

## FEMA law pertaining to Succession – Inheritance and Gift<sup>1 2 3 4</sup>

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<sup>1</sup> In this article, FEMA provisions for Inheritance and Gift have been discussed. While some provisions of other laws have been discussed and observations have been made, readers are advised to take professional advice on other legal matters and not rely on this article for matters other than tax & FEMA.

<sup>2</sup> FEMA law is not drafted in a precise manner. Hence there are gaps in the law and some controversies on interpretation of provisions. These have been discussed at the relevant places. Wherever the matter is not clear or there is a doubt of confusion, it is advisable to obtain clarification / approval from RBI.

<sup>3</sup> There can be several laws dealing with one transaction / asset. Each law may have its own meaning and implications. Hence what may be considered as permitted in one law, may not be considered as permitted in another law. The reader should consider all issues and form a view.

<sup>4</sup> This article makes a legal analysis of FEMA provisions. **It is not a legal opinion.** The views expressed here may or may not be agreed upon by the regulator or the judiciary.

### **Abbreviations**

EEFC A/c	Exchange Earner's Foreign Currency Account
FCNR	Foreign Currency (Non-Resident) Account
FEMA	Foreign Exchange Management Act
GOI	Government of India
IP	Immovable Property
LRS	Liberalised Remittance Scheme
NDI rules	Non-Debt Instrument rules under FEMA
Notn	Notification
NRE	Non-Resident (External) Rupee Account
NRI	Non-resident Indian
NRO	Non-Resident Ordinary Rupee Account
OCI	Overseas Citizen of India cardholder
OI rules	Overseas Investment rules under FEMA
PIO	Person of Indian Origin
RBI	Reserve Bank of India
Reg	Regulation
RFC A/c	Resident Foreign Currency Account
RFC (Domestic) A/c	Resident Foreign Currency (Domestic) Account
Ru	Rule
S/Ss	Section / Sections
SNRR	Special Non-Resident Rupee Account

## 1. <sup>5 6</sup> Background:

### 1.1 Succession – what does it involve?

By succession, normally what comes to mind are Wills and Trusts. However Succession is more than that. It is a more a personal matter than a legal matter. It involves understanding of the family background and family desires. These are amongst the most important considerations in a succession plan.

Law comes later. Drafting documents comes even later.

Succession involves transfer (transmission) of family wealth to the next generation. Next generation could be bloodline (lineal descendants or even ascendants) or outside it.

Transfer of wealth is different from transfer of business. When it comes to business, it may not be possible to divide the business. It requires competence to manage the business. Different businesses may be divided, but one business cannot be split easily. Business may be transferred to one heir and other heirs may be compensated with other assets. Whereas transfer of non-business wealth can be more specific. It is easier to divide the wealth and transfer.

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<sup>5</sup> The author acknowledges valuable contribution by CA Mr. Rashmin Sanghvi, Rutvik Sanghvi and Bhavya Gandhi.

#### <sup>6</sup> Guidelines for reading this article:

- FEMA has several rules governing the transactions. One transaction may be covered by multiple provisions. It is advisable to read the background carefully to understand some concepts of FEMA. **Paras 1.9 to 1.11 discuss key FEMA issues which have to be considered. These provisions can apply to multiple situations. It will be useful to read these carefully.**
- The article has become long as there are several permutations of the situations. It becomes difficult to read in one sitting. I have therefore divided the article into paras. The main paras are 2 to 7. Each para can be read independently.
- Below each situation, general observations have been given which give a bird's eye view of the situation. One should go to specific sub-paras below to understand the FEMA rules.
- While reading the para, the reader may keep in mind the situation described in the beginning of the para. For example, para 2 deals with Indian testator / donor having Indian assets and non-resident heirs / donees. Entire discussion in para 2 is based on this situation. Hence I may not have repeated the phrase "non-resident heir / donor". I may have just used the word "heir / donor". If I have mentioned that gift can be given, it means the resident donor can give gift to a non-resident donee of Indian asset. If I have to use the phrase "non-resident heir / donor", or mention "Indian resident donor can give a gift of assets to a non-resident donee" every time, it becomes repetitive and adds to the length of the article.
- Similarly, each sub-para deals with the specific asset. For example, para 2.2 deals with immovable property of Indian resident testator. The entire discussion in sub-para is for this specific asset under specific situation.

Succession can also involve creating adequate financial means for weaker family members, members who may not be able to manage assets on their own. It may involve transferring assets which are simple to manage such as bank fixed deposits.

Thus, succession can involve a whole gamut of issues.

## 1.2 Means of succession:

Means of succession can be by way of Gift, Will, Trust, Insurance, etc. For different levels of family size and family assets - different means or a combination of means are relevant. For large wealth - combination of means is more relevant.

It can involve non-binding means such as family agreements, discussions and mentoring by senior generation.

## 1.3 Why Gifts are important part of succession planning?

There can be several reasons. Some of these are:

i) A Will can be challenged. If it is challenged, the ownership of the asset becomes unclear. The matter can drag on for years. This can be especially serious if it involves say shares of a company which give control over a business. If the ownership of shares is not clear, other shareholders may get more rights over the company. To avoid disputes at the time of execution of the Will, making a gift during the lifetime of a person can be helpful.

ii) In case of inheritance, a probate from a Court is required if the testator has immovable property (IP) in Maharashtra, Tamilnadu or West Bengal. It takes a lot of time and costs to obtain a probate. Gift does not require any probate or Court involvement. Inheritance can also involve estate duty in some countries abroad.

iii) Some banks have asked for a probate even if it is not required! They say we don't know whether the Will which the heir is producing has been amended or replaced subsequently.

iv) In some cases, the Court has asked witnesses to a Will to appear personally in case of probate applications. This becomes difficult if the testator and Witnesses are in different cities or countries. A court had asked a Witness to come from abroad personally.

v) In one case, the registrar did not understand the difference between transmission (in case of inheritance) and transfer. He was not willing to register the transmission document as it did not contain the term "transfer"!

Till probate is obtained, further transactions will be stuck.

Gifts help to avoid issues of inheritance. Even though the thrust of succession is through inheritance, provisions for gifts are also covered. Gifts on the other hand can lead to tax issues and stamp duty as explained later.

#### 1.4 **Different meaning of “relatives” under different laws:**

In the case of gifts (and for few situations in case of inheritance), one has to consider different meanings of relatives under Companies Act and Income tax Act. FEMA refers to Companies Act for the meaning of relatives. For example, under the Companies Act, Brother’s son is not a relative (unless they are members of HUF). Grandson is not a relative (unless they are members of HUF). Whereas under the Income-tax Act, such persons are relatives. While there may be no income-tax on gifts between relatives, if under FEMA, persons are not relatives, it may not be possible to give a gift by a resident to a non-resident in some situations (or vice-versa in some situations). (Reducing the list of relatives under Companies Act was to liberalise. Adopting the same definition under FEMA has become restrictive. However, this is a separate issue. It has not been discussed here.)

#### 1.5 **Joint holder and Nomination:**

For bank accounts, shares, securities, immovable properties, etc., a good step is to have a joint holding or a nomination. Joint holding or a nomination is of course different from inheritance. If the heir is different from the joint holder or a nominee, then the joint holder or the nominee has to transfer the assets to the heir. However, the asset can be transferred to the joint holder or the nominee on death of the other holder/owner. They do not get stuck with the bank, or any other person. The bank account can be operated and assets can be transferred. Kindly note that here joint holder means adding a joint holder for the sake of convenience and not for co-ownership by the joint holder. There are however controversies as to whether a joint holder can be for convenience only (i.e. joint holder does not own the property), or joint holder is a true joint owner. Reader may take professional advice on this.

One also has to consider specific laws for nomination. For example, it seems under the Insurance Act, nominee is the absolute owner of funds on receipt of insurance policy proceeds after the death of the insured person.

#### 1.6 **Several laws and procedures:**

There can be several laws and procedures involved for succession. Some of these are:

- Indian succession act;
- Personal laws;
- Indian Trust act;
  
- FEMA in case of cross border assets;
- Company law in case of securities;
- Other laws such as SEBI, etc.;
- Laws pertaining to specific assets – e.g. land; etc.
- Income-tax law – S. 56, etc.;
- Stamp duty on Gift;
- Probate / succession certificate / letter of administration;
  
- Foreign laws – Succession laws, Estate duty, Trust law etc.;
- Process of Will execution.

It is important to note that the heir may have to consider succession laws of the country where assets are situated and the country in which the testator / donee is resident or domiciled, or the country of citizenship of the testator / donee.

#### 1.7 **Private Trust:**

Usually a private Trust is advised as a solution to many problems. But there are issues in case of a Trust. Indian Trust law is different from other country's Trust law. As a culture, we don't have Professional Trustees in India – except a few. For FEMA aspects of a private Trust, a separate article is available on our website -

[https://www.rashminsanghvi.com/downloads/foreign\\_exchange\\_law/FEMA/Private%20Trust%20issues%20under%20FEMA-2022.html](https://www.rashminsanghvi.com/downloads/foreign_exchange_law/FEMA/Private%20Trust%20issues%20under%20FEMA-2022.html)

**In this article, FEMA law for inheritance and gift has been covered. Gift can also be made to a Trust. To the limited extent of gift, Trust has been discussed.**

#### 1.8 **Basic terms for inheritance and gift:**

“Will” is a statement (document) by the author of the Will. It lays down the author's intention for distribution of his assets owned at the time of death, to the heirs in a specified manner. There can be oral Wills also. However written Will is always better. Normally the heirs are close family members. Some people provide for distant relatives, employees, well-wishers and charitable organisations.

The act of making provision for the heir in the Will is known as a “bequest” (verb). The property received is also known as a “bequest” (noun). It is also called a “legacy”. The act of acquiring property by the heir is known as

“inheritance”. Author of the Will is known as “testator”. The person who inherits property is known as “heir”. The person who executes the Will (who transfers assets to the heirs) is known as “executor”.

Where the testator and heirs are Indian residents and assets are in India, FEMA does not come in the picture. Similarly, where the testator and heirs are non-residents and assets are outside India, FEMA does not come in the picture. When the inheritance involves cross border transactions, FEMA comes in the picture. However, FEMA is peculiar. Some rare transactions which are ostensibly not covered under FEMA, may require a direction from RBI. (See para 7.5).

The act of transferring assets without consideration (giving assets) is known as “gift”. The person who gives a gift is known as the “donor”. The person who receives the gift is known as the “donee”. Gift may or may not involve a document. The donor may just give a gift and donee may accept it without any document. Again, where the donor and donee are Indian residents and the assets are in India, FEMA does not come in the picture. Where the donor and donee are non-residents and the assets are outside India, FEMA does not come in the picture.

## 1.9 Various transactions to be considered under FEMA:

- 1.9.1 FEMA has to be considered for bequest / inheritance, holding the inherited assets, sale of the assets, and repatriation of funds abroad in case of non-resident heirs. Similarly, FEMA has to be considered for bequest / inheritance, holding the inherited assets, sale of the assets, and remittance of funds into India in case of Indian resident heirs. **Any inheritance of a cross-border asset is a Capital Account Transaction.** Unless specifically permitted, a prior approval is required. Each step – inheritance, holding the asset, sale of asset, remittance of funds and income on the assets has to be examined.
- 1.9.2 Similarly for gifts, FEMA has to be considered for the gift, holding the asset after the gift, sale and repatriation of funds. Generally gifts from non-residents to residents are permitted. Gifts from residents to non-residents are permitted to some extent. Gifts have less flexibility compared to inheritance.

Gift is primarily a **Current Account Transaction**. For example, if an Indian resident receives foreign remittance in India as a gift from a non-resident, the transaction is over. There is no claim by the resident over the non-resident or vice-versa. The resident or the non-resident does not own any asset in another country. Hence gift is a Current Account transaction. Current Account Transactions can be undertaken freely except where there are restrictions prescribed. For giving a gift by a resident individual to non-resident, there is a restriction of US\$ 2,50,000 per year (through the Liberalised Remittance Scheme). But for this restriction, there would be no limit on gift. There are no

restrictions for receiving a gift by a resident from a non-resident. However say a non-resident wants to give a gift of immovable property abroad to an Indian resident, it will amount to a Capital Account Transaction for the Indian resident as it will give rise to an asset outside India. For such transactions, one has to consider various FEMA notifications.

- 1.9.3 Some situations require an approval from RBI. Some may be under automatic route – i.e. Government or RBI may already have permitted inheritance, gift, sale, and remittance of funds in the FEMA notifications. There are some situations which are not specifically permitted under FEMA, but allowed under the automatic route as a practice. These are discussed at appropriate places later.

It may be noted that by and large where the provisions do not allow the heir to hold on to the assets, or retain funds abroad, or repatriate the funds outside India, an application to RBI to do the opposite is also unlikely to be successful. RBI generally follows the policy laid down in the rules and regulations.

- 1.9.4 For bequest to anyone there is no restriction. However for inheritance, in some situations, approval from RBI is required. There may be further restrictions on holding the assets, sale and repatriation of funds. **Hence the issues are mainly for inheritors & executors to the estate** – inheritance, holding the assets, sale of assets, repatriation of funds.

For gifts however, **issues are for donors and donees.**

## 1.10 Some more FEMA background:

- 1.10.1 **Unfortunately FEMA is not drafted in a user-friendly manner. Further there are only a few provisions dealing with inheritance and gift specifically. In fact FEMA does not have specific provisions to deal with all kinds of assets. These provisions are spread over many notifications. This causes a lot of difficulties.** FEMA is drafted in such a manner that all cross border financial/commercial transactions are covered. Every “covered” transaction needs a permission – either a general permission; or a specific permission. RBI & GOI attention is on investments, loans, exports & imports. Other items like trusts & inheritance are insignificant from regulator’s perspective. Hence some provisions have not been made under FEMA. Wherever there is a gap in the regulations, RBI itself refuses to take corrective actions.

We assume that a law must be complete in areas where it is applicable. Then try to interpret the law. But fact is that FEMA is incomplete & confusing. The liberalisation under FEMA has not been taken to its full logical conclusion.

While liberalisation has taken place, usually liberalisation comes with conditions. Some liberalisation has been reversed. Classic case is of LRS where



it was supposed to be a liberal “no questions asked” scheme. Today however it is a very restricted scheme compared to the original scheme. While liberalisation takes place, the “control mindset” is still there.

When faced with such a situation, options available to the person are:

- (i) Avoid the situation. In other words, do not make a Will where heirs will have to go seek RBI permission. Or
- (ii) Be prepared to apply to RBI & take a permission. Do not plan/ enter into a transaction which is not permitted under FEMA.

1.10.2 FEMA legal provisions dealing with inheritance and gift are reproduced in the Annexures. In Annexure A, provisions applicable to Indian resident heirs / donees are reproduced. In Annexure B, provisions applicable to non-resident heirs/ donees are reproduced. Some provisions are given in this article at relevant places. Only specific provisions are reproduced. Other general provisions are not reproduced.

FEMA provisions for **inheritance by resident heirs** and **receipt of gift by Indian residents** deal only with the following:

- foreign exchange,
- foreign security,
- immovable property outside India,
- foreign currency account,
- exemption from realisation and repatriation of foreign exchange,
- surrender of foreign exchange to bank.

Provisions for **inheritance by non-resident heirs** and **receipt of gift by non-residents** deal only with the following:

- Indian currency,
- Indian security,
- immovable property in India,
- Indian rupee account,
- remittance of funds abroad by NRI, PIO, foreigners (Non-NRI/Non-PIO).

As an example of gap in FEMA, specific regulations for gold, objects of art, intellectual property rights, HUF, Trust are not there at all. There are also no specific regulations for inheritance even for bank account. There are some regulations for nomination in case of non-resident’s bank account in India, but not for inheritance. Nomination is different from inheritance. Even where there are rules and regulations for specific assets, some of these don’t have provisions for inheritance.

Some provisions such as remittance of funds abroad apply generally to all assets. Some provisions are specific to the asset. Usually all provisions, permissions etc. come with several conditions attached. One should carefully consider these.

1.10.3 The executor of a Will is responsible for distribution of the assets to the heirs. In some situations he may have to apply to RBI for approvals / distribution etc. However the executor's status does not affect the inheritance. In practice, if the executor is a non-resident and has to hold the assets in his own name for some time, there may be difficulties. For example, will the bank allow him to open a bank account? A person becoming an executor to a Will which involves cross-border inheritance should be prepared to understand applicable FEMA provisions or take legal assistance in order to execute the Will. It may not be a straight-forward execution.

