee is to be given [Regulation 6(4)(ii)].
- Regulation 7 - Investment by Indian Party engaged in financial services sector shall be subject to following conditions:
  - Indian party must have earned net profit during the preceding three financial years from financial services
  - It must be registered with regulatory authority
  - It must obtain approval from regulatory authority both in India and abroad
  - It has to fulfill prudential norms relating to capital adequacy as prescribed by concerned regulatory authority.

Probable Contraventions – ODI (Contd…)

- Capitalization of export proceeds remaining unrealized beyond prescribed period of realization without obtaining prior RBI approval [Regulation 11(1)].
- Overseas investment by proprietorship concern or an unregistered partnership firm without prior RBI approval. [Regulation 19A]
- Overseas investment by registered trusts and societies engaged in manufacturing/educational/hospital sector without prior RBI approval. The investment shall be made in the same sector [Regulation 19A].
- Restructuring of balance sheet of JV/WOS involving write off of capital and other receivables by an unlisted Indian company up to 25% of equity investment in JV/WOS without RBI approval. Indian party shall hold at least 51% stake in the overseas entity [Regulation 16A(3)]
- Failure to repatriate all dues receivable from overseas entity like dividend, royalty, technical fees etc. within 60 days of the date of falling due [Regulation 15(ii)].
- Receipt of shares of step down subsidiary on account of liquidation of JV/WOS without reporting in Part I of Form ODI.

Probable Contraventions – ODI (Contd…)

- **Regulation 16(1) - Transfer by way of sale of shares** is subject to following conditions:
  - The sale does not result in write off
  - Sale is to be effected through stock exchange where shares of overseas JV/WOS are listed.
  - If shares are not listed and are disinvested through private arrangement, share price shall not be less than value certified by Chartered Accountant or Certified Public Accountant.
  - Indian party does not have any outstanding dues by way of dividend, technical know-how, fees, royalty, consultancy, commission, or other entitlements and /or export proceeds from JV / WOS.
  - Overseas concern has been in operation for at least one full year.
  - APRs based on audited financials have been submitted regularly.
  - Indian party is not under investigation by CBI/DOE/SEBI/IRDA or any other regulatory authority in India.

Probable Contraventions – ODI (Contd…)

- **Regulation 16(1A) - Disinvestment involving write off is permitted in following cases:**
  - Where JV/WOS is listed in overseas stock exchange
  - Where Indian party is listed company with net worth not less than Rs. 100 crore
  - Where Indian party is unlisted company, investment in overseas venture does not exceed USD 10 million
  - Where Indian party is listed company with net worth less than Rs. 100 crore but investment in overseas venture does not exceed USD 10 million.
  - The sale does not result in write off

  Other conditions as mentioned in transfer by way of sale will also be applicable.
- Proceeds shall be repatriated within 90 days from the date of sale of shares [Regulation 16(2)].

Probable Contraventions – ODI (Contd…)

- Failure to comply with following reporting requirements will be contravention:
  - Non Filing of Form ODI within 30 days of date of making remittance overseas for obtaining UIN [Regulation 10].
  - Making subsequent remittance under ODI without obtaining UIN
  - Non Filing of Annual Performance Report (APR) based on audited financial statements of JV/WOS every year before 31st December [Regulation 15(iii)].
  - Non Filing of Annual Return on Foreign Liabilities and Assets every year before 15 July.
  - Non receipt of share certificate or any other evidence of overseas investment and non submission of the same with RBI within six months from date of making investment [Regulation 15(i)].
  - Non reporting of post investment changes such as diversification of activities of JV/WOS abroad or setting up step down subsidiary or alteration in shareholding pattern within 30 days of approval of such changes and the same to be included in APR [Regulation 13].

Probable Contraventions – ODI (Contd…)

- **Regulation 20A and Schedule V - ODI by resident individuals:**
  - Investment made by resident individual shall be within LRS limits of USD 2,50,000.
  - Investment by way of subscription to equity shares or CCPS is only permitted.
  - Investment shall be made to set up an operating entity and no step down subsidiary is allowed to be acquired or set up.
  - Disinvestment shall not be made before the expiry of one year from the date of making first remittance.
  - No write off shall be allowed in case of disinvestment.
  - Disinvestment proceeds are to be repatriated within 60 days form the date of disinvestment.
  - UIN is to be obtained by filing Part I of Form ODI at the time of making first investment
  - Disinvestment is to reported in Part III of revised form ODI.

Probable Contraventions – Acquisition and Transfer of Immovable Property in India

FEMA NOTIFICATION NO. 21

- Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau and Hong Kong acquiring or transferring immovable property in India without prior approval of RBI (Regulation 7)
- Foreign National cannot acquire property in India unless acquired by way of inheritance from resident.
- NRI and PIO cannot acquire agricultural/plantation/farm house in India [Regulation 3(a) and 4(a)].
- Payment of acquisition of immovable property shall not be made by traveler's cheque or currency notes of any foreign currency or any other mode than those specifically permitted [Regulation 3(a) and 4(a)].
- NRIs or PIO can sell or gift agricultural property only to residents [Regulation 3(b) and 4(e)].

