NRIs – Tax & FEMA issues

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NRIs – Tax & FEMA issues – Presentation Layout

Sr. No.	Particulars
1	Background
2	Residential Status under Income-tax & FEMA
3	Common Tax & FEMA issues for NRIs – Case study analysis
4	Returning Indian
5	Specific reporting requirements in Tax Return for NRIs
6	Remittances
7	Change of Citizenship & Other issues

Background

Prevalence of cross-border situations

- Cross-border transactions
  - Imports and Exports
  - Outbound and Inbound Investments
  - Other commercial & personal transactions
- India has the world's largest diaspora
  - Spreads over > 200 countries
- Cross-border movement of Indians
  - 25 Lakh Indians migrate abroad every year
  - 60% of NRIs consider settling back in India on retirement
    - NRIs of US, UK, Canada, Australia and Singapore
- NRI Investments in India:
  - NRI **deposit inflows** doubled to $7.82 billion in April to August 2024
  - NRI investment in **real estate** is growing by 15%; will be 20% in 2025
- **Significant implications under FEMA & Income-tax**

Income-tax *vis-à-vis* FEMA

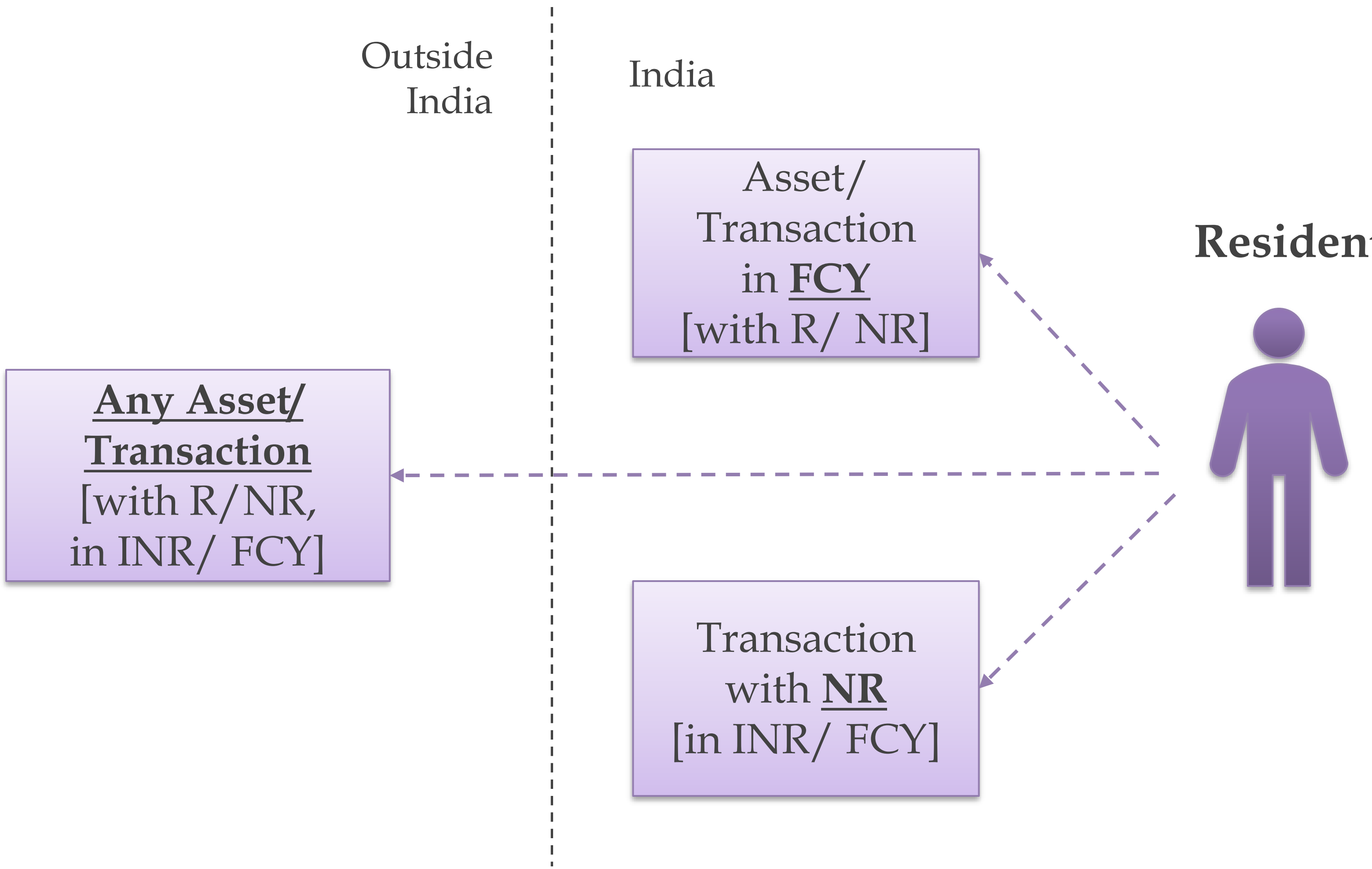
Income-tax

- Revenue Law
- Collection of tax
- Generally, no prohibitions (except the limit on cash transactions)
- Disclosure of foreign assets, TDS, SFT, etc.