1.10.4 Some other points can be kept in mind are given below.

i) Inheritance is more liberal if testator is a Returning Indian (see para 3.2.4) compared to a regular Indian resident.

ii) Gift by Returning Indian is also more liberal compared to a regular Indian resident.

iii) NRI/OCI/PIO has more flexibility compared to an outright foreigner. It may be noted that PIO term has been removed for Indian securities and immovable property in India. Only NRI and OCI have more flexibility to acquire Indian securities and immovable property in India. PIO however continues for bank accounts and deposits. Kindly note that NRI and PIO have been defined. OCI means an individual non-resident who is a registered as a OCI cardholder under Citizenship Act. PIO includes an OCI cardholder but OCI does not include a PIO. **Hence it is advisable for PIOs to obtain OCI card.** In this article OCI and OCI cardholder has been used synonymously.

iv) If an heir can acquire the asset by way of purchase or gift, inheritance is generally permitted.

v) The asset which is to be bequeathed or gifted, should have been acquired as permitted under FEMA. Otherwise the heir or the donee may face difficulties.

vi) **For substantiating that assets have been acquired as per FEMA rules, documentary evidence has to be produced.** Corporate entities have formal systems for preserving the documents. For individuals, it becomes a difficult exercise – especially after the testator has expired; or donor has given away the gift.

## 1.11 Heir or donee – is the person bound to accept the inheritance or the gift?:

1.11.1 Normally an heir will accept the inheritance. The donee also will normally accept a gift. However, this is not necessarily so. Some people out of self-respect or any other reason may not accept the inheritance or a gift. This issue is more relevant for an Indian resident getting an inheritance or a gift of foreign assets.

If the heir does not accept the inheritance, what happens under succession law is a separate matter. In case of gift, if the donee does not accept the gift, it remains with the donor. Nothing turns on it. Let us consider the relevant FEMA provisions.

1.11.2 Sections 4 and 8 of FEMA provide as under:

*“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.*

*Section 8 - Realisation 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 realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.”*

Relevant clauses of Notn. 9(R) dated 29.12.2015 - Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 – are reproduced below.

*“Reg. 2(iii) – ‘foreign exchange due’ means the amount which a person has a right to receive or claim in foreign exchange;*

**Reg. 3 - Duty of persons to realise foreign exchange due :-**

*A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -*

- (a) that the receipt by him of the whole or part of that foreign exchange is **delayed; or***
- (b) that the **foreign exchange ceases in whole or in part to be receivable** by him.”*

**Reg. 7 - Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals :-**

*A person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.*

**Under these provisions, can an inheritor or a donee refuse to accept the assets?** One can analyse the situation as under.

Section 4 puts a blanket bar on even acquiring foreign exchange, foreign securities and immovable property outside India except as provided in FEMA. Section 8 and Notn. 9(R) apply to foreign exchange.

- 1.11.3 Let us consider foreign exchange first. Section 8 provides that if any foreign exchange is due to or has accrued to an Indian resident, he is required to bring it to India. Normally “due” means something which has become a right, or a credit in person’s favour on account of sales or services or investment or some activity. “Accrue” means something which been earned. There is some difference between “accrue” and “due”. Interest income can accrue daily but can become due on year end. For FEMA purpose, we may consider these terms to have similar meaning.

Reg. 2(iii) of Notn. 9(R) defines “foreign exchange due” to mean foreign exchange which a person has a “right to receive” or “claim”. If any foreign exchange has become due to an Indian resident, he has to realise it and repatriate it back to India.

Can one say that an inheritance “accrues” or is “due” to an Indian resident? In my view, inheritance does not accrue or become due. The heir simply receives the legacy without becoming due or accruing.

In case of gift, the donee can always refuse it. Until the donee accepts it, the gift is not complete. Here also one cannot say that when the donor offers to give a gift, it becomes due to or has accrued to the donee. If the gift is accepted, it is received. If it not accepted, then that is the end of the matter. Gift does not become due or does not accrue.

Once the funds are received, these have to be surrendered to the bank within 180 days. (Reg. 7 of Notn. 9(R)).

- 1.11.4 For foreign securities and immovable property outside India, sections 8 and 9 of FEMA do not apply. Only section 4 applies which states that except as provided in FEMA, a person cannot acquire or hold these assets. There are specific provisions under S. 6(4) and OI rules (discussed later). One can

receive securities or IP only as stated in these provisions and subject to compliance. Otherwise, one cannot even acquire, hold or possess such assets.

If one receives an inheritance, what should a person do? There is no provision where if a person receives an asset on inheritance, what is a person supposed to do. If he does not accept the bequest, he is actually giving it over to someone. In case of gift, if a person does not accept a gift, that is end of the matter. If he wants to receive a gift, very strictly, a prior approval is required as section 4 prohibits even acquisition and holding of assets except as permitted. Practically if the resident receives any foreign asset on account of inheritance or gift, he should bring it to India, or sell it and remit the funds to India.

Thus for gift, the resident person has an opportunity to consider FEMA rules and then decide what to do with the gift offer. For inheritance the person simply receives it.

- 1.11.5 The above are legal issues. I will however go to a fundamental aspect. Some people would not like to accept inheritance. This could be out of self-respect or principles or any other reason.

If the heir is an Indian resident and does not want to accept the inheritance or a gift, there is no bar per se. Section 123 of the Indian Succession Act 1925 permits the heir to refuse the bequest. Sections 4, 8, 9 and the relevant regulations discussed above provide that the Indian resident has to bring the assets to India / surrender the funds to the bank in India. These cannot override the Indian succession act.

If the person accepts the bequest and then wants to give it over, regular FEMA rules will apply. But if he does not want to accept it, the law cannot force him to accept it.

One may argue that under inheritance, there is no suspense about ownership. The testator owned the asset till he was alive. The next moment the heir owns it. Some litigation or ambiguity or dispute does not violate the fact that some person (heir) is the owner. Hence can one say that the Indian heir is the owner and hence FEMA rules will apply? In my submission that cannot be the case. If the heir does not wish to accept the inheritance, he can give a no objection to the Executors to distribute the assets as they please. This issue however remains controversial.

It is possible that the heirs may arrive at an understanding that the assets of the testator may be distributed in a manner where the Indian resident may receive some other asset instead of what the testator may have stated in his Will. This can happen for various reasons such as difficulty in dividing an asset, etc. This situation will be considered as exchange of assets between

heirs and FEMA will apply accordingly. Depending on the facts, a prior approval may be required.

- 1.11.6 For other assets, there are no specific provisions under FEMA. If the Indian resident refuses to accept a gift, it is end of the matter. For inheritance, in my view the resident can refuse to accept the bequest. However once the resident agrees to accept the inheritance, he has to bring the asset in India, or sell the assets and bring back the funds.

## 1.12 Indian Trust:

One of the questions usually asked is – whether Indian Trust with non-resident beneficiaries can be the heir to the assets?

Briefly, there is apparently no approval required. However, there being no specific provision under FEMA, it will be better to obtain an approval from RBI – if there are assets where beneficiaries are not permitted to own directly.

Reg. 4(2)(ii) of Notn. 13(R) (*Foreign Exchange Management (Remittance of Assets) Regulations, 2016*) provides that if parents or relatives (as per Companies Act 2013) make a Settlement which comes into effect on death of the Settlor, the NRI / PIO can remit upto US\$ 1 mn. per year. There cannot be a “settlement” which comes into effect on death. Settlement means a transfer/gift during the lifetime of the settlor. Settlement coming into effect on death is effectively inheritance on death. Here in my view the meaning could be that a Trust comes into effect on death (i.e. settlor would have provided for the Trust in the Will). It is equivalent to inheritance by the Trustee (of the Trust). If assets are inherited directly by the NRI / PIO, the NRI / PIO has a facility of remitting US\$ 1 mn. per year. Similarly, where the Trustee inherits the assets, NRI/PIO beneficiary can remit upto US 1 mn. per year on distribution by the Trustee. If the Trust has to come into effect while the settlor is alive, that requires approval from RBI.

For details on Trust, one may refer to article on [www.rashminsanghvi.com](http://www.rashminsanghvi.com).

## 1.13 Foreign Trust:

People staying abroad would like to have a Foreign Trust as an heir to Indian assets. There is no clarity on such foreign trusts.

Can a non-resident settle foreign assets in a foreign Trust, which has Indian resident as beneficiaries? It is possible. However, there could be some issues. One may refer to the article on Trusts on [www.rashminsanghvi.com](http://www.rashminsanghvi.com).

1.14 **Format of this article:**

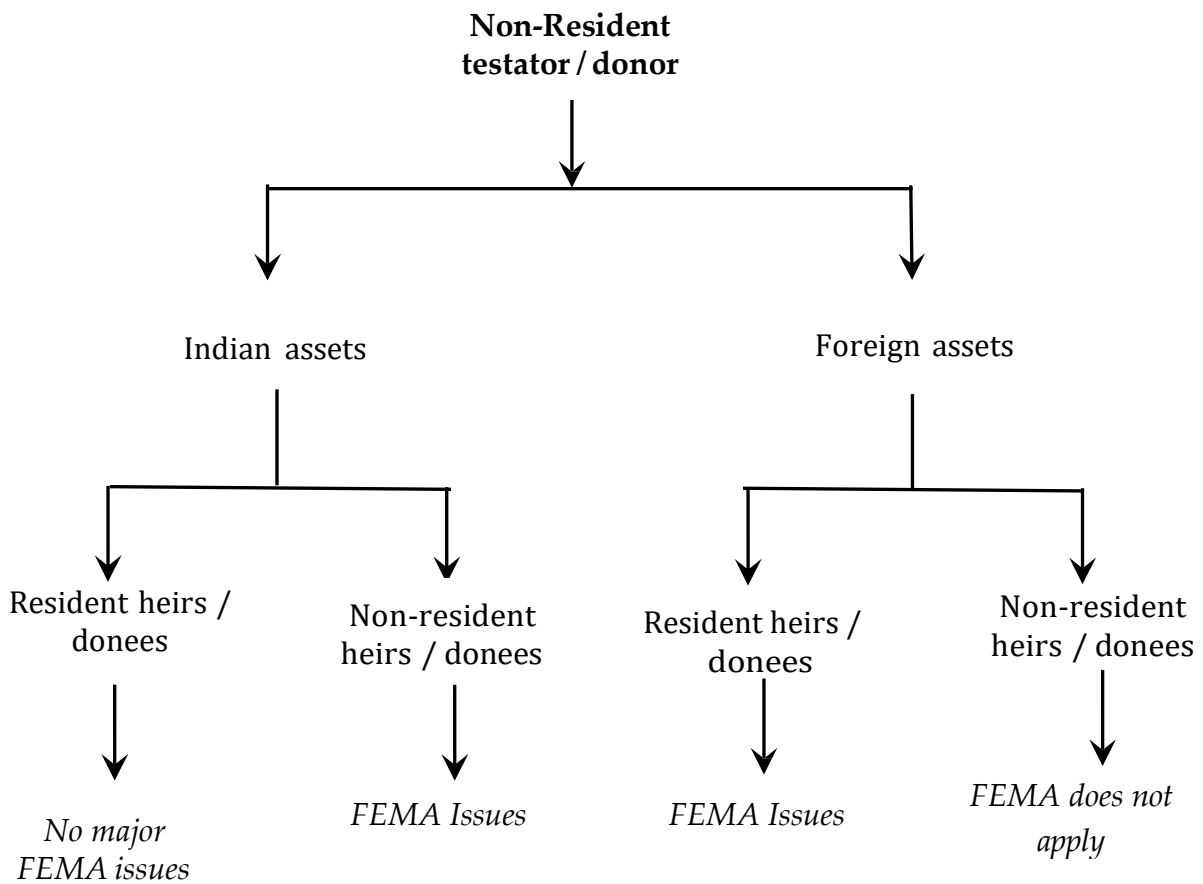
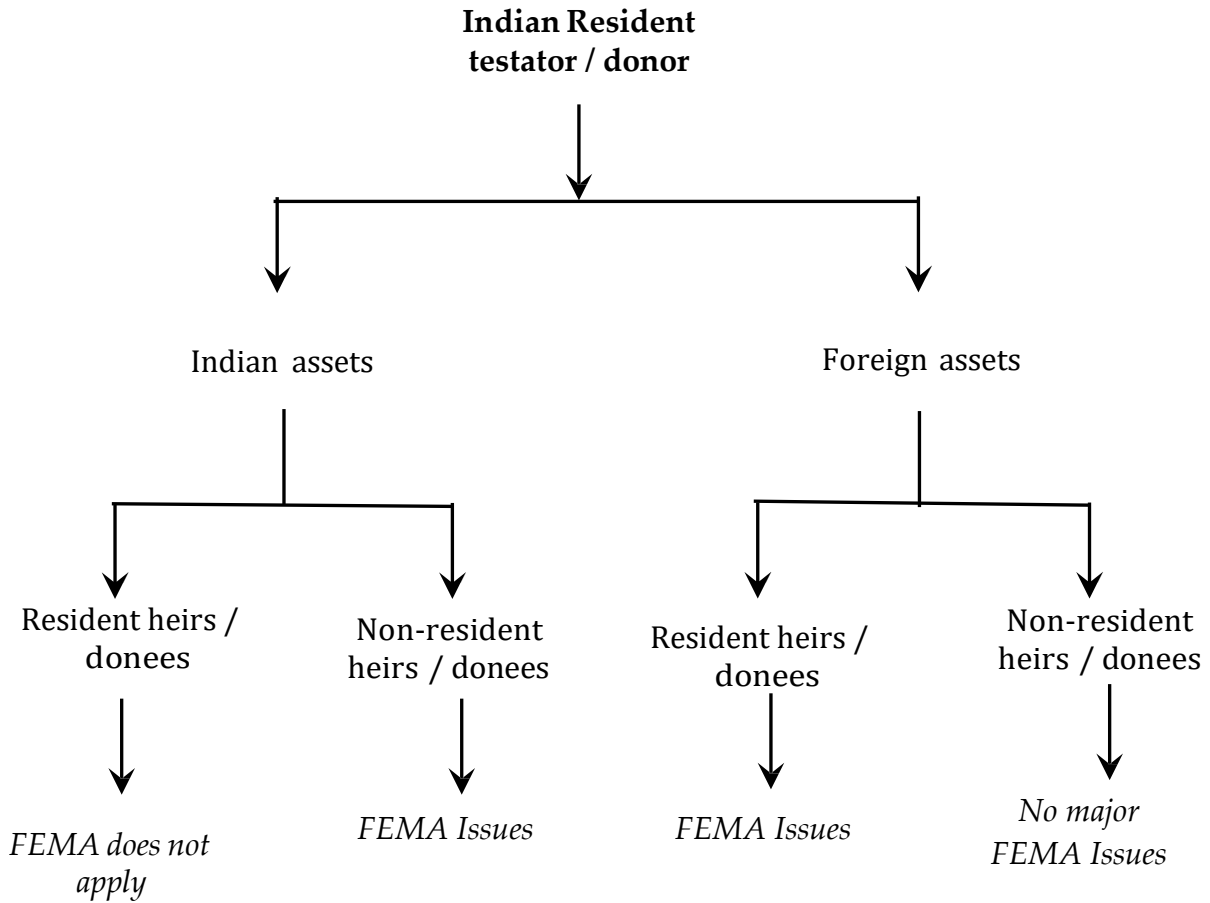
For this article, the matter has been divided into two situations as under –

- i) Testator is an Indian resident on death.
- ii) Testator is a non-resident on death.

Testator's assets are in India and abroad. Heirs are in India and abroad.

Situation of testator also can have implications. For example, the testator has acquired assets abroad while he was a non-resident of India. At the time of his death, he could be a non-resident of India, or he could be an Indian resident. Both these have different outcomes.

There can be several situations. A chart is given below.





Thus there are 6 situations in which FEMA has to be considered. The table lays down same situations as in the chart above, but in a tabular form.

Sr.	Testator / Donor	Assets	Heirs / Donees	Para dealing with this situation
1.	Indian resident	Indian asset	Indian Resident	NA
2.	Indian resident	Indian asset	Non-resident	2
3.	Indian resident	Foreign asset	Indian Resident	3
4.	Indian resident	Foreign asset	Non-resident	4
5.	Non-resident	Indian asset	Indian Resident	5
6.	Non-resident	Indian asset	Non-resident	6
7.	Non-resident	Foreign asset	Indian Resident	7
8.	Non-resident	Foreign asset	Non-resident	NA

The situations in serial numbers 2 to 7 are analysed in paras 2 to 7 below for various kinds of assets.

The assets could have been acquired in different manners – purchase, gift, inheritance. These could have been acquired with foreign exchange or rupees. These could have been acquired at different times - as a resident or a non-resident. Various permutations add to the complexity.