Probable Contraventions – Acquisition and Transfer of Immovable Property in India (Contd…)

- PIO can sell immovable property (other than agricultural/plantation/farm house) to Resident. PIO selling to NRI or other PIO will require prior RBI approval. [Regulation 4(d)].
- In case of sale of immovable property by NRI or PIO, the amount to be repatriated shall not exceed the cost of acquisition of such property.
- In case of sale of residential property the repatriation is restricted to two properties. [regulation 6(b)(iii)].
- Capital appreciation can be credited to NRO account and repatriated up to USD 1 million per financial year.

Probable Contraventions – Deposit Accounts

FEMA NOTIFICATION NO. 6R

- **Intimation to AD in case of change in residential status of the account holder:**

Non-Ordinary Rupee Account (NRO Account)	Non-Resident (External) Rupee Account Scheme (NRE Account)	Foreign Currency (Non-Resident) Account (Bank) (FCNR(B) Account)
NRO accounts may be designated as resident accounts on the return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period. Likewise, when a resident Indian becomes a person resident outside India, his existing resident account should be designated as NRO account.	NRE accounts should be designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts, at the option of the account holder, immediately upon the return of the account holder to India for taking up employment or on change in the residential status.	In case account holder becomes resident, deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by him. AD Banks should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account, at the option of the accountholder.

Probable Contraventions – Deposit Accounts (Contd…)

- Company registered under Companies Act 1956 or a Body Corporate created under an act of parliament shall not accept deposits on repatriation basis from a NRI. Deposits already accepted may be renewed [Regulation 6(1)].
- Company registered under Companies Act 1956 or a Body Corporate or a proprietary concern or a firm in India may accept deposits on non-repatriation basis from a NRI [Regulation 6(2)].
- The amount of deposit shall not be received through inwards remittance from abroad or transfer of funds from NRE/FCNR(B) accounts. The amount of deposit shall be received from debit to existing balances in NRO account.

Probable Contraventions – Foreign Currency Accounts

- Exchange Earners Foreign Currency Account (EEFC):
  - Remittances received on account of foreign currency loan or FDI from abroad or amounts received for meeting specific obligations by the account holders cannot be credited to EEFC account.

Probable Contraventions – Remittance of Assets

- Remittance in excess of USD 1 Million per financial year without prior approval of RBI in following cases:
  - On account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India, and
  - By NRI or PIO out of balances held in NRO accounts / sales proceeds of assets / assets acquired by way of inheritance/legacy.
- Citizen of foreign state other than NRI or PIO referred to in Section 6(5) shall require prior approval for RBI for remittance of sales proceeds of immovable property acquired when he was resident in India or inherited from a person resident in India.

Probable Contraventions – External Commercial Borrowings (ECB)

FEMA NOTIFICATION NO. 3

- ECBs are commercial loans in foreign currency raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis.
- **Revised framework announced by RBI on November 30, 2015 vide A.P. (DIR Series) Circular No. 32 (effective from December 2, 2015).**
- ECB can be availed in following three tracks:

TRACK	DENOMINATION	MAM
I	Medium Term Foreign Currency Denominated	3/5 years
II	Long Term Foreign Currency Denominated	10 years
III	INR denominated	3/5 years

Probable Contraventions – ECB (Contd…)

- All in Cost ceiling shall be as under:

Track I	Track II	Track III
ECB with MAM of 3 to 5 years – 300 basis points per annum over 6 months LIBOR or applicable bench mark for the respective currency	Maximum spread will be 500 basis points per annum	In line with market conditions
ECB with MAM of more than 5 years – 450 basis points per annum over 6 month LIBOR or applicable bench mark for the respective currency	Remaining conditions as under Track I	

- All in cost shall include rate of interest, other fees, expenses, charges, guarantee fees paid in foreign currency or INR.
- It will however not include commitment fees, prepayment fees, withholding tax payable in INR.
- Penal interest cannot exceed 2% over and above the 'contracted rate of interest'
- Non fulfillment of all-in-cost guidelines shall be violation of FEMA provisions.

Probable Contraventions – ECB (Contd…)

Following is List of Eligible Borrowers:

Track I	Track II	Track III
➢ Companies in manufacturing and software development sectors ➢ Shipping and airlines companies ➢ Companies in Infrastructure Sector ➢ Holding Companies ➢ CICs ➢ SIDBI ➢ Units in SEZs ➢ EXIM Bank of India (Only under the approval route) ➢ Infrastructure Finance Companies. ➢ Asset Finance Companies	➢ All entities under Track I ➢ Companies in Infrastructure sector (harmonised Master List) ➢ Holding Company ➢ CICs ➢ REITS and INVITS regulated by SEBI	➢ All entities listed under Track II ➢ All NBFCs and NBFC-MIs (Only INR denominated route available) ➢ Not for profit companies registered under the Companies Act, 1956/2013 ➢ Societies, trusts, cooperatives, NGOs in microfinance activities ➢ Companies engaged in **miscellaneous services** viz. R&D, training (except educational), **companies supporting** infrastructure and providing logistics and services ➢ Developers of SEZs/ NMIZs

Probable Contraventions – ECB (Contd…)

- Availment of ECB by entities not fitting in the given list of eligible borrowers is contravention.
- Supporting Infrastructure is not defined.
- Hotels and hospitals are included in definition of infrastructure.