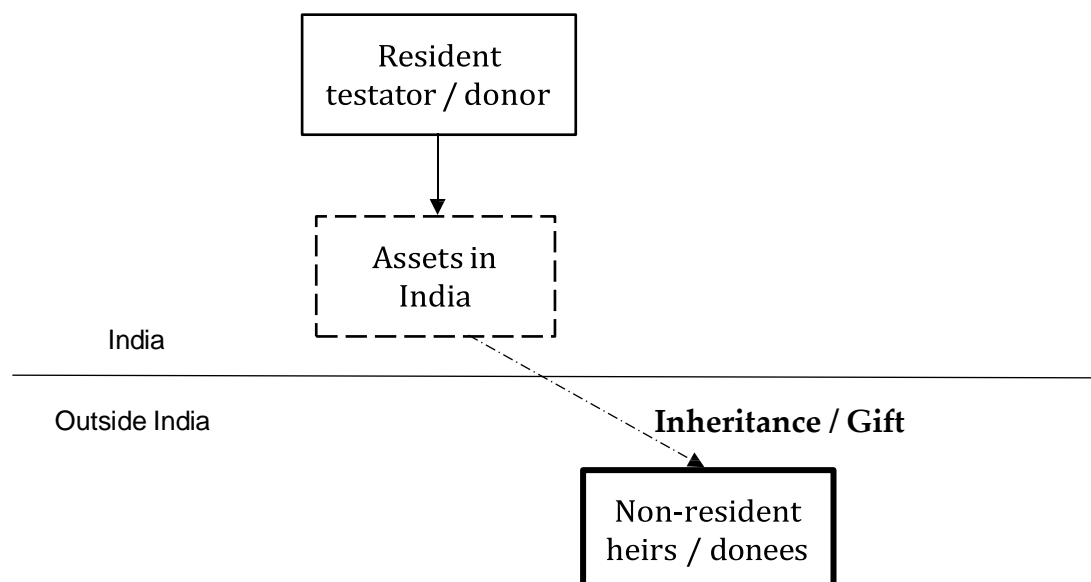
FEMA regulations are framed according to the kind of assets. Thus immovable property, shares, loans, etc have different regulations. There are no specific rules pertaining to gold, bullion, jewellery, precious metals, paintings, work of art, intellectual property such as copyright and others.

In this article, I have considered the situation according to the assets of the testator / donor.

With this background, let us see the specific provisions under different situations.

2. **Situation 1 - Testator / Donor is an Indian resident, has Indian assets and heirs / donees are non-residents:**

2.1.1 A chart is given below for the above situation.



This is one of the most common situations. Children of several Indian parents migrate abroad. The parents continue to be Indian residents for various reasons.

The testator could have acquired assets in India in any of the following manners.

- Acquisition as an Indian resident.
- Acquisition while being a non-resident (and then returning to India).

2.1.2 **General observations:**

a) Inheritance is permitted on non-repatriable basis – for some assets approval is required to hold the assets.

It is possible that the testator (while he was a non-resident) may have purchased assets in India as repatriable asset by remitting foreign exchange or from NRE / FCNR account. Once the testator becomes an Indian resident, the character of repatriability is lost.

b) Remittance facility is permitted under automatic route under different situations. Wherever permitted, upto US\$ 1 mn. per financial year can be made by each heir. For excess remittance, an approval is required from RBI.

c) Gift to non-resident is permitted for some assets. For some assets, an approval is required. Under LRS, gift of funds to non-residents by remitting funds abroad, and to NRIs / OCIs in rupees in India is permitted.

## 2.2 Immovable Property (IP):

2.2.1 IP has more clear rules for inheritance. An Indian resident can bequeath IP to anyone. However, for the inheritor, one has to examine FEMA rules.

2.2.2 Under the *Foreign Exchange Management (Non-debt Instruments) Rules, 2019* (NDI rules), an **NRI or OCI** can inherit the IP.

As per Rule 24(c)(i) of NDI rules – “*Acquisition and transfer of property in India by a NRI or an OCI –*

*A NRI or an OCI may -*

*(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property:-*

*(i) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these rules; or*

*(ii) from a person resident in India;”*

In the above rule, sub-clause (ii) appears to state that NRI or OCI can inherit the property “from a non-resident who had acquired from an Indian resident”. However that is not the intention. Sub-clause (i) is sufficient for inheritance from a non-resident. Sub-clause (ii) is meant to provide that NRI and OCI can inherit the IP from an Indian resident. Master Direction No. 12 on Immovable Property updated upto 1.9.2022 (when erstwhile FEMA Notification no. 21(R) was in force), clarifies this in para 3.1.4.

In most of the cases, children of the testator in this situation will be NRIs/ OCIs. Hence children can inherit the property.

After inheritance, the IP can be sold to an Indian resident or to an NRI/OCI.

Funds can be repatriated abroad under general facility of US\$ 1 mn. scheme. [Reg. 4(2) of *Foreign Exchange Management (Remittance of Assets) Regulations, 2016*].

Agricultural land, plantation property and farm house (agricultural property) can also be inherited by the NRI / OCI. Even agricultural activities can be carried out. However such a property can be sold to an Indian resident only.

- 2.2.3 a) If the heir is an **outright foreigner (not an NRI or OCI)** or a foreign person such as a foreign company, an approval is required from RBI to **hold the property on inheritance.**

It may be noted that before 2018, a foreign citizen of Indian Origin (Person of Indian Origin or PIO) could acquire IP just as an NRI. However, PIO concept has been removed for Immovable Property (and securities). PIO concept continues for bank accounts, deposits and some other assets. Therefore, if children have acquired foreign citizenship but have not acquired OCI card, approval will be required to hold the property on inheritance. However, the remittance facility of US\$ 1 mn. per year is permitted to a PIO. PIO includes an OCI. Thus NRI / PIO / OCI are all eligible for this remittance facility.

b) Subsequently if the foreigner wants to **sell the IP to an Indian resident**, no approval is required. The buyer should be eligible to acquire the IP. [Ru. 30(2)]. Under Ru. 31, a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan and Democratic People's Republic of Korea (DPRK) is **not allowed to acquire immovable property without RBI approval**. If such citizens are Indian residents, legally FEMA does not apply. However there is a bar on such citizens to acquire IP in India. Legally, this rule is ultra-vires as FEMA does not apply to Indian residents having Indian IP. However, this is not the scope of this article. Hence it is not discussed further. One may visit our firm's website for a presentation on Immovable Property.

Thus except for citizens of the above 11 countries, IP can be sold to any Indian resident. Practically most of the times, sale will be to Indian citizens. No approval is required for sale to Indian residents.

**However, sale to NRI / OCI** requires an approval.

Sale to outright foreigner is not permitted.

- c) **Repatriation of funds** - For a foreigner, a prior approval is required to repatriate the funds abroad – unless the situation is as specified in sub-para (d) below.
- d) **General facility for repatriation of funds** – Notification No. 13(R) - *Foreign Exchange Management (Remittance of Assets) Regulations, 2016* deals with repatriation facilities. These facilities are for all assets and not just IP. Discussion in this para will apply to other assets also.

One may note that sale of an asset and remittance of funds are separate matters. **Notification 13(R)** is for repatriation of funds. For sale, separate rules apply depending on the kind of assets.

i) Under Reg. 7(1)(i)(a), an **executor of the Will** can repatriate upto US \$ 1 mn. per financial year on account of legacy, bequest or inheritance to a foreign national resident outside India. Under this regulation, the heir can also remit funds.

ii) Under Reg. 4(1)(ii) read with Ru. 29(1) of NDI rules, a **foreign citizen (not a PIO or a citizen of Nepal and Bhutan)** who has inherited assets from a person referred to in **S. 6(5) (Emigrating Indian)**, can remit upto USD 1,000,000 per financial year.

iii) Under Reg. 4(1)(iii), a **widow/ widower who is a foreign citizen (not a PIO or a citizen of Nepal and Bhutan)** who has inherited assets of the deceased **spouse who was an Indian citizen resident in India**, can remit upto USD 1,000,000 per financial year. Relevant documents for inheritance should be provided by the widow / widower.

iv) An **NRI or a PIO** can remit upto US\$ 1 mn. per financial year under Reg. 4(2)(i). [This is a general permission for all NRO funds and not only for inheritance].

v) For remittance exceeding US\$ 1 mn. on account of inheritance by a foreign citizen, NRI or PIO, or in case the person considers that it will cause him hardship if remittance is not made, an **application can be made to RBI**. [Reg. 7(1)(i) and Reg. 7(1)(ii) of Notn. 13(R)]. Good justification will be required. If RBI is convinced of the need for repatriation, it may grant an approval.

It has been provided that repatriation under clauses (ii), (iii) and (iv) above, remittance should be through the same bank if it is being made in more than one instalment (2<sup>nd</sup> proviso to Reg. 4(1) and 1<sup>st</sup> proviso to Reg. 4(2) of Notn. 13(R)). This is to enable the bank to keep a track. Though not mentioned, in practice remittance under (i) above should also be made through one bank.

[It may be noted that under Reg. 4(1) of Notn. 13(R), it appears that the facility of US\$ 1 mn. is permitted only to widow / widower. However, this facility is available to all persons referred to the regulation. Master Direction no. 13 on Remittance of Assets clarifies this in para 3.1.]

The remittance facility of US\$ 1 mn. is out of capital funds. Income on such assets can be remitted without any limit as incomes are current account transactions. (It should be clarified that capital gain is not considered as current account transaction. The “sale” is a capital account transaction and is governed as such.)

## 2.2.4 Gift of IP:

An Indian resident can give a gift of IP only to an NRI or an OCI under Rule 24(b) of NDI rules. The resident can gift IPs to multiple people or give multiple IPs to one persons. This will involve payment of stamp duty but will save the process of getting a probate or succession certificate or letter of administration later. There is no limit on the value of IP which can be gifted.

## 2.3 Equity instruments:

- 2.3.1 Equity instruments mean **equity shares, mandatorily convertible preference shares, and mandatorily convertible debentures** [*Ru. 2(k) of NDI rules*]. Rules for investment in equity instruments are provided in NDI rules. For debt securities, Debt Instrument regulations govern the same. For inheritance, whatever applies to equity shares, applies to all equity instruments.

**For equity instruments, there is no specific provision in FEMA for inheritance by non-residents.** Prima facie one has to consider whether the heir can own the property assuming that he had to acquire it by purchase or gift (other than inheritance). If the heir can buy the property or accept it as a gift, then on inheritance, heir can hold the same. This test can be applied to other assets as well wherever FEMA provisions are silent about inheritance.

Let us see more details for various categories of heirs.

- 2.3.2 **NRI and OCI** – An NRI and OCI can inherit shares. As the shares are being inherited from an Indian resident, the shares will be held on **non-repatriable basis**. Under schedule IV of NDI rules, NRIs and OCIs can invest on non-repatriable basis. Hence inheritance is permitted on non-repatriable basis.

In some sectors such as agricultural activities, NRIs and OCIs cannot invest. If NRI / OCI inherit shares of a company engaged in agricultural activities, should the agricultural activity stop? Agricultural activities are permitted if agricultural land is inherited. However, in case of company with non-resident investment, agricultural activities (other than those specifically allowed) are prohibited. Hence, in such cases, it will be advisable to seek clarification from RBI. The sectors in which NRIs and OCIs cannot invest are real estate business trading, construction of farmhouses, trading in TDRs, Nidhi companies and agricultural & plantation activities. Except for these sectors, inheritance is permitted by NRIs and OCIs on non-repatriation basis.

Shares can be sold as permitted under the NDI rules.

NRIs and PIOs can repatriate upto US\$ 1 mn. per year as stated in para 2.2.3(d).

- 2.3.3 Under Schedule IV of NDI rules, **incorporated foreign entities which are owned and controlled by NRI/OCI**, can also invest on non-repatriable basis. Hence if such an entity is the heir, it can inherit the shares in Indian companies.

Such a company can sell the shares as permitted under NDI rules.

However, such entities cannot repatriate the funds outside India. This is one gap in FEMA rules. RBI has not made any rules for such companies owned and controlled by NRIs / OCIs inheriting assets from Indian residents. One can apply to RBI. However, it is doubtful whether RBI will approve such a remittance. Otherwise there will be no difference between repatriable and non-repatriable investment in substance.

This issue assumes importance in some cases. NRIs living in countries where inheritance tax is applicable, want their parents to bequeath their estate to the companies or trusts settled by NRIs. It will be difficult.

Further Trust is an unincorporated entity. Unincorporated entities are not eligible to invest under the NDI rules. For this reason also, the Trust cannot inherit without approval from RBI.

It may be possible that such foreign company can declare dividend which can be paid to the NRI/OCI shareholder in India. Or the company can be liquidated. The funds and assets of the company will then come in the possession of NRI/OCI in India. From these assets, funds can be repatriated depending on whether these are current account transactions or capital account transactions. Similar distribution can be considered for other foreign entities. It may involve additional tax cost. This is however not yet been tested.

Practical way out for the testator will be to avoid making a bequest to such companies & others where law is absent.

- 2.3.4 **Non-resident entity and foreigner (Not NRI/OCI)** – If an heir is a foreign entity, or an outright foreigner, it can inherit the shares. However, it should obtain an approval from DPIIT to hold the shares. This is because foreigners are permitted to invest on repatriable basis. They cannot invest on non-repatriable basis. Inheritance will be primarily on non-repatriable basis.

Here the testator is an Indian resident and normally no foreign exchange would have come in India for the investment. Hence heirs cannot hold shares on repatriable basis. This is a rare situation where shares will be held on non-repatriable basis by a foreigner. (If the testator had acquired the shares as a non-resident on repatriable basis and then become an Indian resident, chances of approval to hold the shares by the heir on repatriable basis are better.)

For sale and repatriation of sale proceeds, again an approval from RBI is required. It is difficult to envisage whether RBI will permit repatriation of sale proceeds. It is preferable to avoid such situation.

### 2.3.5 Gift of equity instruments:

Gift of equity instruments is permitted with prior approval of RBI. The limit is upto US\$ 50,000 in value per year and upto a maximum of 5% of the total paid up capital of the equity instrument (Ru. 9(4) of NDI rules). It is a small limit. Generally, this is impractical and may not serve the purpose of "succession".

### 2.4 Mutual funds, Debt and other instruments (other than equity instruments):

2.4.1 For securities (other than equity instruments), there are **no specific rules for inheritance**. Similar considerations will apply as in the case of equity instruments. I.e. if the heir can buy the property or accept it as a gift, then on inheritance, the heir can hold the same.

a) **NRI and OCI** are permitted to invest in **following non-debt instruments (other than equity instruments) on repatriable basis** under NDI rules:

- Units of mutual fund which invest more than 50% in equity.
- shares in public sector enterprises which are divested by the Government.
- Subscription to National Pension Scheme.
- units of investment vehicle (Alternative Investment Funds).
- Capital in LLP.
- Convertible Note of startups.
- Depository receipts.

b) **NRI and OCI** are permitted to invest in **following non-debt instruments (other than equity instruments) on non-repatriable basis** under NDI rules:

- Units of mutual fund which invest more than 50% in equity.
- Units issued by an investment vehicle.
- Capital in LLP.
- Convertible Note of startups.
- capital of a firm or a proprietary concern.

c) **NRI and OCI** are also permitted to invest in following **debt instruments on repatriable basis** under Debt Instrument rules.



- Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds or
- Exchange-Traded Funds (ETFs) which invest less than or equal to 50 percent in equity;
- Bonds issued by a Public Sector Undertaking (PSU) in India;
- Bonds issued by Infrastructure Debt Funds;
- Listed non-convertible/ redeemable preference shares or debentures issued on account of merger or demerger of an Indian company in terms of Regulation 6 of these Regulations;
- debt instruments issued by banks, eligible for inclusion in regulatory capital.

d) **NRI and OCI** are also permitted to invest in following **debt instruments on non-repatriable basis** under Debt Instrument rules.

- Dated Government securities (other than bearer securities), treasury bills
- units of domestic mutual funds or Exchange-Traded Funds (ETFs) which invest less than or equal to 50 percent in equity,
- National Plan/ Savings Certificates.
- Listed non-convertible/ redeemable preference shares or debentures issued on account of merger or demerger of an Indian company in terms of Regulation 6 of these Regulations;
- Chit funds authorised by the Registrar of Chits or an officer authorised by the State Government in this behalf.

2.4.2 If the Indian resident holds the above investments, the NRI and OCI can **inherit the above investments on non-repatriable basis**.

Securities mentioned in para 2.4.1(a) and 2.4.1(b) can be sold. Securities (Debt instruments) mentioned in para 2.4.1(c) and 2.4.1(d) can be sold if these are purchased. (See clause 3 in Sch. I to Debt instruments regulations.) If these Debt instruments are inherited, for sale, there is no specific approval given under the rules. The term "investment" in Reg. 2(j) of Debt instrument regulations includes "transfer"! As a practice, sale is permitted.

Remittance upto US\$ 1 mn. per year is permitted.

2.4.3 If there are any other kinds of investments, the NRI / OCI will require an approval to hold the assets on inheritance. For non-debt instruments, DPIIT has the jurisdiction. For debt instruments, RBI has the jurisdiction. For sale also an approval will be required. Remittance upto US\$ 1 mn. per year is permitted.

Similarly if an **outright foreigner** can invest in any other kinds of instruments (which is very rare), then he can inherit these. Otherwise an approval from

RBI will be required. Sale and repatriation will also require an approval. For investments inherited on non-repatriable basis, it is doubtful whether an approval can be given.

It is best to avoid such bequests.

#### 2.4.4 **Gift of securities (other than equity instruments):**

Gift of units of Investment Vehicle is permitted with prior approval of RBI (Ru. 9(4) of NDI rules). Somehow “unit” has been defined in Ru. 2(aq) of NDI rules to mean a beneficial interest of an investor in an “investment vehicle”. Investment Vehicle is defined in Ru. 2(ae) of NDI rules. It means REITs, InvIts and AIFs. Technically units of mutual fund are not included. The limit is upto US\$ 50,000 per year and upto a maximum of 5% of the total paid up capital of the equity instrument. It is a small limit.

Earlier Investment Vehicle included units of a mutual fund which invested more than 50% in equity. Now these units are not included within the meaning of Investment Vehicle, although reference to 5% of total capital includes reference to such mutual funds. Gift of mutual funds and other securities will require an approval from RBI.

#### 2.5 **Loans and deposits:**

- 2.5.1 There are **no specific rules on inheritance for loans and deposits**. Under some circumstances (eg. under Sch. 7 of Deposit regulations), NRIs can give a loan and place deposits on non-repatriable basis. If the NRI / PIO heir inherits such loan and deposits which the NRI / PIO could have given / held, then they can hold on to the loans and deposits on inheritance.

If these do not fall within the permitted provisions, an approval from RBI will be required.

- 2.5.2 **Gift of loans and deposits** is not permitted and requires an approval. Generally an approval may not be granted.

#### 2.6 **Bank accounts:**

- 2.6.1 There are **no provisions for inheritance**. NRI / PIO can have NRO bank accounts in India. Hence on inheritance, they can hold on to the funds. The testator would have a resident rupee account. The NRI / PIO heir will have NRO account.

Although there is **no specific provision for inheritance of bank accounts by non-residents**, inheritance is permitted as a practice. This is another gap in the provisions, but permitted in practice.

An outright foreigner will require an approval to inherit the funds. An outright non-resident can open an NRO account for “legitimate dues in India”. Inheritance in my view will not be considered as a “due”.

Returning Indian can hold a Resident Foreign Current (RFC) account under Reg. 4(B) of Notn. 10(R). These are free from all restrictions under FEMA. The relief is equivalent to reliefs provided for foreign assets owned by Returning Indians. The resident can gift the funds to a non-resident. Hence in principle there should be no problem in inheritance by a non-resident. However, there is no provision to hold an RFC account by a non-resident. Joint holding with resident relative is permitted. There is no provision to hold the account jointly with a non-resident. If a non-resident inherits the funds in RFC account, the bank should ideally close the account and remit the funds to the non-resident. If there is any objection or doubt, directions should be taken from RBI.

Residents can hold Exchange Earner’s Foreign Currency (EEFC) A/c. Joint holding with resident relative is permitted. It should be noted that EEFC A/c does not have freedom like an RFC A/c. Normally the funds have to be converted into rupees after one month. Ideally NRI / PIO should be able to inherit the funds on non-repatriable basis after converting the balance in rupees.

An individual can also hold Resident Foreign Currency (Domestic) A/c. It is similar to EEFC A/c and should be given same treatment as the EEFC A/c.

Any other situation will require RBI approval.

- 2.6.2 **Gift in rupees** to NRI/PIO who is a relative is permitted upto LRS limit. Funds have to be transferred to the NRO account. Remittance abroad for gift by an Indian resident to any non-resident in foreign exchange is permitted under LRS. One will have to consider sections 9(1)(viii) and 56(2)(x) of the Income-tax Act along with the applicable Double Tax Avoidance Agreement. One can consider the following. Indian resident can gift up to LRS limit in India. NRI recipient can remit this fund abroad under his US\$ one million limit. If parties do not want limits to be doubly exhausted, Indian resident should remit foreign exchange abroad under his LRS limit. The NRI will have full US\$ one million facility available.

Gift from RFC account can be made without limit to a non-resident.

## 2.7 **Other assets such as gold, bullion, jewellery, paintings, etc.:**

- 2.7.1 FEMA regulates foreign exchange, investments, loans, deposits, bank accounts and immovable property. **It does not specifically regulate assets**

such as gold, bullion, paintings, etc. There are no provisions for inheritance.

Non-residents can purchase gold, jewellery, etc. in India and keep it in India itself. They can bring the gold and jewellery from abroad also. There is no bar on holding precious jewellery and stones. This is by way of practice and not as per any specific rules.

At the same time, if a non-resident proposes to hold these assets, it will amount to Capital Account Transaction.

As a practice, if an NRI / OCI inherits these assets, they can hold assets on inheritance.

He can sell the assets also and repatriate the funds under US\$ 1 mn. scheme.

- 2.7.2 Can the NRI / OCI take away from India gold and jewellery which he acquired on inheritance? Under Customs Baggage Rules, there is no limit on taking out personal jewellery which can be considered as bonafide personal baggage. FEMA does not provide any guidance. There is no specific bar under FEMA. At the same time if the NRI wants to take away jewellery etc. worth more than US\$ 1 mn. per year, it will amount to taking away more than what is permitted under the US\$ 1 mn. scheme.

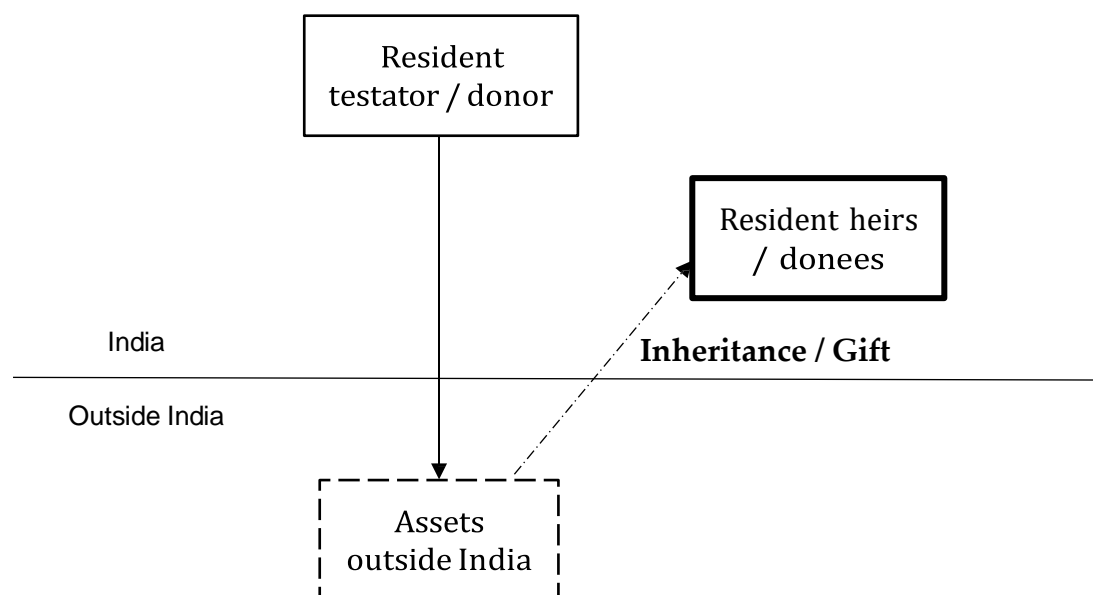
In my view if the NRI wants to take away jewellery exceeding US\$ 1 mn. (including funds remitted under US\$ 1 mn. facility), an application should be made to RBI.

Similar logic will apply for other assets.

- 2.7.3 An outright foreigner will require an approval to inherit the assets, sell and repatriate the same.
- 2.7.4 **Gift** - Legally for a **gift of such assets**, a prior approval is required. In practice, if there are gifts given on occasions such as wedding, these are considered as all right.

3. **Situation 2 - Testator / Donor is an Indian resident, has foreign assets and heirs / donees are Indian residents:**

3.1.1 A chart is given below for the above situation.



This situation has become important as under LRS, several Indians have acquired assets abroad. The next generation continues to stay in India. Some testators could have acquired assets while they were non-residents, and have subsequently returned to India.

The testator could have acquired assets abroad in any of the following manners.

- Funds sent under LRS (including ODI route).
- Gift or inheritance from resident (including Returning Indian – u/s. 6(4)), or a non-resident.
- Purchase from RFC account funds.
- Acquisition while being a non-resident.

This situation may require examination of succession laws of the country where assets are situated.

Legal provisions of this situation are more complicated due to multiple / overlapping provisions.

3.1.2 **General observations:**

a) Inherited assets normally will have to be sold and funds will have to be remitted to India. There are however exceptions for some assets.

There is no specific time limit for sale. Sell it as early as possible – say within 90 days. If it is going to take time for sale, it is advisable to apply to RBI for more time.

On realising funds, remit the same to India within 180 days.

**Assets of Returning Indian** can normally be inherited and retained abroad by the first level heir.

b) From January 2016, under erstwhile Notn. 7(R) and now OI rules, important reliefs have been provided for immovable property – for inheritance and gift. From August 2022, under OI rules, important reliefs have been provided for securities – for inheritance and gift.

c) Gift to some extent is permitted for securities and immovable property.

d) What is stated in para 1.11 applies in this situation.

### 3.2 **Immovable property:**

3.2.1 An Indian resident can bequeath IP abroad to anyone. If an Indian resident inherits the foreign IP, can he retain it?

Normally if an Indian resident acquires any foreign asset, he is required to bring the assets in India, or sell the property / assets and bring the funds in India. Today several Indian residents have invested in IP abroad under the LRS. If the person expires, and the heir has to sell and bring the proceeds to India, it can cause a lot of difficulty.

There are multiple and overlapping provisions dealing with one transaction.

Under Ru. 21(2)(i) of **Overseas Investment Rules (OI rules)** enacted with effect from 22.8.2022, inheritance of IP abroad is permitted by an Indian resident heir from another resident (testator) who had acquired the IP in accordance with FEMA rules as they existed when the testator acquired the IP. This was also permitted under Reg. 5(2) of the erstwhile Notification no. 7(R) - Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015, which was enacted with effect from 21.1.2016. This is big relief. Prior to 21.1.2016, in the erstwhile Notification no. 7, this relief was not there.

Under this provision, the property can pass on from one heir to another for any number of generations. This is a welcome provision.

3.2.2 Under **section 6(4) of FEMA**, heir of a **Returning Indian** can hold IP abroad on inheritance. (Returning Indian means the person was a non-resident and

had acquired assets abroad while he was a non-resident. On return to India, such a person can retain the assets. [S. 6(4) of FEMA]. Such person is referred to as **Returning Indian.**) If the Indian resident heir inherits IP from a such a Returning Indian, he can also retain he same abroad.

In case of Returning Indians, u/s. 6(4) of FEMA, heir of heir cannot hold the IP abroad. However under Ru. 21(2)(i) of OI rules, heir of heir can retain the IP abroad. Thus relief under section 6(4) for IP abroad is not required. (However for other assets it is required.)

Needless to say, relief under section 6(4) is for IP acquired while the person was a non-resident. If the person acquires IP as an Indian resident, relief under section 6(4) does not apply. Relief under OI rules applies.

A table is given below to explain the inheritance of IP abroad by Indian resident heir from Returning Indian and regular Indian resident.

Particulars	Inheritance u/s. 6(4)	Inheritance under OI rules
Testator	Returning Indian	Any Resident other than Returning Indian
Generation of heirs who can inherit	Only first level heir can inherit IP.	Any generation of heir can inherit IP.
As under OI rules, any generation of heir can inherit the IP abroad from an Indian resident testator, inheritance u/s. 6(4) if not relevant for IP.		

3.2.3 The objective of section 6(4) (Returning Indian) and 6(5) (Emigrating Indian) is that people who change their residence, should be able to continue to – hold the asset, transfer the asset, retain the sale proceeds and reinvest the same. This relief is extended to one level of heir of Returning Indian and Emigrating Indian. One may note that sections 6(4) and 6(5) deal with following category of assets – currency, security and immovable property. In practice the relief applies to all assets. See para 3.2.4 for more details on “Returning Indian”. See paras 6.2.2 for more details on “Emigrating Indian”.

3.2.4 **Returning Indian S. 6(4)** - The language of the section 6(4) is confusing. It appears that an Indian resident can inherit assets if these are inherited from a non-resident. However that is not the interpretation. The correct interpretation is that a resident heir can inherit and hold the foreign IP from a Returning Indian (who was a non-resident earlier, but is an Indian resident at the time of death).

The background of this is the circulars and notifications issued in 1992 and 1995 providing relief to Returning Indians. The circular and notifications run into several pages under FERA. It was quite clear that inheritance should be from a Returning Indian (who was a non-resident when asset was acquired). Under FEMA this relief has been shrunk to 4 lines. Hence it gives rise to incorrect interpretation.

After representations were made, RBI has issued AP circular 90 dated 9<sup>th</sup> Jan 2014 to clarify further section 6(4). Though it does not resolve all the issues, it brings out the purpose of S. 6(4).

In this article I am not going into the details. Interested readers may visit our website for more details.

In essence, if an heir acquires assets u/s. 6(4), such assets can be retained or sold by the heir. Sale proceeds can be invested abroad in any manner as the person likes.

If however assets are inherited from a non-resident, the assets have to be sold and funds have to be brought into India. There are some exceptions. These are covered below at the relevant places.

[It may be noted that from 1995 till 2000 when FEMA was brought into effect, a resident in India could also received gift from a Returning Indian relative which could be kept abroad and dealt with in any manner. Under FEMA, facility of gift has been removed. Relief only for inheritance has been maintained.]

- 3.2.5 Ru. 4 of OI rules provide **exemption from applicability of OI rules** in case IP is acquired abroad through RFC A/c or in accordance with S. 6(4). In case of IP, this does not provide additional relief as inheritance by the heir is permitted as discussed above. This rule is helpful for foreign securities. It is discussed later.
- 3.2.6 Foreign nationals resident in India are exempt from rules pertaining to acquisition of IP abroad. (Ru. 21(1)(i) of OI rules). They can inherit assets without any approval. This is a separate relief meant for foreign nationals.
- 3.2.7 **Gift** - Under Ru. 21(2)(i) of Overseas Investment Rules (OI rules), an Indian resident can acquire IP by way of gift from another Indian resident (donor) who had acquired the IP in accordance with FEMA rules as they existed when the donor acquired the IP. As a corollary, under Ru. 21(2)(iv)(a), the Indian resident can give a gift of IP to another Indian resident. Again this is a welcome provision.



Acquiring IP by way of gift from a Returning Indian is not permitted without RBI approval. However this restriction is now not relevant in view of relief provided in OI rules referred to above. OI rules have been enacted from 22.8.2022.

Prior to that, erstwhile Notification 7(R) dealt with Immovable property abroad by an Indian resident. Under Reg. 5(1)(a), it was provided that an Indian resident could acquire IP abroad by way of gift from Returning Indian. Under Reg. 5(2), an Indian resident could acquire IP as a gift from another resident who had acquired the IP in accordance with FEMA law. Reg. 5(1)(a) was effectively a surplus provision. Notn. 7(R) was enacted from 21.1.2016. Prior to this, the erstwhile Notification no. 7 also permitted such a gift – but to a limited extent.

If the heir acquires IP as inheritance from a Returning Indian, he cannot gift it to another resident. However due to Ru. 21(2)(i) of IO rules, now this restriction is no longer relevant.

A foreign national resident in India can acquire IP by way of gift as the OI rules do not apply to such a person (Ru. 21(1)(i) of OI rules). However, gift can be acquired only from such Indian residents who are foreign nationals. Such donors are also exempt from OI rules (Ru 21(1)(i)). Indian citizens resident in India, cannot gift the IP to a foreign national.

### 3.3 Shares and securities:

- 3.3.1 a) Under **OI rules**, as per para 1(2)(iii)(e) read with para 2(1) of Schedule III, **resident individual** can inherit the foreign securities as ODI or OPI as the case may be. ODI and OPI have been defined in the OI rules.

ODI primarily means investment in unlisted equity capital, or 10% or more of listed equity capital or investment with control in listed equity capital (Ru. 2(k)). “Equity capital” has been defined in Ru. 2(e) to mean “*equity shares or perpetual or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments*”. Essentially investment in an entity to undertake business is ODI.

OPI means investment in foreign securities other than ODI. It however does not include unlisted debt instruments (Ru. 2(s)). Some other investments are not considered as OPI as per OI directions. Essentially portfolio investment is OPI.

If it is ODI, compliance has to be undertaken as per the OI rules.

Needless to say the resident testator should have acquired the securities as per FEMA rules.

b) Para 2(1) specifically provides that inheritance of securities can be without limit. (For individuals, normally there is a limit of US\$ 2,50,000 per year under LRS). OI directions in para 17(4) clarify that inheritance will not be counted towards LRS limit. Thus LRS facility is not curtailed by this inheritance.

c) Foreign securities which cannot be considered as ODI or OPI, will require RBI approval.

d) ODI reliefs - Proviso to para 1(2)(iii)(e) of Schedule III further provides that ODI by way of inheritance may be made in a foreign entity "*whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control*". Thus these restrictions under ODI don't apply in case of inheritance. It is difficult to envisage how would a testator have investment in financial services activity or step down subsidiary (with control) – as an Indian individual resident has never been permitted to have such investment. The only situations could be these.