'Infrastructure Sector' has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide Notification F. No. 13/06/2009-INF dated March 27, 2012 as amended / updated from time to time.

Thus infrastructure sector and sub-sectors for the purpose of ECB include:

a. Energy
b. Communication
c. Transport
d. Water and Sanitation
e. Mining, exploration and refining
f. Social and commercial infrastructure (includes Hospitals/Hotels)

For full definition refer A.P. DIR Series Circular No. 48 dated September 18, 2013

Probable Contraventions – ECB (Contd…)

Following is List of Recognized Lenders:

Track I	Track II	Track III
International banks, international capital markets, multilateral financial institutions, regional financial institutions, export credit agencies, suppliers of equipment, foreign equity holders, prudentially regulated entities, pension funds, insurance companies, sovereign wealth funds, overseas branch / subsidiaries of Indian banks	All entities listed under Track I except for overseas branch/subsidiaries of Indian banks.	All entities listed in Track I except for overseas branch/subsidiaries of Indian banks

- Eligible borrowers can avail ECB only from entities given in the list of recognized lenders.
- Foreign equity holder – direct foreign equity holder with minimum 25% direct equity holding, indirect equity holder with minimum 51% indirect equity holding and group company (with common overseas parent).

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses - Track I:

- ECB proceeds can be utilised for capital expenditure in the form of:
  - Import of capital goods
  - Local sourcing of capital goods;
  - New project;
  - Modernisation /expansion of existing units;
  - ODI in JV/ WOS;
  - Acquisition of shares of PSU under a disinvestment programme
  - Refinancing of existing trade credit raised for import of capital goods;
  - Payment of capital goods already shipped / imported but unpaid;
  - Refinancing of existing ECB provided the residual maturity is not reduced.
- SIDBI can raise ECB only for the purpose of on-lending to the MSME sector

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses - Track I:

- Units of SEZs can raise ECB only for their own requirements.
- Shipping and airlines companies can raise ECB only for import of vessels and aircrafts respectively.

(A.P. DIR Series Circular No. 52 dated March 30, 2016)

- Companies in infrastructure sector shall utilize the ECB proceeds raised under Track I for the end uses permitted for this Track. NBFCs-IFCs and NBFCs-AFCs will, however, be allowed to raise ECB only for financing infrastructure.
- Holding Companies and CICs shall use ECB proceeds only for on-lending to infrastructure Special Purpose Vehicles (SPVs)

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses: - Track II

- The ECB proceeds can be used for all purposes excluding the following:
  - Real estate activities
  - Investing in capital market
  - Using the proceeds for equity investment domestically;
  - On-lending to other entities with any of the above objectives;
  - Purchase of land

- Holding companies can also use ECB proceeds for providing loans to their infrastructure SPVs.

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses: Track III:

- NBFCs can use ECB proceeds only for:
  - On-lending for any activities, providing hypothecated loans to domestic entities for acquisition of capital goods/equipment; and
  - providing capital goods/equipment to domestic entities by way of lease and hire-purchases
- Developers of SEZs/ NMIZs can raise ECB only for providing infrastructure facilities within SEZ/ NMIZ.
- NBFCs-MFI, other eligible MFIs, NGOs and not for profit companies registered under the Companies Act, 1956/2013 can raise ECB only for on-lending to self-help groups or for micro-credit or for bonafide micro finance activity

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses: Track III:

- For other eligible entities under this track, the ECB proceeds can be used for all purposes excluding the following:
  - Real estate activities
  - Investing in capital market
  - Using the proceeds for equity investment domestically;
  - On-lending to other entities with any of the above objectives;
  - Purchase of land

Probable Contraventions – ECB (Contd…)

ECBs: Permitted End Uses – General Corporate Purposes (Including Working Capital)

Automatic Route	Earlier Regime	Master Direction on ECB
Eligible borrowers	Companies in the manufacturing, infrastructure, hotels, hospitals, and software sector.	All eligible borrowers under Track I and Track II All eligible borrowers under Track III other than NBFCs, developers of SEZs/NMIZs, other eligible borrowers, MFIs, NGOs, not for profit companies
Recognized Lender	Direct foreign equity holders	Direct/Indirect foreign equity holders and group companies
MAM	7 years	5 years

- For ECB under automatic route from direct equity holder, ECB liability shall not be more than 4:1.
- For ECB under approval route this ratio shall not be more than 7:1
- ECB liability ratio will not be applicable if total of all ECBs raised by an entity is up to USD 5 million or equivalent.