One situation is where an individual could have acquired such shares as sweat equity shares, qualification shares or under Employee Benefit Scheme (clauses (f), (g) and (h) of para 1(2)(iii) of Schedule III of OI rules). The other situation where this relief can be useful is this. U/s. 6(4), a Returning Indian can continue to hold investments abroad which he had acquired as a non-resident even if these are in financial services activity or these have step down subsidiaries. His heir can also continue to hold such investments u/s. 6(4). Heir of Returning Indian does not require any relief provided in proviso to para 1(2)(iii)(e) as S. 6(4) permits inheritance. Heir of heir however can inherit such investments as per proviso to para 1(2)(iii)(e). Such an heir of heir will be able to avail of this relief.

e) OPI reliefs - For OPI, there is no restriction regarding financial services activity or step down subsidiary. Hence there is no difficulty in inheriting securities. However there is no specific relief either. Thus if unlisted debt instrument is inherited (which is not permissible as OPI), directions from RBI will be required for inheritance. However, heir of Returning Indian can inherit securities u/s. 6(4) whether these are OPI or not.

f) Inheritance was also permitted under erstwhile Notification no. 120 under Reg. 22(1)(iii). Heir of heir could also inherit the securities. This was permitted under the erstwhile FEMA Notification no. 120 dated 7.7.2004 (repealed on 21.8.2022) and FEMA Notification no. 19 dated 3.5.2000 (repealed on 6.7.2004).

g) On sale, the repatriation rules for ODI and OPI as the case may be, will apply. In case of ODI, the funds have to be brought back to India within 90 days. In case of OPI, funds have to be brought back into India within 180 days.

h) In case of sale of OPI investment, can the individual reinvest the sale proceeds within 180 days (as permitted under LRS), or does he have to mandatorily remit the proceeds in India? If one reads the Master Direction, para 17 states that "*Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. ...*". In case of inheritance, there is no remittance under LRS. Strict reading of this provision suggests that only those who have remitted the funds under LRS, can reinvest the income.

Para 1(2)(ii) of Sch. III to OI rules provides that investment can be made in OPI including by way of reinvestment. Clause 1(ix)(c) of OI directions state that "*‘Reinvestment’ means that the OPI proceeds are exempted from repatriation provisions as long as such proceeds are reinvested within the time specified for realisation and repatriation as per Notification No. FEMA 9(R)/2015-RB...*". While this para is with reference to OPI by listed Indian company, the meaning should apply to reinvestment by all persons. The objective seems to be that funds can be reinvested as OPI within 180 days. However as there is lack of clarity, it will be advisable to obtain clarification from RBI.

i) Inheritance by persons other than individuals, requires RBI approval.

3.3.2 Under **section 6(4)**, a Returning Indian can continue to hold the assets abroad. See paras 3.2.2 to 3.2.4 for discussion on Returning Indian. Further, Indian resident heir of Returning Indian, can inherit the property and hold it. The heir also can retain the sale proceeds abroad and reinvest abroad.

The heir of heir however cannot hold the assets under section 6(4). The heir of heir has to bring back the assets / sale proceeds.

However as discussed in para 3.3.1, now heir of heir can inherit the shares as ODI or OPI under OI rules. Hence relief under section 6(4) is not relevant. It is relevant for the first level heir where foreign securities are neither ODI nor OPI (such as debentures). U/s. 6(4), the first level heir can inherit such securities.

Ru. 4 of OI rules provide that the **entire OI rules do not apply if securities are acquired in accordance with S. 6(4) or from RFC A/c**. This is helpful where the testator has investment in companies which are say in prohibited category such as real estate leasing (Ru. 19(1) of OI rules) or where there is round tripping (Ru. 19(2) of OI rules). Under Schedule III of OI rules, the heir can inherit securities as ODI or OPI. Under ODI, investment in prohibited category such as real estate leasing is not permitted. However under Ru. 4 of

OI rules read with S. 6(4), such investment can be inherited. Heir of heir cannot hold such securities as the heir of heir does not get relief u/s. 6(4). He has to go under Schedule III of OI rules where the inheritance has to be ODI or OPI. Thus inheritance by heir of heir of foreign entity engaged in real estate leasing which is not permitted under ODI, will require an approval from RBI.

Investment made by the testator from RFC A/c. is free from restrictions (such as financial services activity). This relief does not help the heir – as the relief is available to the investor and not the heir.

**3.3.3 Section 6(4) and OI rules overlap** - For inheritance of securities, S. 6(4) and Sch. III of OI rules – both apply. Does the provision which is more beneficial apply, or does one which is more restrictive apply? Normally in income-tax, more beneficial provision applies. Under FEMA, more restrictive provision applies. If a transaction has restrictions or conditions in two or more provisions, then all provisions have to be complied with - i.e. the most restrictive provision applies. However the two provisions discussed above are two different situations / routes under which one can hold securities. Whichever provision one falls into, will apply. Further OI rules specifically provide exemption for investment u/s. 6(4). If transactions are covered u/s. 6(4), OI rules do not apply. It may appear that whichever provision is more beneficial applies. However, these deal with two different situations. There is no overlap.

As there are different provisions, key features of both these provisions are given in the table below for the resident heirs.

Particulars	Inheritance u/s. 6(4)	Inheritance under Sch. III of OI rules
Testator	Returning Indian	Any Resident other than Returning Indian
Kind of security which can be inherited	Heir can acquire any security (except as stated below in this table).	Heir can acquire any security which is permitted as ODI or OPI (except as stated below in this table).
Generation of heirs who can inherit	Only first level heir can inherit security.	Any generation of heir can inherit security.
Foreign entity engaged in financial services or has step down subsidiary	There is no restriction on first level heir in case of such entities. Heir of heir cannot inherit u/s. 6(4).	There is no restriction on any generation of heir in case of such entities. (This is practically possible)

where heir has control	He will have to go under OI rules.	where first level heir inherits securities u/s. 6(4) or testator has acquired securities as sweat equity shares, qualification shares or under Employee Benefit Scheme).
Foreign entity engaged in prohibited category such as real estate leasing	There is no restriction on first level heir in case of such entity. Heir of heir requires RBI approval to inherit.	Any heir cannot inherit such securities without RBI approval.
OPI securities	There is no restriction on first level heir for any kind of Portfolio securities - including unlisted debt, unregulated mutual fund units. Heir of heir requires RBI approval to inherit.	Any heir can inherit only those Portfolio securities which can be considered as OPI. Thus unlisted debt, or unregulated mutual fund units cannot be inherited without approval.

3.3.4 **Gift - Resident individuals** can receive foreign securities as gift from a resident relative (either as ODI or as OPI) under paras 1(2)(iii)(d) and 2(2) of Sch. III of OI rules. (The resident donor should have acquired the securities as permitted under FEMA.)

This is exactly opposite of erstwhile regulations (FEMA Notification no. 120). Under this notification, gift was not a permissible transaction. This is a welcome provision.

For gift also, what can be received as gift should be those securities which an Indian resident can hold as ODI or OPI. If for example, shares of a company engaged in real estate business are to be gifted, can such gift be received? Such a gift cannot be received before obtaining approval from RBI.

It may be noted that relief available for financial services activity or step down subsidiary available in case of inheritance (discussed in para 3.3.1(d) above), is not available in case of gift.

Under Schedule III, what can be invested is upto the LRS limit of US\$ 2,50,000. However it has been specifically stated in para 2(2) of Schedule III that a resident can receive gift of foreign securities from an Indian resident

relative without any limit. OI directions in para 17(4) clarify that gift will not be counted towards LRS limit. Thus LRS facility is not curtailed by this gift.

It may be noted that there is no specific provision for an Indian resident donor to give a gift. It is however implied.

For sale of securities and reinvestment of sale proceeds, kindly refer to para 3.3.1(g) above.

### 3.4 **Bank account funds and foreign currency:**

#### 3.4.1 There are **no specific rules for inheritance of bank accounts by Indian residents**. The heir has to bring back the funds on inheritance.

The situation of Returning Indian has been discussed in paras 3.2.2 to 3.2.4 above. Under **section 6(4)**, the Indian resident heir can inherit the bank funds and hold it. Funds can be used for acquiring any other assets outside India. Heir of heir however cannot keep the funds abroad on inheritance.

#### 3.4.2 In other situations (e.g. where a resident has remitted funds under LRS) there is no permission provided to retain the funds abroad. If the Indian resident heir inherits bank funds, he has to bring it in India.

Reg. 3 of *Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 (Notification 9(R))* – it provides that any resident to whom any foreign exchange is due or has accrued, has to take all reasonable steps to realise and repatriate to India such foreign exchange.

He should not in any case do or refrain from doing anything, due to which receipt of foreign exchange is delayed, or the foreign exchange ceases in whole or in part to be receivable by him.

Under Reg. 4(1)(a) of the above referred regulation [Notification 9(R)], on realisation of foreign exchange, the person has to bring the same in India and sell the same to the bank.

Thus the heir has to bring back the funds into India.

#### 3.4.3 Under LRS, with effect from 24.8.2022, Indian resident has to use the funds as permitted within 180 days or bring it back to India. Bank Fixed Deposits are considered as funds abroad. However, before 24.8.22, there could be a situation where deposits are for a particular period. A few years are left before the deposit can be encashed. The heir cannot bring back the funds.

In such a situation, the heir should apply to RBI to allow one to hold the deposits till maturity. On maturity of the deposit, the amount should be

brought back. Of course if one can encash the deposits, then RBI will generally not approve of holding the deposits abroad. LRS amendments are covered in more details in an article on our website.

- 3.4.4 Under Reg. 3(iii) of *Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 - Notification No. FEMA 11(R)/2015-RB December 29, 2015*, an Indian resident can retain foreign coins without limit.

This is practically insignificant.

- 3.4.5 FEMA rules also permit an Indian resident to hold foreign exchange abroad which is acquired before 8<sup>th</sup> July 1947 in terms of general or specific approval. Income on such accounts is also permitted to be held abroad. [S. 9(c) of FEMA].

An Indian resident heir is permitted to hold foreign exchange in RFC account - which is received as inheritance from Returning Indian or heir of Returning Indian or person referred to in S. 9(c) of FEMA. [Reg. 4(B)(1)(c) and 4B(1)(d) of Notn. 10(R)].

- 3.4.6 **Gift** – A gift of funds abroad from one resident to another resident is an impermissible transaction under LRS. In other situations such as gift by donor who holds funds abroad u/s. 6(4), the Indian resident donee has to bring back the funds to India. This is the case for all assets except where it is specifically permitted (such as gift of IP discussed in para 3.2.7 above). However foreign exchange received as gift from Returning Indian or heir of Returning Indian or person referred to in S. 9(c) of FEMA can be held in RFC A/c. [Reg. 4(B)(1)(c) and 4B(1)(d) of Notn. 10(R)].

### 3.5 **Loans:**

- 3.5.1 This situation is similar to the bank accounts. There is **no specific provision for inheritance of loans by Indian residents**. The heir has to bring back the funds on inheritance.

The situation of **Returning Indian** has been discussed in paras 3.2.2 to 3.2.4 above. Under **section 6(4)**, the Indian resident heir can inherit the loan funds and hold it. Heir of heir however cannot keep the funds abroad on inheritance. Loan could have been given by the Indian testator from RFC A/c. The heir however cannot keep the loan abroad. He has to bring the funds to India.

Here also there could be a situation where loan has been given for a particular period. A few years are left before the lender can insist on repayment. One cannot bring back the funds. In such a situation, the heir should apply to RBI to allow one to hold the loan till maturity. On maturity of the loan, the

amount should be brought back. Of course if one can realise the loan before maturity, then RBI will generally not approve of holding the loan abroad.

3.5.2 Loan given under the Liberalised Remittance Scheme by the testator is also under similar situation as above. However RBI has taken a view that giving loan abroad is not permitted under LRS. If loan is not permitted, it cannot be bequeathed. The language of LRS is clear that loan can be given. However “variance between clear law and RBI view” is a separate topic and not dealt with here.

3.5.3 **Gift** – A gift of foreign loan cannot be received without a prior RBI approval. If gift is accepted, the donee has to realise the loan and bring the funds in India.

3.6 **Other assets – including gold, jewellery, paintings etc.:**

3.6.1 Apart from provisions for assets discussed above, **FEMA does not have any specific regulations** to regulate any other assets. Does it mean that FEMA does not apply to other assets? One cannot take a view that FEMA does not apply. FEMA continues to apply.

The reason is that “Capital Account Transaction” u/s. 2(e) provides that transaction which alters the assets and liabilities of a non-resident in India, or alters the assets and liabilities outside India of an Indian resident is a capital account transaction. This definition applies to all assets.

Gold, jewellery, paintings etc. are covered within the definition of Capital Account Transaction. There are however no rules.

Can one take a view that there is no prohibition on holding of such assets abroad? So far to the best of my knowledge RBI does not want to regulate such assets. Yet to take a view that FEMA does not apply will not be a correct interpretation.

Sections 4 & 8 together apply to every Indian Resident. All foreign assets inherited by an Indian resident should be brought back into India or these should be sold and funds should be remitted to India; or apply to RBI to retain the assets abroad.

Normally a testator could not have gold, etc. outside India as such investment is not permitted under LRS. However the testator could have acquired such assets under old LRS rules, or from RFC A/c or could have acquired as a non-resident. The heir will have to bring the assets / sale proceeds in India.

3.6.2 I have discussed above the permission granted to Returning Indians to maintain their assets outside India u/s. S. 6(4) (paras 3.2.2 to 3.2.4).

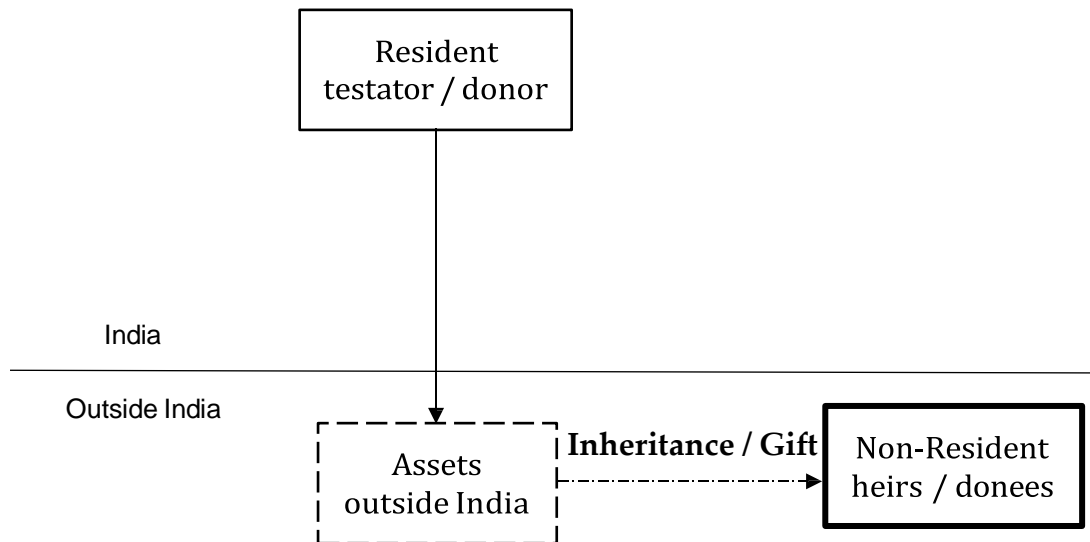


Even in 1992 and 1995, while the rules permitted Returning Indians to keep their assets abroad, it did not refer to assets such as gold, etc. Those rules only covered securities, immovable property etc. In practice the Returning Indian can keep all kinds of assets abroad. The heir of Returning Indian can also keep the assets abroad.

- 3.6.3 **Gift** – A gift of gold etc. cannot be received without a prior RBI approval. If gift is accepted, the donee has to sell the same and bring the funds in India or bring the asset in India.

4. **Situation 3 - Testator / donor is an Indian resident, has foreign assets and heirs / donees are non-residents:**

4.1.1 A chart is given below for the above situation.



This situation is similar to the situation discussed in para 3 above, except that the heirs are non-residents. Under LRS, several Indians have acquired assets abroad. Children become non-residents. This is simpler compared to the situation in para 3 above.

The testator could have acquired assets abroad in any of the following manners.

- Funds sent under LRS (including ODI route).
- Gift or inheritance from resident (including Returning Indian – u/s. 6(4)), or a non-resident.
- Purchase from RFC account funds.
- Acquisition while being a non-resident.

This situation may require examination of succession laws of the country where assets are situated.

4.1.2 **General observations:**

a) Generally foreign assets can be bequeathed by Indian resident (regular Indian resident or Returning Indian) to non-residents.

Non-residents can hold assets. **After inheritance, assets go out of FEMA jurisdiction.**

b) Gift of assets is also permitted. There are restrictions on gift of securities and immovable property under the OI rules from August 2022.

For assets of Returning Indians, there are no restrictions on gifts.

## 4.2 Immovable property:

4.2.1 There are **no specific rules for inheritance of foreign IP by a non-resident from an Indian resident**. IP can be bequeathed to a non-resident. Once the non-resident heir inherits the IP outside India, the IP goes out of the jurisdiction of FEMA. The heir can deal with the IP as he considers appropriate.

4.2.2 **Gift** – Returning Indian can gift the foreign IP to a non-resident. Heir of Returning Indian can also gift the IP to a non-resident.

An Indian resident (other than a Returning Indian or heir of Returning Indian) could gift the IP prior to Aug 2022 when OI rules were enacted. Under the LRS rules, once the funds are remitted abroad, these could be dealt with in any manner.

The LRS was updated on 23.8.2022. Under the revised LRS, investment has to be made as per OI rules. Under Ru. 21(2)(iv)(a) of OI rules, an Indian resident can give a gift of IP to another Indian resident. There is no provision to give a gift to a non-resident. Hence now it is doubtful whether a gift can be given to a non-resident.

Under Ru. 21(1)(i) of OI rules, a foreign citizen can gift the property to a non-resident. Under this rule, the OI rules for IP do not apply to a foreign citizen.

Under Reg. 4(B)(2) of FEMA Notification no. 10(R) - Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015 – funds in RFC A/c are free for use including investment outside India in any form [Reg. 4(B)(2) of Notn. 10(R)]. A gift to a non-resident can be made from the RFC A/c. It is equivalent to having assets abroad by a Returning Indian. If IP is acquired from **RFC funds**, can the same can be gifted to a non-resident? In my submission, funds in RFC A/c are equivalent to assets outside India. Funds in RFC A/c can be deposited out of assets earned by a person as a non-resident. If there were assets outside India of a Returning Indian or heir of Returning Indian, he could gift the same to a non-resident. Hence in principle, IP acquired from funds in RFC A/c can be gifted to a non-resident. This issue applies for all assets acquired from RFC A/c funds. What is stated for RFC A/c also applies for funds referred to in S. 9(c) of FEMA (funds acquired before 8.7.1947). However as there is lack of clarity, it is advisable to seek clarification from RBI before gifting the assets acquired from RFC A/c.

### 4.3 Shares and securities:

4.3.1 There are **no specific rules for inheritance of foreign shares and securities by a non-resident from an Indian resident**. Securities acquired under the Liberalised Remittance Scheme or by a Returning Indian or heir of Returning Indian, can be bequeathed to a non-resident. The non-resident heir can inherit such securities. Once the assets are inherited by the non-resident heir, these go out of the jurisdiction of FEMA. The heir can deal with the shares and securities as he considers appropriate.

4.3.2 Indian resident individual could have invested as ODI under OI rules.

There is no specific rule for such bequests and inheritance. Normally for investment under regulations for ODI, as long as the business is being conducted, the Indian resident can hold the assets. If business is closed, or the shares of the foreign entity are sold, the proceeds have to come to India. In case of inheritance by a non-resident, funds will not come to India. Hence in case of inheritance by the non-resident heir, one should apply to RBI for directions. Some procedures such as cancellation of UIN will have to be done.

4.3.3 **Gift** – If securities are acquired under LRS, the person **cannot gift the same to a non-resident** [Para 22(4) of OI directions]. Prior to OI rules of August 2022, securities could be gifted.

Returning Indian or Indian resident heir of Returning Indian can gift the securities to a non-resident u/s. 6(4) of FEMA.

If a person has acquired securities from **RFC account**, the same can be gifted to a non-resident. However there is lack of clarity. What is stated in para 4.2.2, applies here also.

Gift under any other situation requires a prior approval of RBI.

### 4.4 Foreign Bank account funds and foreign currency:

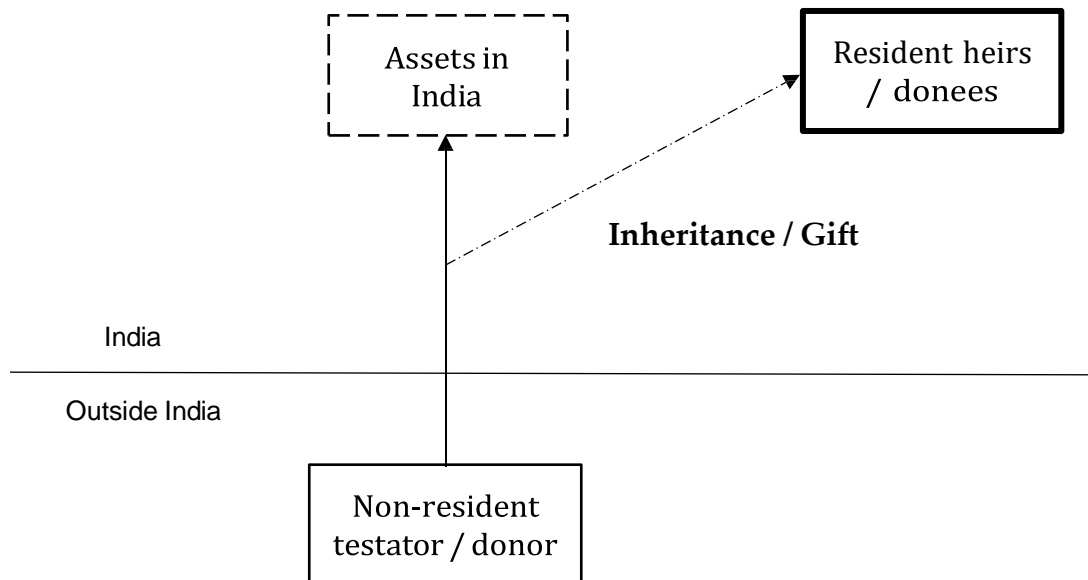
4.4.1 There are **no specific rules for inheritance of bank accounts or foreign currency by non-resident from an Indian resident**. Funds would normally be acquired either under LRS, or would be owned by Returning Indian or Indian resident heir of Returning Indian, or would have been remitted from RFC account in India. In any of the situations, the non-resident heir can inherit the funds. Once these funds are inherited by the non-resident heir, these go out of the jurisdiction of FEMA. The heir can deal with the funds as he considers appropriate.

- 4.4.2 Normally foreign currency and foreign coins cannot be held abroad. A Returning Indian could have acquired foreign currency and coins while he was a non-resident. In this situation the foreign currency and coins can be inherited by a non-resident. This is practically insignificant.
- 4.4.3 **Gift** – Funds in the bank account can be given as a gift to a non-resident. Once the non-resident acquires the funds, these go out of FEMA jurisdiction. For a foreign bank account opened with funds from RFC A/c, what is stated in para 4.2.2 will apply here. It may be better to give the gift from directly from RFC A/c. as there are no restrictions on funds in RFC A/c.
- 4.5 **Loans:**
- 4.5.1 There are **no specific rules for inheritance of loans by non-resident from an Indian resident**. The loans can be held by Returning Indians or Indian resident heir of Returning Indian or by residents who may have remitted funds from RFC account. Such loans can be bequeathed to non-residents. Once the loans are inherited by the non-resident heir, these go out of the jurisdiction of FEMA. The heir can deal with the loans as he considers appropriate.
- 4.5.2 Loan given under the Liberalised Remittance Scheme by the testator is also under similar situation as above. However RBI has taken a view that loan is not permitted under LRS. If loan is not permitted, it cannot be bequeathed. The language of LRS is clear that loan can be given. However as mentioned in para 3.5.2 above, “variance between clear law and RBI view” is a separate topic and not dealt with here.
- 4.5.3 **Gift** – Returning Indian and Indian resident heir of Returning Indian can gift the loan to a non-resident. For gift of loan given from RFC A/c, what is stated in para 4.2.2 applies here also. Under LRS, if loan could not be given, there is no question of gifting the same.
- 4.6 **Other assets such as gold, bullion, jewellery, paintings, etc.:**
- 4.6.1 As discussed in para 3.6.1, **FEMA does not have any specific regulations** to regulate any other assets. These are however covered under FEMA in the definition of Capital account transaction.
- 4.6.2 Returning Indian and Indian resident heir of Returning Indian can continue to hold the assets abroad. An Indian resident can remit funds from RFC account and acquire assets outside India. Such persons can bequeath the property to non-resident heir. The non-resident heir can inherit such funds. Once the assets are inherited by the non-resident heir, these go out of the jurisdiction of FEMA. The heir can deal with these assets as he considers appropriate. See paras 3.2.2 to 3.2.4 for issues relating to Returning Indian.

- 4.6.3 Under LRS, an Indian resident is not specifically permitted to acquire gold, jewellery, etc. Hence inheritance in such situation does not arise. However under old LRS rules, gold could be acquired. In this situation, the heir can inherit gold. Once the assets are inherited by the non-resident heir, these go out of the jurisdiction of FEMA. The heir can deal with the assets as he considers appropriate.
- 4.6.4 **Gift** – Returning Indian and Indian resident heir of Returning Indian can gift the assets to a non-resident. For gift of assets acquired from RFC A/c, what is stated in para 4.2.2 applies here also. Under LRS, if assets could not be acquired, there is no question of gifting the same. If the assets were acquired under old LRS rules before restrictions were introduced, these can be gifted to non-residents.

5. **Situation 4 - Testator / donor is a non-resident, has Indian assets and heirs / donees are Indian residents:**

5.1.1 A chart is given below for the above situation.



This situation is also common. Several NRIs / OCIs / PIOs (even some outright non-resident foreigners) have assets in India. Their children could be Indian residents.

The testator could have acquired assets in India in any of the following manners.

- Funds remitted from abroad.
- Use of rupee funds in India.
- Gift or inheritance from another non-resident or Indian resident.
- Acquisition while being an Indian resident.

This situation may require examination of succession laws of the country where testator / donor is resident / domiciled.

5.1.2 **General observations:**

a) This is amongst the simplest situations.

b) Acquisition of assets in India by an Indian resident heir is not a Capital Account transaction. A gift by a non-resident of Indian assets is a Capital Account Transaction for such a non-resident as it is an alteration of assets in India. However assets can be inherited by Indian residents. Gift is also permitted. There is a “donee principle” under which an Indian resident can always receive any Indian assets from a non-resident.

c) Repatriable character if any of the assets, is lost.

## 5.2 Immovable Property (IP):

5.2.1 Only NRIs and OCIs are allowed to acquire IP in India. Only in rare situations where a foreigner (Non-NRI/Non-OCI) has become an Indian resident, he can acquire IP in India. The foreigner can hold on to the IP in India when he returns to his home country.

There is **no specific provision for inheritance by resident heirs**. There is a provision for inheritance by the NRI/OCI but not by a resident.

5.2.2 **However acquisition of property in India by an Indian resident is not a Capital Account transaction.** Capital Account transaction is defined as “*a transaction which alters the assets or liabilities...outside India ... of persons resident in India*”. When an Indian resident inherits Indian IP from anyone, the transaction is not a Capital account transaction. Hence FEMA does not apply. Inheritance of IP in India by a resident heir from non-resident testator has always been permitted. The principle is that if an asset is coming under the ownership of Indian resident, it is permitted (donee principle).

The closest provision is Ru. 24(d) of NDI rules. It provides that an NRI / OCI can transfer any immovable property in India to a person resident in India. Transfer is permitted. Transmission is not specified. Prima facie, this is a permissible transaction.

Under Ru. 31, a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan and Democratic People's Republic of Korea (DPRK) is **not allowed to acquire immovable property without RBI approval**. It is a debatable whether this rule is ultra-vires. See para 2.2.3(b).

5.2.3 **Gift of IP** – Gift can be made to an Indian resident under Ru. 24(d) of NDI rules.

## 5.3 Other assets:

5.3.1 There is **no specific provision for inheritance by resident heirs** at all for any other asset. As a principle an Indian resident can receive any assets in India as inheritance. When an Indian resident inherits Indian asset from anyone, the transaction is not a Capital account transaction. Hence FEMA does not apply. The discussion in para 5.2.2 applies here.

5.3.2 Non-resident testator would have invested under specific rules. For example, the non-resident may have invested under NDI rules. On inheritance by the



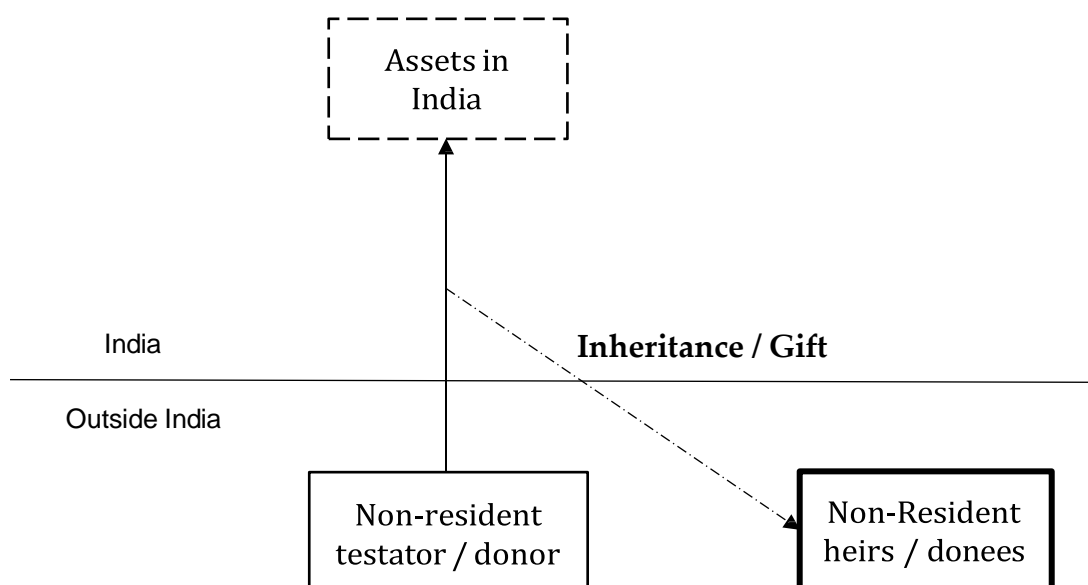
resident heir, the foreign investment record on firms.rbi.org.in portal will have to be amended. One can do so through the bank for this. Repatriable character will be lost. There could be such small procedures for other assets.

5.3.3 **Gift** - Gift of securities can be made to an Indian resident under Ru. 9(2) of NDI rules.

For other assets, there are no specific rules. There are no specific rules even for bank funds. However gift has always been permitted. As explained in para 1.9.2, gift is primarily a current account transaction. For a resident, receipt of Indian asset is a not a Capital account transaction. For a non-resident, legally it is a Capital account transaction as there is an alteration of asset in India. However as long as assets are coming under ownership of Indian residents, it has been accepted.

6. **Situation 5 - Testator / donor is a non-resident, has Indian assets and heirs / donees are non-residents:**

6.1.1 A chart is given below for the above situation.



This situation is similar to the situation discussed in para 5 above, except that the heirs are non-residents. Several NRIs / OCIs / PIOs (even some outright non-resident foreigners) have assets in India. Their children could be non-residents. This situation is also simple but has more issues compared to situation in para 5.

The testator could have acquired assets abroad in any of the following manners.

- Funds remitted from abroad.
- Use of rupee funds in India.
- Gift or inheritance from another non-resident or Indian resident.
- Acquisition while being an Indian resident.

This situation may require examination of succession laws of the country where testator / donor is resident / domiciled.

6.1.2 **General observations:**

a) Generally an NRI / OCI can inherit assets. For PIO, there are some restrictions.

For non-residents (other than NRI/OCI/PIO), inheritance is permitted for some assets. RBI approval is required for inheriting other assets.

b) Remittance out of inherited assets of upto US\$ 1 mn. per year is possible for all non-residents – subject to conditions.

Executor of the estate can repatriate upto US \$ 1 mn. per annum without approval on account of legacy, bequest or inheritance to a foreign national resident outside India. [Notn. 13(R), Reg. 7(1)(i)(a).]

See Para 2.2.3(d) for more details.

c) Gift by one non-resident to another non-resident is permitted most of the times. However gift from NRI/OCI/PIO to other non-resident (outright foreigner) is generally not permitted except for some assets.

## 6.2 Immovable Property:

6.2.1 Normally only NRIs and OCIs are allowed to buy IP in India. They can bequeath IP to NRIs and OCIs. In some rare cases, foreigners (Non-NRI/Non-OCI) may have acquired the IP. See para 2.2 above. Such foreigner can also bequeath IP to NRI / OCI.

As per Rule 24(c)(i) of NDI rules – “*Acquisition and transfer of property in India by a NRI or an OCI –*

*A NRI or an OCI may -*

*(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property:-*

*(i) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these rules; or*

*(ii) from a person resident in India;”*

See para 2.2.2 for discussion in sub-clause (ii).

Thus an NRI / OCI can inherit the Indian property. They can hold the IP. Later they can also sell the property as permitted in the rules. Funds can also be remitted abroad under US\$ 1 mn. scheme.

However, if the testator was a foreigner (not an NRI or OCI), the testator should have taken approval for holding the property. If approval has not been obtained, the NRI/OCI heir cannot hold the property.

**If the heir is an outright foreigner (not an NRI or OCI), an approval of RBI is required to hold on to the IP on inheritance.** For sale of that IP & for

remittance of sale proceeds net of tax, again an approval is required (subject to what has been discussed in para 2.2.3).