Probable Contraventions – ECB (Contd…)

ECBs under Approval Route:

- FCEBs
- ECB proposals in excess of prescribed individual borrowing limits
- ECBs availed by EXIM Bank as borrower
- ECBs for low cost affordable housing projects forwarded by NHB to RBI
- Trade credit for import of non-capital and capital goods beyond USD 20 million per import transaction
- Availing ECB for import of second hand goods as per DGFT guidelines without obtaining prior approval.

Probable Contraventions – ECB (Contd…)

- Limits of borrowing:

Limits	Eligible Entities
USD 750 million	Companies in infrastructure, manufacturing sectors, NBFC-IFCs, NBFC-AFCs, Holding companies, CICs
USD 200 million	Companies in software development
USD 100 million	Entities engaged in micro finance activities
USD 500 million	Remaining entities

- ECB proposals beyond aforesaid limits will come under approval route

Probable Contraventions – ECB (Contd…)

- In case of Rupee Borrowing, Change of currency any foreign currency is not permitted.
- Companies in infrastructure sector, NBFC-IFCs, NBFC-AFCs, holding companies CICs being eligible borrowers under Track I shall keep their ECB exposure hedged 100% at all times.
- Permission for creation of charge on immovable assets shall not be construed as a permission to acquire immovable property in India by the overseas lender / security trustee.
- In event of enforcement/invocation of charge, immovable asset / property will have to compulsorily sold to resident and sales proceeds shall be repatriated to liquidate the outstanding ECB.
- Routing of Funds raised abroad by overseas holding / associate / subsidiary / group companies of Indian companies with the support of Indian companies is not permissible unless it conforms to any specific or general permission granted.

Probable Contraventions – ECB (Contd…)

- Failure to comply with following reporting requirements will be contravention:
  - Drawdown as well as payment of any fees/charges for raising ECB without obtaining Loan Registration Number (LRN).
  - Non filing of Form 83 for obtaining LRN
  - Non reporting of actual transactions in ECB2 return on monthly basis within 7 days from the close of the month.
  - Non filing of revised Form 83 in case of changes in any terms and conditions of ECB within 7 days from the date of such change.
  - Non filing of Form FC-GPR for conversion of ECB to equity.

Probable Contraventions – ECB (Contd…)

- Powers delegated to AD Banks - Failure to obtain approval of AD bank for following transactions will be contravention:
  - Changes/modifications in drawdown/repayment schedule
  - Changes in currency of borrowing
  - Change of AD Bank
  - Change in the name of borrower company
  - Transfer of ECB
  - Change in recognized lender
  - Change in name of lender
  - Prepayment of ECB
  - Cancellation of LRN
  - Change in end use of ECB proceeds
  - Reduction in amount of ECB
  - Change in all-in-cost
  - Refinancing of ECB

Probable Contraventions – ECB (Contd…)

- **Rupee Denominated Bonds**
  - Bonds can either be privately placed or listed
  - Amount of borrowing exceeds INR 50 billion per financial – prior RBI approval required
  - Minimum maturity will be three years
  - Any corporate or body corporate, REITs, INVITs can issue rupee bonds
  - Bonds can be subscribed by resident of country that is a member of FATF and whose securities market regulator is signatory to International Organization of Securities Commission's (IOSCOs)
  - All-in-cost should be commensurate with prevailing market conditions

Probable Contraventions – ECB (Contd…)

- Can be used for all purposes except for following:

i. Real estate activities other than development of integrated township/affordable housing projects

ii. Investing in capital market and using proceeds for equity investment domestically

iii. Activities prohibited as per FDI guidelines

iv. On-lending to other entities for any of above purposes

v. Purchase of land.

Probable Contraventions – Trade Credits

Trade Credit refers to the credit extended by the overseas supplier, bank and financial institution for maturity of up to 5 years for import into India.

- **Types of Trade Credit:**
  - Suppliers Credit – credit for imports into India extended by overseas supplier
  - Buyers credit – loans for payment of imports into India arranged by the importer from overseas bank or financial institution.
- **Routes and amount of Trade Credit:**

Route	Transaction	Amount
Automatic Route	Import on non capital and capital goods	Upto USD 20 million or equivalent per import transaction
Approval Route	Import on non capital and capital goods	Above USD 20 million or equivalent per import transaction

Probable Contraventions – Trade Credits (Contd…)

- **Maturity Period:**
  - It is same for automatic and approval route

Transaction	Maturity Period
Import of non capital goods	Upto one year from date of shipment or operating cycle whichever is less
Import of capital goods	Up to five years from date of shipment

  - No roll over / extension permitted beyond the permissible period.
- **All in Cost Ceiling:**
  - 350 basis points over 6 month LIBOR (for respective currency of credit or applicable benchmark).
  - All in cost includes arranger fee, upfront fee, management fee, handling/processing charges, out of pocket and legal expenses.