There is however another provision for inheritance which is discussed below in para 6.2.2.

- 6.2.2 **Emigrating Indian S. 6(5)** - Section 6(5) permits a non-resident to hold on to Indian security, Indian currency and Immovable property in India if he had acquired when he was an Indian resident. Such a person is referred to as "emigrating resident". A non-resident heir can inherit the assets from an "emigrating resident". Heir of heir however does not get relief u/s. 6(5). It means heir of heir will require RBI permission for inheritance / holding the IP, sale and repatriation of funds.

Legally u/s. 6(5) what is permitted to be held or inherited, are only three assets – immovable property, Indian security and Indian currency. Other assets are not covered. This does not seem to be the intention. In practice, all Indian assets can be held by Emigrating Indian or the heir of Emigrating Indian.

Under section 6(4) (Returning India), there is an explanatory circular [AP 90 of 2014] which has elaborated as to what all assets can section 6(4) apply to. Such a clarification is not there for section 6(5). The objective of section 6(4) and 6(5) is that people who change their residence, should be able to continue to – hold the asset, transfer the asset, retain the sale proceeds and reinvest the same. The relief is extended to the first level heir of such person also.

Thus under **section 6(5)**, any non-resident can inherit property from an Emigrating Indian. There is no distinction between NRI/OCI and a foreigner. The property can be sold subsequently.

- 6.2.3 **Remittance of sale proceeds –**

a) As discussed in para 6.2.1, NRI / PIO have the facility of remitting US\$ 1 mn. per year out of non-repatriable funds.

b) The testator who had acquired the property with foreign exchange remitted to India, can take away entire sale proceeds. Can the heir who inherits IP from such a person also repatriate the funds on sale of IP?

One needs to consider Ru. 29(2) of NDI rules. Two conditions are laid down for repatriation of sale proceeds. The first is that the seller should have acquired the IP in accordance with FEMA rules. Here inheritance is in accordance with FEMA rules. Secondly, "*the amount for acquisition of the immovable property was paid in foreign exchange ...*". It does not state that the seller (heir) should have acquired the property with foreign exchange. As

long as the IP was acquired with foreign exchange (who acquires is not relevant), the condition is satisfied. In essence the IP is a repatriable asset. The principle is akin to that of FDI. Under FDI, if one non-resident acquires repatriable shares (FDI) from another non-resident (whether by way of sale, gift or inheritance), the acquiring non-resident gets the shares on repatriable basis. The successor can repatriate the funds on sale. Hence in my view the entire amount can be repatriated abroad on sale of IP by the heir. If there is any objection or doubt, a clarification / approval should be taken from RBI.

c) If inheritance is from a non-resident u/s. 6(5) (from an Emigrating Indian), upto US\$ 1 mn. can be repatriated. [*Notn. 13(R), Reg. 4(1)(ii)*]. (See para 6.2.2 above for discussion on S. 6(5)). For remittance of more funds, the heir of an Emigrating Indian, requires approval to repatriate the funds. [*Rule 29(1) of NDI rules.*] (However if the Emigrating Indian himself wants to remit funds on sale of IP, approval is required. This seems to be a lacuna.)

d) A widow/ widower resident outside India who has inherited assets of the deceased spouse who was an Indian citizen resident in India, can remit upto USD 1,000,000 (US Dollar One million only) per financial year. [*Notn. 13(R), Reg. 4(1)(ii)*].

e) If foreigner inherits property in any other manner, he cannot remit funds out of India without an approval from RBI.

6.2.4 **Gift of IP** – Gift of IP (other than agricultural property) to an NRI / OCI is permitted. Gift to other non-residents is not permitted.

### 6.3 **Shares and securities:**

6.3.1 Shares and securities can be acquired under various provisions of NDI rules and Debt instruments rules. There is **no specific provision for inheritance of securities by non-residents**. Generally, transfer from one non-resident to another non-resident is permitted. In practice, inheritance is also permitted. Due to lack of specific provisions, the individual foreigner should ideally invest in India through his foreign entity. On the non-resident's death, there is no inheritance by anyone of Indian securities.

If securities are held on repatriable basis, the heir can hold these on repatriable basis. If securities are held on non-repatriable basis, the heir can hold these on non-repatriable basis. There will be some compliance required in the "Entity Master" (foreign investment data on RBI portal) for change of name of the investor on RBI's "firms" portal.

In some situations, if an outright foreigner inherits securities which are held by an NRI/OCI on non-repatriable basis, an approval will be required to hold

the same from DPIIT. For sale and repatriation of funds also, an approval will be required. (See para 2.3.4 for more details.)

- 6.3.2 What has been stated above in para 6.2.2 for Emigrating Indian, applies for Indian security. [S. 6(5)]

Thus NRI/OCI and foreigner can normally inherit the above assets.

- 6.3.3 **Gift of securities** - Gift is permitted from one non-resident to another. Gift of securities held on non-repatriable basis to an NRI / OCI who will hold these securities on non-repatriable basis, is permitted.

Gift of securities and units of investment vehicle from NRI/OCI who hold the securities held on non-repatriable basis, to a non-resident (Non-NRI), requires a prior approval of RBI. There are limits of gift upto 5% of each class of securities and upto US\$ 50,000 for the year. (See para 2.4.4 for more discussion.) (Ru. 13(3) of NDI rules).

#### 6.4 **Bank accounts in India:**

- 6.4.1 There are **no specific provisions for inheritance of bank accounts by non-residents**. Non-residents can hold Special Non-Resident Rupee Account (SNRR) and NRO bank accounts in India. NRIs and PIOs can also hold NRE and FCNR bank accounts in India. Nomination can be made for these accounts. In case of death of account holder, regulations provide for nomination under Deposit Regulations [*Notn. 5(R)*] as under:

- i) NRE account – Schedule 1, clause 8 – Funds can be remitted to the non-resident nominee.
- ii) NRE account – Schedule 1, clause 9(f) – If the resident is a nominee and he has to remit funds for meeting liabilities or similar purpose, an application has to be made to the RBI.
- iii) NRO account – Schedule 3, para 10 – Funds can be credited to the NRO bank account of the non-resident nominee.
- iv) SNRR account – Schedule 4, para 13 – Funds can be credited to NRE / NRO account of the non-resident nominee or can be remitted abroad through normal banking channels.

However nomination is different from inheritance. The testator may have made one person as the nominee and someone else as the heir. The funds belong to the heir. Hence the nominee who gets the funds, is required to hand it over to the heir. Nomination only eases the dealings with the bank. It is better to have nomination in line with the bequest.

What is stated in para 6.2.2 applies to Emigrating Indian. [S. 6(5)]. Thus NRI/OCI and foreigner can normally inherit the bank accounts from an Emigrating Indian.

6.4.2 **Gift of funds** – Gift is permitted as provided in Deposit Regulations. Funds from NRO account can be transferred to the donee's NRO account. Funds from NRE / FCNR accounts can be transferred to donee's NRE / FCNR accounts. Somehow there is no provision for transfer of funds from NRE / FCNR account to an NRO account. In practice it is permitted as funds prima facie become non-repatriable. However earlier there was no provision for transfer of funds from NRO account to another NRO account. In one such case, where NRI mother transferred funds from her NRO account to her NRI daughter's NRO account, the transferor had to go for Compounding!

6.5 **Other assets:**

6.5.1 There is **no specific provision for inheritance of other assets by non-residents**. Other assets can be of several kinds – gold, Jewellery, paintings, etc. One may say that if the heir is permitted to own the assets in India, then there is no difficulty in inheriting such kind of assets. If heir is not eligible to own the asset, an approval of RBI will be required to hold the asset acquired by way of inheritance.

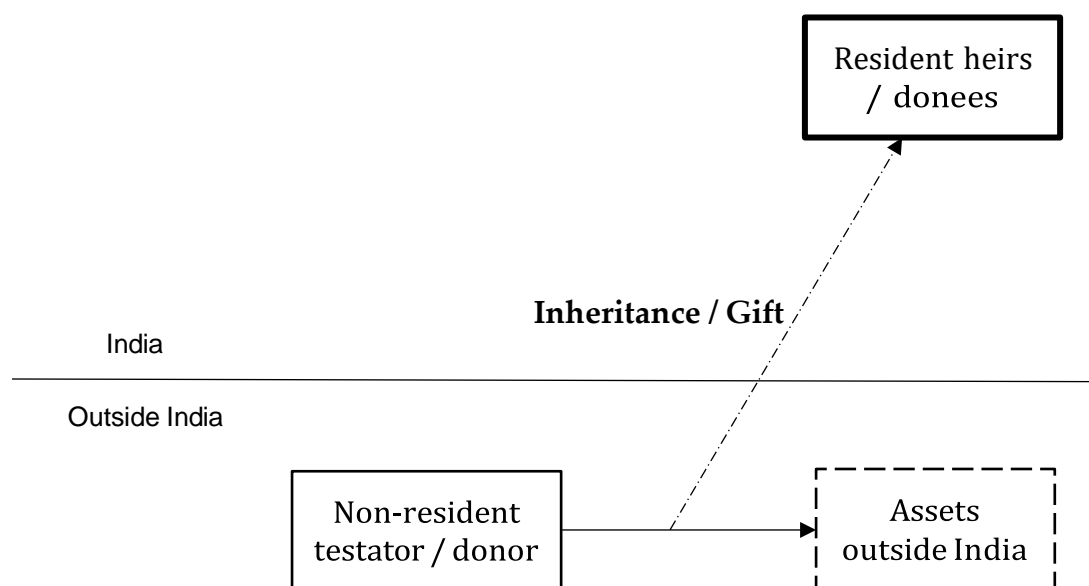
For sale and remittance of funds abroad, an approval is required.

6.5.2 What has been stated above in para 6.2.2 for Emigrating Indian, applies for other assets. [S. 6(5)]. Thus NRI/OCI and foreigner can normally inherit the above assets from an Emigrating Indian.

6.5.3 **Gift of other assets** – If the non-resident donee can acquire the assets, the gift can be made. Generally a gift to an NRI/OCI can be made by any non-resident. Gifts to outright non-residents cannot be made. In practice, if some assets such as gold, jewellery is made, it is permitted as a practice.

7. **Situation 6 – Testator / donor is a non-resident, has foreign assets and heirs / donees are Indian residents:**

7.1.1 A chart is given below for the above situation.



In this situation a non-resident testator has assets abroad. The heirs however are Indian residents.

The testator could have acquired assets abroad in any of the following manners.

- Acquisition as a non-resident.
- Acquisition while being an Indian resident.

This situation may require examination of succession laws of the country where assets are situated, and also where testator / donor is resident / domiciled.

7.1.2 **General observations:**

- a) Normally Resident heir has to bring the funds to India or sell the assets and bring the funds to India. There are some exceptions.
- b) Gift also does not help in many situations. Resident donee has to bring the funds to India or sell the assets and bring the funds to India. There are very few exceptions.
- c) What is stated in para 1.11 applies in this situation.



## 7.2 Immovable property:

- 7.2.1 If an Indian resident inherits IP abroad from a non-resident, he can retain the same abroad [Ru. 21(2)(ii)(a) of OI rules]. This was not permitted under erstwhile Notification no. 7(R) or even the earlier Notification no. 7. Under the OI rules enacted on 22.8.2022 this has been permitted. This is a welcome provision.
- 7.2.2 **Gift** - However gift cannot be received and retained abroad. In fact one cannot receive a gift without an approval from RBI. It is unlikely that RBI will permit receipt of gift.

## 7.3 Shares and securities:

- 7.3.1 Foreign securities can be inherited by a resident individual from a non-resident [Paras 1(2)(iii)(e) and 2(1) of Sch III of OI rules]. It may be ODI or OPI as the case may be. ODI will require compliance.

Para 2(1) specifically provides that inheritance can be without limit. (For individuals, there is a limit of US\$ 2,50,000 per year under LRS). OI directions in para 17(4) clarify that inheritance will not be counted towards LRS limit. Thus LRS facility is not curtailed by this inheritance.

Proviso to para 1(2)(iii)(e) further provides that ODI by way of inheritance may be made in a foreign entity "*whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control*". Thus these restrictions under ODI don't apply in case of inheritance.

The restriction which will apply is that if the activity of the foreign company is not "bonafide", then one will have to apply for directions from RBI. "Bonafide activity" has been defined in explanation to Ru. 9 to mean any activity which is permissible under the laws of India and the foreign country.

As discussed above, what can be received as inheritance should be those securities which an Indian resident can hold as ODI or OPI. If for example, shares of a company engaged in real estate business are inherited, can such inheritance be received? Real estate and a few other businesses are prohibited under Ru. 19 of OI rules. It will be better to apply to RBI. Quite likely RBI will ask that such shares should be sold and funds brought into India.

For securities inherited as OPI, there is no specific relief as in case of ODI. Thus if unlisted debt instrument is inherited (which is not permissible as OPI investment), directions from RBI will be required.

For sale of securities and reinvestment of sale proceeds, kindly refer to para 3.3.1(g) above.

Inheritance was also permitted under erstwhile Notification no. 120 under Reg. 22(1)(iii).

- 7.3.2 **Gift - Resident individuals** can receive foreign securities as gift from a non-resident (either as ODI or as OPI) under paras 1(2)(iii)(d) and 2(3) of Sch. III of OI rules. (The resident donor should have acquired the securities as permitted under FEMA.)

Resident can receive gift of foreign securities from a non-resident subject to FCRA rules [Paras 1(2)(iii)(d) and 2(3) of Sch. III of IO rules]. There is a controversy surrounding the issue of FCRA. FCRA is applicable to specified persons such as journalists, Government employees etc. If the person is not a specified person, FCRA does not apply. An FAQ issued by the Government states that for gift received from non-resident relatives exceeding Rs. 10 lakhs, a report has to be submitted to the Government. On this basis, some banks are asking for an approval / compliance under FCRA. However when the law itself is not applicable, there is no issue of reporting.

Under erstwhile Notification 120 also, gift was permitted under Reg. 22(1)(i). There was no prescribed compliance. To avoid compliance, companies would be formed by non-residents with nominal capital. Then the shares would be gifted to an Indian resident. Now it is good that compliance has been prescribed. In fact this route could be used to acquire companies where investment is not permitted to an Indian resident (such as real estate trading). Now it is good that this loophole has been plugged.

It should be noted that for inheritance there is no limit on the amount of inheritance. It has been specifically stated in para 2(1) of Sch. III. However in case of gift from a non-resident, there is no such relief. Under Schedule III of OI rules, the normal limit is the LRS limit of US\$ 2,50,000 per year. This limit continues to apply. (For gift from a resident, there is no limit.). OI directions in para 17(4) however clarify that gift in accordance with Para 2 of Schedule III to OI Rules will not be counted towards LRS limit. Thus it seems that LRS facility is not curtailed by this gift. This clarification seems to be contrary to the OI rules. The directions cannot override the OI regulations. Does it mean that the gift will be counted towards the LRS limit, or the LRS limit remains separate? It will be better to obtain clarification from RBI.

For sale of securities and reinvestment of sale proceeds, kindly refer to para 3.3.1 above.

- 7.3.3 As discussed above, what can be received as gift should be those securities which an Indian resident can hold as ODI or OPI. Thus shares of a company

engaged in real estate business cannot be received as ODI without first obtaining approval. Or unlisted debt instruments cannot be received as OPI without first obtaining an approval. It is doubtful whether RBI will give an approval.

It may be noted that relief available for financial services activity or step down subsidiary available in case of inheritance (discussed in para 7.3.1 above), is not available in case of gift.

#### 7.4 **Other assets:**

7.4.1 There is **no specific provision dealing with inheritance of other assets by residents**. Any other foreign asset inherited by a resident has to be sold off and proceeds have to be brought into India. If there is any difficulty, it is better to apply to RBI for directions.

7.4.2 **Gift** – Any receipt of gifts also have to be brought back to India. Any gift which cannot be brought into India, should not be accepted without an RBI approval.

#### 7.5 **Shares under ODI route – a peculiar situation:**

An Indian resident individual could have acquired shares of a company outside India under the Overseas Direct investment route (referred to LRS-ODI route). Under this situation, RBI grants a Unique Identification Number (UIN). The Indian resident has to file Annual Performance Report every year and in general comply with the FEMA rules for the investment.

When the resident becomes a non-resident, does FEMA continue to apply? Legally the person (who becomes a non-resident), and the shares are outside India. FEMA should not apply. However, investment has been made from Indian funds. RBI has advised that one may write to RBI and they will suspend the UIN. Till the suspension remains, there is no requirement of filing APRs. Later when the person comes back to India, the UIN can be revived. The objective is that if investment has gone from India, the funds should ultimately come to India on disinvestment.

If the non-resident shareholder bequeaths the shares to an Indian resident, no approval is required (see para 7.3). Only the UIN will be revived. If the shares are bequeathed to a non-resident, direction from RBI will be required.