Interest-free loan to 'close relatives'

- Regulation 5(6) of FEMA Notification No. 3 – Borrowing or lending in Foreign Exchange
- An individual resident in India may borrow a sum not exceeding USD 250,000 from his <u>close relatives outside India</u>, subject to the conditions that:
  - minimum maturity period of the loan is 1 year
  - the loan is free of interest
  - loan is received by inward remittance in free foreign exchange through normal banking channels or by debit to the NRE/FCNR account

  'Close relative' means relative as defined in Sec. 6 of Companies Act, 1956
- Applicable only to Indian resident as per FEMA
- Limit of USD 250,000 is applicable for borrowings from all relatives put together.
- No restriction on end use.

Probable Contraventions – Borrowing in Rupees

FEMA NOTIFICATION NO. 4

- Company incorporated in India cannot borrow in rupees from non-resident Indian or Person of Indian Origin except by way of issue of listed Non Convertible Debentures (NCDs) either on repatriation or non-repatriation basis (Regulation 5).
- Company issuing NCDs shall not be engaged in agricultural/plantation/real estate business/trading in TDRs or shall not act as Nidhi or Chit fund company.
- Borrowed funds cannot be used for on-lending /re-lending to infrastructure sector or keeping in fixed deposits with banks in India pending utilization for permissible end uses without prior approval of RBI.
- Reporting with RBI - Within 30 days of receipt of funds
- % of NCDs issued to the total paid up capital of company shall not exceed the ceiling prescribed for issue of equity shares/convertible debentures under FDI.

Probable Contraventions – Borrowing in Rupees (Contd…)

- **Regulation 4 of FEMA 4**

A person resident in India other than company can borrow in rupees subject to fulfillment of following conditions:

- Borrowing shall be only on a non-repatriation basis;
- Mode of receipt
  - Inward remittance through normal banking channel or through NRE/ NRO/ FCNR-B account of the lender maintained by AD
- Rate of Interest
  - Shall not exceed (2% + prevailing bank rate on date of availment of loan)
- Maturity Period
  - Shall not exceed 3 years

Probable Contraventions – Borrowing in Rupees (Contd…)

- **Regulation 8B:**

  INR Loan by resident individual to a NRI relative shall be subject to fulfillment of following terms and conditions:

  - The loan is free of interest.
  - Minimum maturity of the loan is one year;
  - The loan amount to be within LRS Limit of USD 2,50,000 per financial year;
  - Loan shall be utilized for borrowers personal requirements or for his own business in India.
  - Loan not to be used for real estate or agricultural or plantation activities, chit fund business etc. (Reg 6)
  - Loan to be credited to NRO account.
  - Loan amount not to be remitted outside India.
  - Repayment by way of inward remittance through normal banking channel or by debit to NRO/NRE/FCNR or out of sales proceeds of shares or securities or Immovable property against which such loan was granted.

Probable Contraventions – Opening of Branch office or Liasion Office or Project Office

FEMA NOTIFICATION NO. 22R

- Regulation 5 - An application from a person resident outside India for opening of a BO/LO/PO in India shall require prior approval of Reserve Bank of India in the following cases:
  - the applicant is a citizen of or is registered/incorporated in Pakistan;
  - the applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a BO/LO/PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
  - The principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting.
  - The applicant is a Non-Government Organisation (NGO), a Non-Profit Organisation, or a Body/ Agency/ Department of a foreign government.

Probable Contraventions – Opening of Branch office or Liasion Office or Project Office (Contd…)

- Regulation 4(a) - A person resident outside India can establish a branch office or a liaison office in India provided it meets the following criterion:
  - For Branch Office – a profit making track record during the immediately preceding five financial years in the home country and net worth of not less than USD 100,000 or its equivalent.
  - For Liaison Office – a profit making track record during the immediately preceding three financial years in the home country and net worth of not less than USD 50,000 or its equivalent.
- If a person resident outside India is not financially sound and is subsidiary of other company, it may submit a Letter of Comfort from its parent company subject to the condition that the parent company satisfies the prescribed criterion for net worth and profit.

Probable Contraventions – Opening of Branch office or Liasion Office or Project Office (Contd…)

- In case no office is opened by the person resident outside India within six months from the date of approval letter, the approval for establishing the office in India shall be cancelled [Regulation 4(C)].
- AD bank may consider granting extension of time by six months for establishing office. Any further extension will require prior RBI approval.
- Approval for liasion office is only for three years. After the expiry of three years extension may be applied for [Regulation 4(d)(I)].
- Entities engaged in construction and development sectors and which are NBFCs are permitted to open liasion office only for two years. No further extension is granted to such companies. Upon expiry the offices shall be either closed down or converted into JV/WOS [regulation 4(d)(III)].
- In terms of Regulation 5 of FEMA 21, a person resident outside India who has established a branch office or other place of business excluding liasion office may acquire immovable property in India necessary for or incidental to carrying on its business activity [Regulation 4(j)].
- Branch office or liasion office ,ay submit Annual Activity Certificate (AAC) along with audited accounts on or before September 30 every year [Regulation 4(l)].

Probable Contraventions – Export of Goods and Services

FEMA NOTIFICATION NO. 23R

- Every exporter of goods and software (whether in physical or any other form) is required to furnish declaration of exports [Regulation 3(1)].
- In case of service exports no need to furnish any declaration [Regulation 3(3)].
- All the exporters must have Import-Export Code Number (IEC). IEC number shall be indicated on all copies of declaration submitted y exporters [Regulation 5].
- SOFTEX Form is to be filed in respect of export of computer software and audio/video/television software [Regulation 6(B)].
- The proceeds of export of goods/software/services shall be realised within nine months from the date of export [Regulation 9(1)].
- In case goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods [Regulation 9(1)(a)];

Probable Contraventions – Export of Goods and Services (Contd…)

- The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form [Regulation 10].
- In following cases prior approval of RBI shall be obtained:
  - Export of goods under special arrangement between Central of State Government or under rupee credits extended by Central Government to government of foreign state [Regulation 13(i)]
  - Export under line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India [Regulation 13(ii)].
  - Export of goods on elongated credit
  - Export of goods on lease/hire purchase etc.
  - Counter trade arrangement involving adjustment of value of goods imported into India against value of goods exported from India.

Probable Contraventions – Export of Goods and Services (Contd…)

- **Third party payments** for exports/imports are permitted subject to fulfillment of following conditions [AP DIR Circular No. 70 dated November 08, 2013 and AP DIR Circular No. 100 dated February 08, 2014 and Regulation 3(4)]:
  - Firm irrevocable order backed by tripartite agreement (tripartite agreement may not be insisted if documentary evidence for circumstances leading to third party payments / name of third party being mentioned on irrevocable order or invoice is produced).
  - AD bank must be satisfied with bona-fides of transaction and export documents such as invoice/FIRC etc.
  - Third party payments are routed only through banking channels.
  - Third party remittance is declared by exporter in EDF form.
  - Report of outstanding in the XOS would continue to be shown against the name of exporter and name of third party should appear instead of the overseas buyer.

Probable Contraventions – Export of Goods and Services (Contd…)

- Regulation 15
- Where exporter receives advance payment from buyer outside India, shipment of goods is to be made within **ONE year** from the date of receipt of advance payment
- Rate of interest (if any) payable on such advance payment does not exceed LIBOR + 100 basis points.
- For remittance towards refund of unutilized portion of advance payment or towards payment of interest after expiry of one year, prior approval of RBI is required.
- An exporter may receive advance payment where export agreement provides for shipment of goods beyond the period of one year from the date of receipt of such advance.

Probable Contraventions – Export of Goods and Services (Contd…)

EXTENSION OF TIME OF REALIZATION:

- RBI has authorised AD banks to extend period of realization of export proceeds up to six months beyond stipulated period.
- Export transaction is not under investigation of ED/CBI or any other agency.
- Exporter to submit declaration.
- For extension beyond one year from date of export – total outstanding should not exceed USD one million or 10% of Avg. export realizations for 3 preceding FYs, whichever is higher.
- If exporter has filed suit against buyer, extension may be granted irrespective of amount involved/outstanding.
- Further extension may be granted if he expects to be able to realize.

Probable Contraventions – Export of Goods and Services (Contd…)

WRITE OFF OF EXPORT BILLS:

- If not able to realize outstanding dues, exporter may either self write off the same or approach AD for write off.
- Limits for write off

Self write off by exporter (other than Status Holder Exporter)	5% of total export proceeds realized during the previous calendar year.
Self write off by Status Holder Exporter	10% of total export proceeds realized during the previous calendar year.
Write off with approval of AD Bank	10% of total export proceeds realized during the previous calendar year.

Probable Contraventions – Export of Goods and Services (Contd…)

- The limits relate to total export proceeds realized during previous calendar year and will be cumulatively available.
- To be eligible for write off, the amount has to remain outstanding for more than one year, satisfactory documentary evidence to be furnished by exporter having all efforts made by him to realize the dues and case falls under any of undernoted category:
  - Overseas buyer is declared insolvent. Official certificate of liquidator indicating no possibility of recovery of export proceeds is produced.
  - Overseas buyer is not traceable
  - Goods exported have been auctioned or destroyed by Port/Customs/health authorities in importing country.

Probable Contraventions – Export of Goods and Services (Contd…)

- The unrealized amount represents balance due in a case settled through intervention of Indian Embassy, Foreign Chamber of Commerce etc.
- It represents undrawn balance of export bill remaining outstanding and not realizable (not exceeding 10% of invoice value).
- Legal Cost would be disproportionate to the unrealized amount or even after winning court case, exporter could not execute Court Decree.

- In case of self write off – CA certificate is submitted indicating export realization in preceding calendar year and also amount of write off availed during the year along with details of relevant EDF bill to be written off, Bill No., invoice value, commodity exported, country of export and export benefits if any availed by exporter whether surrendered or not.

Probable Contraventions – Export of Goods and Services (Contd…)

- Following not to qualify for write off facility:
  - Export made to countries with externalization problem (overseas buyer deposited value of export in local currency but same is not allowed to be repatriated by central banking authorities of the country).
  - EDF under investigation of ED/Directorate of Revenue Intelligence/CBI etc.
  - Outstanding bills subject matter to civil/criminal suits.