8. **Legal proceedings:**

Section 43 provides for devolving of rights etc. on the legal representative. Any right, obligation, liability, proceeding or appeal will not abate due to death or insolvency of the person. Upon such death or insolvency, the rights and obligations will devolve on the legal representative of such person or the official receiver or the official assignee, as the case may be:

The legal representative of the deceased shall be liable only to the extent of the inheritance or estate of the deceased.

9. **End Note** – The FEMA rules are quite confusing as the reader would have noticed. Simplification is much desired. A better situation will be to scrap several rules and keep only limited rules.

The article deals with the issues in a legal manner. It is possible that some issues may have been missed out. The article is not a legal opinion. Those facing issues of succession, should obtain legal advice.

**Annexure A**

**Extracts of current FEMA law – Act, Rules, Regulations and circulars providing for inheritance in case of resident heir or receipt of gift by a resident donee**

**1. Foreign Exchange Management Act (FEMA):**

**1.1 Section 3 - Dealing in foreign exchange, etc.:**

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

(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

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

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;

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

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

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

**1.2.1 Section 6(4) – Capital Account Transactions:**

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.

### 1.2.2 A.P. (DIR Series) Circular No. 90 January 9, 2014:

Attention of Authorized Dealers is invited to Section 6 (4) of FEMA, 1999 in terms of which 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.

2. We have been receiving representations with regards to nature of transactions covered under Section 6(4) of FEMA, 1999. In this regard it is clarified that Section 6(4) of FEMA, 1999 covers the following transactions:

(ii) 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;

(iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of **inheritance** from a person resident outside India.

(iv) 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 therefor 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.

### 1.3 Section 9 - Exemption from realisation and repatriation in certain cases:

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

(d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or **inheritance** from a person referred to in clause (c), including any income arising therefrom. (Sections 4, 8, and 9(1)(c) are reproduced below,)

***[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.***

***Section 8 - Realisation 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 realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.***

**Section 9 - Exemption from realisation and repatriation in certain cases:**

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

*(c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank.*

**1.4 Section 9 - Exemption from realisation and repatriation in certain cases:**

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

(e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, **inheritance** or any other legitimate means up to such limit as the Reserve Bank may specify.

*[Sections 4 and 8 are reproduced in para 1.2 above.*

*RBI has issued FEMA Notification 11(R) - Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015. There is no exemption from sections 4 and 8 for holding foreign exchange acquired on **inheritance**.]*

**1.5 Section 43 - Death or insolvency in certain cases:**

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

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

**2. Immovable property outside India by residents:**

**Foreign Exchange Management (Overseas Investment) Rules, 2022 - Notification No. G.S.R. 646(E) dated 22<sup>nd</sup> August 2022:**

**Regulation 21 - Restriction on acquisition or transfer of immovable property outside India:**

(1) Save as otherwise provided in the Act or this rule, no person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank:

Provided that nothing contained in this rule shall apply to a property

(i) held by a person resident in India who is a national of a foreign State;

(ii) acquired by a person resident in India on or before the 8th day of July, 1947 and continued to be held by such person with the permission of the Reserve Bank;

(2) Notwithstanding anything contained in sub-rule (1)

(i) a person resident in India may acquire immovable property outside India by way of **inheritance or gift** or purchase from a person resident in India who has acquired such property as per the foreign exchange provisions in force at the time of such acquisition;

(ii) a person resident in India may acquire immovable property outside India from a person resident outside India

(a) by way of **inheritance**;

(iv) a person resident in India who has acquired any immovable property outside India in accordance with the foreign exchange provisions in force at the time of such acquisition may

(a) transfer such property by way of gift to a person resident in India who is eligible to acquire such property under these rules or by way of sale;

### 3. **Foreign currency accounts by Indian residents:**

**Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015 - Notification No. FEMA 10(R) /2015-RB dated January 21, 2016**

#### 3.1 **Regulation 4 - Opening, holding and maintaining Foreign Currency Accounts in India:**

##### **(B) - Resident Foreign Currency Account:**

(1) - A person resident in India may open, hold and maintain with an authorised dealer in India a Foreign Currency Account, to be known as a Resident Foreign Currency (RFC) Account, out of foreign exchange –

(c) received or acquired as **gift or inheritance** from a person referred to in sub-section (4) of section 6 of the Act; or

(d) referred to in clause (c) of section 9 of the Act, or acquired as **gift or inheritance** there from. [Section 9(1)(c) is reproduced above in para 1.2.]



**3.2 Master Direction – Deposits and Accounts - FED Master Direction No.14/2015 dated 16 January 1, 2016 (as updated):**

**3.2.1 Part I - Opening, holding and maintaining foreign currency accounts by a person resident in India:**

**Para 1. Introduction:**

1.3 A person resident in India may maintain a foreign currency account outside India if he had maintained it when he was resident outside India or **inherited** it from a person resident outside India.

**3.2.2 Para 3. Foreign Currency Accounts that can be held in India:**

**3.2 Resident Foreign Currency (RFC) Account – RFC Account**

1) A person resident in India is permitted to open a RFC account with an AD bank in India out of foreign exchange received or acquired by him:

b. by converting assets which were acquired by him when he was a non-resident or **inherited** from or gifted by a person resident outside India and repatriated to India.

**4. Overseas investment in Foreign entities:**

**4.1 Foreign Exchange Management (Overseas Investment) Rules, 2022. – Notification No. G.S.R. 646(E) dated 22<sup>nd</sup> August 2022:**

**Ru. 4. Non-applicability of rules and regulations relating thereto in certain cases –**

Nothing in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022 shall apply to

(a) any investment made outside India by a financial institution in an IFSC;  
(b) acquisition or transfer of any investment outside India made,

- (i) out of Resident Foreign Currency Account; or
- (ii) out of foreign currency resources held outside India by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or
- (iii) in accordance with sub-section (4) of section 6 of the Act.

Explanation. For the purpose of this rule, the expression shall have the same meaning as assigned to it in the International Financial Services Centres Authority Act, 2019 (50 of 2019).

4.2 **Foreign Exchange Management (Overseas Investment) Rules, 2022. – Notification No. G.S.R. 646(E) dated 22<sup>nd</sup> August 2022:**

**Schedule III - Manner of making Overseas Investment by resident individual:**

**1. Manner of making OI-**

(2) A resident individual may make or hold Overseas Investment by way of,-

(iii) ODI or OPI, as the case may be, by way of -

(d) **gift** as per the conditions laid down under this Schedule;

(e) **inheritance**;

Provided that ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step down subsidiary where the resident individual has control:

**2. Acquisition by way of gift or inheritance-**

(1) A resident individual may, without any limit, acquire foreign securities by way of **inheritance** from a person resident in India who is holding such securities in accordance with the provisions of the Act or from a person resident outside India.

(2) A resident individual, without any limit, may acquire foreign securities by way of **gift** from a person resident in India who is a relative and holding such securities in accordance with the provisions of the Act.

(3) A resident individual may acquire foreign securities by way of **gift** from a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010 ( 42 of 2010) and the rules and regulations made thereunder.

4.3 **Foreign Exchange Management (Overseas Investment) Directions, 2022 - RBI/2022-2023/110, A.P. (DIR Series) Circular No.12 August 22, 2022:**

**22. Overseas investment by resident individuals:**

(4) Resident individuals are not permitted to transfer any overseas investment by way of gift to a person resident outside India.

5. **Realisation, repatriation and surrender of foreign exchange:**

**Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 - Notification No. FEMA 9(R)/2015-RB December 29, 2015:**

5.1 **Regulation 2 - Definitions –**

(iii) 'foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange.

5.2 **Regulation 3 - Duty of persons to realise foreign exchange due:**

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing –

(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

(b) that the foreign exchange ceases in whole or in part to be receivable by him.

5.2 **Regulation 5 - Period for surrender of realised foreign exchange:**

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

(1) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as **inheritance**, settlement or gift, within seven days from the date of its receipt.

5.3 **Regulation 7 - Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals:**

A person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

6. **(Remittance of Assets) Regulations:**

**Foreign Exchange Management (Remittance of Assets) Regulations, 2016 - Notification No. FEMA 13(R)/2016-RB April 1, 2016:**

**6.1 Regulation 4(2)(ii) - Permission for remittance of assets in certain cases:**

(2) A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) may remit through an authorised dealer an amount, not exceeding USD 1,000,000 (US Dollar One million only) per financial year,

(ii) Under a deed of settlement made by either of his parents or a relative (relative as defined in Section 2(77) of the Companies Act, 2013) and the settlement taking effect on the death of the settler, on production of the original deed of settlement;

Provided that where the remittance under Clause (i) and (ii) is made in more than one instalment, the remittance of all instalments shall be made through the same Authorised Dealer.

**Annexure B****Extracts of current FEMA law – Act, Rules, Regulations and circulars providing for inheritance in case of non-resident heir or receipt of gift by a non-resident donee****1. Foreign Exchange Management Act (FEMA):****1.1 Section 3 - Dealing in foreign exchange, etc.:**

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

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

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

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

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

**1.2 Section 6(5) – Capital Account Transactions:**

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.

1.3 **Section 43 - Death or insolvency in certain cases:**

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

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

2. **Immovable property in India by non-residents:**

**Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - S.O. 3732(E) dated 17th October, 2019:**

2.1 **Rule 24 - Acquisition and Transfer of Property in India by a NRI or an OCI:**

An NRI or an OCI may -

(b) acquire any immovable property in India other than agricultural land or farm house or plantation property by way of **gift** from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in clause (77) of section 2 of the Companies Act, 2013;

(c) acquire any immovable property in India by way of **inheritance** from a person resident outside India who had acquired such property:-

(i) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these rules ; or

(ii) from a person resident in India.

2.2 **Rule 29 - Repatriation of sale proceeds:**

(1) A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub- section.

(2) In the event of sale of immovable property other than agricultural land or farm house or plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:-

(a) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition or the provisions of these rules;

(b) the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External Account;

(c) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

**2. Shares and securities in India by non-residents:**

**Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - Notification No. S.O. 3732(E) [F.NO.1/14/EM/2015], dated 17-10-2019**

**2.1 Rule 9: Transfer of equity instruments of an Indian company by or to a person resident outside India:**

(1) a person resident outside India, not being a non-resident Indian or an overseas citizen of India or an erstwhile overseas corporate body may transfer by way of sale or **gift** the equity instruments of an Indian company or units held by him to any person resident outside India;

(2) A person resident outside India, holding equity instruments of an Indian company or units in accordance with these rules may transfer the same to a person resident in India by way of sale or **gift** or may sell the same on a recognised stock exchange in India in the manner specified by the Securities and Exchange Board of India :

(4) A person resident in India holding equity instruments or units of an Indian company may transfer the same to a person resident outside India by way of **gift** with the prior approval of the Reserve Bank, in the manner prescribed, and subject to the following conditions, namely:—

- (i) the donee is eligible to hold such a security under the Schedules of these Rules;
- (ii) the gift does not exceed five percent of the paid up capital of the Indian company or each series of debentures or each mutual fund scheme;

Explanation: The five percent of the paid up capital of the Indian company or each series of debentures or each mutual fund scheme will be on cumulative basis by a single person to another single person.

- (iii) the applicable sectoral cap in the Indian company is not breached;
- (iv) the donor and the donee shall be "relatives" within the meaning in clause (77) of section 2 of the Companies Act, 2013;
- (v) the value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during

the financial year does not exceed the rupee equivalent of fifty-thousand US Dollars;

- (vi) such other conditions as considered necessary in public interest by the Central Government.

## 2.2 **Rule 13: Transfer of equity instruments by NRI or OCI:**

(1) A NRI or an OCI holding equity instruments of an Indian company or units on repatriation basis may transfer the same by way of sale or **gift** to any person resident outside India :

Provided that,—

- (i) prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval;
- (ii) where the acquisition of equity instruments by an NRI or an OCI under the provisions of Schedule III of these rules has resulted in a breach of the applicable aggregate NRI or OCI limit or sectoral limits, the NRI or the OCI shall sell such equity instruments to a person resident in India eligible to hold such instruments within the time stipulated by the Reserve Bank of India in consultation with the Central Government and the breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time, shall not be reckoned as a contravention under these rules.

(3) A NRI or an OCI or an eligible investor under Schedule IV of these rules holding equity instruments or units of an Indian company on a non-repatriation basis may transfer the same to a person resident outside India by way of **gift** with the prior approval of the Reserve Bank of India, in the manner prescribed, and subject to the following conditions, namely :—

- (i) the donee is eligible to hold such a security under relevant Schedules of these rules;
- (ii) the gift does not exceed five percent of the paid up capital of the Indian company or each mutual fund scheme;

Explanation: The five percent shall be on cumulative basis by a single person to another single person.

- (iii) the applicable sectoral cap in the Indian company is not breached;
- (iv) the donor and the donee shall be "relatives" within the meaning in clause (77) of section 2 of the Companies Act, 2013;



- (v) the value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50000;
- (vi) such other conditions as may be considered necessary in public interest by the Central Government.

(4) A NRI or an OCI or an eligible investor specified under Schedule IV of these rules holding equity instruments of an Indian company or units on a non-repatriation basis, may transfer the same by way of **gift** to an NRI or an OCI or an eligible investor under Schedule IV of these rules who shall hold it on a non-repatriable basis.

### 3. Remittance of assets:

**Foreign Exchange Management (Remittance of Assets) Regulations, 2016 - Notification No. FEMA 13(R)/2016-RB dated April 01, 2016:**

#### 3.1 Regulation 4(1) - Permission for remittance of assets in certain cases:

A citizen of foreign state, not being a Person of Indian origin (PIO) or a citizen of Nepal or Bhutan, who

(ii) has **inherited** the assets from a person referred to in sub-section (5) of section 6 of the Act; or

(iii) is a widow/ widower resident outside India and has **inherited** assets of the deceased spouse who was an Indian citizen resident in India,

may remit through an authorised dealer an amount, not exceeding USD 1,000,000 (US Dollar One million only) per financial year on production of documentary evidence in support of acquisition, **inheritance** or legacy of assets by the remitter

Provided that for the purpose of arriving at annual ceiling of remittance, the funds representing sale proceeds of shares and immovable property owned or held by the citizen of foreign state on repatriation basis in accordance with the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2016 and Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 made under the Act, shall not be included.

Provided further that where the remittance is made in more than one instalment, the remittance of all instalments shall be made through the same authorised dealer.

### 3.2 **Regulation 4(2) - Permission for remittance of assets in certain cases:**

A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) may remit through an authorised dealer an amount, not exceeding USD 1,000,000 (US Dollar One million only) per financial year,

(i) out of the balances held in the Non-Resident (Ordinary) Accounts (NRO accounts) opened in terms of Foreign Exchange Management (Deposit) Regulations, 2016/ sale proceeds of assets/ the assets acquired by him by way of **inheritance**/ legacy on production of documentary evidence in support of acquisition, **inheritance** or legacy of assets by the remitter;

(ii) Under a **deed of settlement** made by either of his parents or a relative (relative as defined in Section 2(77) of the Companies Act, 2013) and the **settlement taking effect on the death of the settler**, on production of the original deed of settlement;

Provided that where the remittance under Clause (i) and (ii) is made in more than one instalment, the remittance of all instalments shall be made through the same Authorised Dealer.

Provided further that where the remittance is to be made from the balances held in the NRO account, the account holder shall furnish an undertaking to the Authorised Dealer that "the said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA.

### 3.3 **Regulation 7 - Reserve Bank's prior permission in certain cases:**

(1) A person who desires to make a remittance of assets in the following cases, may apply to the Reserve Bank, namely:

(i) Remittance exceeding USD 1,000,000 (US Dollar One million only) per financial year –

(a) on account of legacy, bequest or **inheritance** to a citizen of foreign state, resident outside India; and

(b) by a Non-Resident Indian (NRI) or Person of Indian Origin (PIO), out of the balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of **inheritance**/ legacy.

(ii) Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made;

(2) On consideration of the application made under sub-regulation (1), the Reserve Bank may permit the remittance, subject to such terms and conditions as it deem necessary.

**4. Deposits and Bank accounts:**

**Foreign Exchange Management (Deposit) Regulations, 2016 - Notification No. FEMA 5(R)/2016-RB dated April 01, 2016:**

**4.1 Schedule 1, para 8:**

**Repatriation of funds to non-resident nominee:**

Authorised dealers/ authorised banks may allow remittance of funds lying in the NRE account of the deceased account holder to his non-resident nominee.

**4.2 Schedule 1, para 9(f):**

**Miscellaneous:**

Remittances abroad by Resident nominee: Application from a resident nominee for remittance of funds outside India for meeting the liabilities, if any, of the deceased account holder or for similar other purposes, should be forwarded to the Reserve Bank for consideration.

**4.3 Schedule 3, para 10:**

**Payment of funds to Non-resident Nominee**

The amount due/ payable to non-resident nominee from the account of a deceased account holder, shall be credited to NRO account of the nominee with an authorised dealer/ authorised bank in India.

**4.4 Schedule 4, para 13:**

The amount due/ payable to non-resident nominee from the account of a deceased account holder, shall be credited to NRO/NRE account of the nominee with an authorised dealer/ authorised bank in India or by remittance through normal banking channels.