Probable Contraventions – Export of Goods and Services (Contd…)

SET OFF – EXPORT RECEIVABLES AGAINST IMPORT PAYABLES:

- AD banks have powers to allow set off of export receivables against import payables.
- Import is as per Foreign Trade Policy
- Invoices/Bill of Lading/Airway Bills/Exchange Control Copies of Bill of Entry for home consumption submitted with AD.
- Payment of import still outstanding in the books of importer.
- Both transactions of sale and purchase may be reported separately in R returns.
- The relative EDF will be released by AD only after entire export proceeds are adjusted/received.
- Set off must be in respect of **same overseas buyer and supplier** and consent to be obtained.

Probable Contraventions – Export of Goods and Services (Contd…)

MERCHANTING TRADE: For transaction to be eligible for merchanting trade following conditions shall be fulfilled:

- Goods must not enter Domestic Tariff Area and state of goods must not undergo any transformation.
- Merchanting trade is a peculiar kind of import – export.
- In this the goods are imported and the same goods are directly shipped to the final customer's destination. The goods do not touch the Indian territory at all.
- The import documents are received through banking channels.

  Goods involved in the transactions are permitted for export/import under prevailing Foreign Trade Policy and all rules, regulations and directions applicable to export (except Export Declaration Form) and import (except Bill of Entry) are complied with for the export leg and import leg, respectively.
- Both legs of Merchant Trade Transactions are routed through same AD Bank.

Probable Contraventions – Export of Goods and Services (Contd…)

- The entire merchant trade transactions should be completed within period of 9 months and there should not be any outlay of foreign exchange beyond 4 months.
- In case any advance against export leg is received, AD must ensure that the same is earmarked for making payment foir import leg.
- Confirmed orders have to be received by Merchanting traders from the overseas buyers.
- Short-term credit either by way of suppliers' credit or buyers' credit is not available for merchanting trade or intermediary trade transactions.

Probable Contraventions – Import of Goods and Services

- Remittances against imports to be made within six months from the date of shipment.
- AD may give guarantee for any debt or obligation or liability incurred by resident and owned to non-resident, in respect of import on deferred terms in accordance with approval of RBI for import on such terms.
- AD may also give guarantee in favour of non-resident service provider on behalf of resident who is a service importer.

  Amount of guarantee not to exceed USD 5,00,000 for importer other than public sector company or department / undertaking of government of India / state government.

  In case of public sector company or department / undertaking of government of India / state government, guarantee amount exceeding USD 1,00,000 shall not be issued with prior approval of Ministry of Finance.

Probable Contraventions – Import of Goods and Services (Contd…)

- **Evidence of import - Physical Imports**

In case of all imports, where foreign exchange remitted exceeds USD 1,00,000, it is obligatory on part of AD Bank to ensure that importer submits:

- Exchange control copy of Bill of Entry of Home Consumption
- Exchange control copy of Bill of Entry for warehousing, in case of 100% EOU, or
- Customs Assessment Certificate or Postal Appraisal Form where import is made by post, or
- Courier bill of entry as declared by courier companies for import made by couriers,
- Exchange control copy of the Ex-Bond Bill of Entry or Bill of Entry issued by customs authority for goods imported and stored in Free Trade Warehousing Zone or SEZ units of warehouses or custom bonded warehouses

Probable Contraventions – Import of Goods and Services (Contd…)

- **Evidence of import – Non Physical Imports**

Where imports are in non-physical form i.e. software or data through internet/datacom channels and drawings and designs through e-mail/fax -

- Certificate from Chartered Accountant that software/data/drawing/design has been received by the importer is to be obtained.

AD banks should advise importers to keep customs authorities informed of non-physical imports made by them.

COMPOUNDING OF CONTRAVENTIONS

MASTER DIRECTION NO. 4
&
Foreign Exchange (Compounding Proceedings) Rules, 2000

Background

- Contravention is breach of provisions of FEMA and rules / regulations / notifications / orders / directions / circulars issued there under.
- Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal.
- Section 15 of FEMA 1999 covers powers to compound contraventions and empowers compounding authority to compound the contraventions.
- Section 13 of FEMA 1999 covers penalties in respect of contraventions which are compounded.

Powers to Compound

- The government has notified Compounding Rules, 2000 vide Notification No. G.S.R.383(E) dated 3rd May 2000.
- Responsibility for administering compounding of contraventions is placed with Reserve Bank except of contraventions under Section 3(a) of FEMA 1999.
- Directorate of Enforcement can compound contraventions under clause (a) of Section 3 of FEMA, 1999 (dealing essentially with Hawala transactions).

Delegation of Powers

- Compounding powers with respect to following contraventions have been delegated to regional offices of Reserve Bank.
  - Delay in reporting of inward remittance for issue of shares.
  - Delay in filing Form FC-GPR after issue of shares.
  - Delay in issue of shares/refund of share application money beyond 180 days
  - Violation for pricing guidelines for issue of shares.
  - Issue of in-eligible instruments such as non-convertible debentures etc.

Delegation of Powers (Contd…)

- Issue of shares without approval of RBI or FIPB respectively, wherever required.
- Delay in submission of FC-TRS on transfer of shares from Resident to Non-resident and vice-versa.
- Taking on record transfer of shares by investee company, in absence of certified FC-TRS.

Delegation of Powers (Contd…)

- The work of Foreign Investment Division (FID) viz. Liasion/Branch/Project Office (LO/BO/PO), Non Resident Foreign Account Division (NRFAD) and Immovable Property (IP) division has been transferred to FED, CO Cell, New Delhi.
- Accordingly following contraventions will be compounded at FED, CO Cell, New Delhi:
  - Contraventions relating to acquisition and transfer of immovable property outside India.
  - Contraventions relating to acquisition and transfer of immovable property in India.

Delegation of Powers (Contd…)

- Contraventions relating to establishment in India of Branch office, Liasion office or Project office.

- Contraventions falling under Foreign Exchange Management (Deposit) regulations, 2000.

PROCESS

- Applications relating to LO/BO/PO, NFRAD and IP shall be submitted to FED, CO cell, New Delhi.
- For all other contraventions applications may be submitted to Cell for Effective Implementation of FEMA (CEFA), foreign Exchange Department, 5th Floor, Amar Building, Sir P. M. Road, Fort, Mumbai – 400 001.

PROCESS (Contd…)

- The application may be submitted on being advised of a contravention through memorandum or *suo moto* on being made or becoming aware of the contravention.
- Application shall be submitted with prescribed fee of Rs. 5,000/- by way of demand draft in favour of "Reserve Bank of India" payable at concerned regional office.

PROCESS (Contd…)

- Following documents shall also be furnished along with the application:
  - Details as per the annexes relating to FDI, ECB, ODI, LO/BO as applicable.
  - Copy of Memorandum and Articles of Association (in case of company)
  - Copy of latest audited balance sheet.
  - Undertaking that the applicant is not under any investigation of any agency such as DOE, CBI etc.
  - Copy of PAN of the applicant.
  - ECS Mandate.

PROCESS (Contd…)

- The proceedings would be concluded and order shall be issued within 180 days of the receipt of the compounding application.
- The compounding authority may call for additional information, record or any other document relevant to the proceedings.
- Such documents are to be submitted within period specified by the authority else the application can be rejected.

Classification of Contravention

- The nature of contravention is determined by following points:
  - Whether it is technical and / or minor and needs only administrative cautionary advice
  - Whether it is of serious in nature and warrants compounding
  - Whether it involves money-laundering, national security concerns involving serious infringement of regulatory framework.
- Once a compounding application is filed suo moto admitting the contravention, the same will not be considered as 'technical' or 'minor' and process of compounding shall be initiated.[A.P. (Dir Series) Circular No. 11 dated July 31, 2012]

Deciding of amount imposed

- The following factors shall be considered to arrive at the quantum of sum on payment of which contravention shall be compounded:
  - Amount of gain of unfair advantage, wherever quantifiable made as result of contravention.
  - Amount of loss caused to any authority / agency / exchequer as a result of the contravention
  - Economic benefits accruing to the contravener from delayed compliances
  - Repetitive nature of contravention, track record and / or history of non-compliance of contravener
  - Conduct of contravener in undertaking the transaction
  - Disclosure of full facts in application and submissions made during personal hearing
  - Any other factors.

Quantum of Penalty

- Up to thrice the sum involved in such contravention where the amount is quantifiable.
- Up to Rupees Two Lakh, where the amount is not quantifiable
- Where the contravention is a continuing one, further penalty may extend to Rupees Five Thousand for every day after the first day during which such contravention continues.

Compounding Order

- Compounding authority shall pass an order after giving opportunity of being heard to the contravener.
- The order has to specify the provisions of the act, rules, directions etc. under which contravention has taken place along with the details of the alleged contravention.
- The sum for which contravention is contravened is to be paid within 15 days of the order by way of demand draft in favor of "Reserve Bank of India"

Compounding Order (Contd…)

- After the realisation of the sum, certificate in this regard shall be issued by the Reserve Bank indicating that the applicant has complied with the order passed by the compounding authority.
- In case on non payment of amount within 15 days of the order, it will be treated as if applicant has not made any compounding application to Reserve Bank.
- Once the order is passed, the provisions of rules do not give any right to applicant to seek to withdraw the order or hold it void or request a review of order.

Certain Pre-requisites

- If a contravention is committed by any person within a period of 3 years from the date on which a similar contravention committed by him was compounded, such contraventions would not be compounded. The same would be dealt with under relevant FEMA provisions.
- Any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.

Certain Pre-requisites (Contd…)

- In case of contraventions for transactions which require proper approvals or permission from government or any statutory authority and the same have not been obtained, such contraventions shall not be compounded ***UNLESS*** required approvals are obtained from concerned authorities.

Questions …

THANK YOU

FIRST DESERVE

AND

THEN DESIRE!!