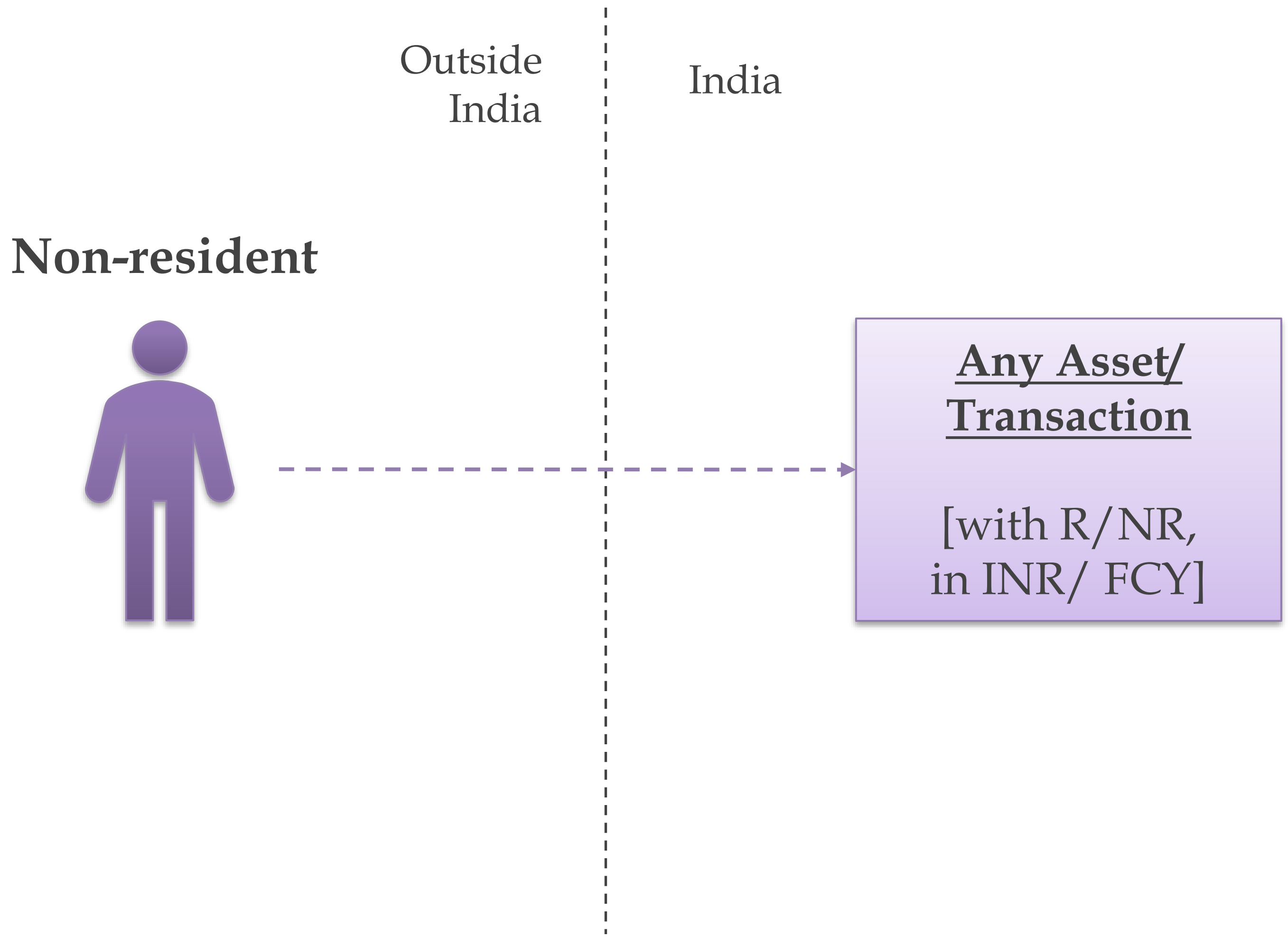
FEMA

- Regulatory Law
- Permissibility for entering into a particular transaction
- Everything is prohibited, unless specifically permitted
- Limits, conditions, reporting, compliances

Applicability of FEMA – for Residents



Applicability of FEMA – for Non-residents



Basics of FEMA – FERA to FEMA

- Erstwhile FERA
- FERA was inherited from British Government
- Under FERA, everything was prohibited unless permitted
  - Heavily regulated Act
  - Enforcement Directorate had discretionary powers
  - FERA was known as Draconian law

- Excessive regulation under FERA led to a precarious situation
- Liberalisation of 1991 did not immediately bring in foreign investors
  - Investors demanded relaxation in forex controls and discretionary powers

- FEMA was introduced in 2000 to change the law from 'control' to 'management'
  - Many provisions have been liberalized & are continuously being liberalized
  - However, regulations have not kept pace with business realities

Basics of FEMA

- Change in mindset was required
  - Law changed but administrators remained the same
  - Forex is still considered by RBI as it's kitty
- Criminal prosecution under FEMA was not possible
  - However, situation has changed post FA 2015
  - Introduction of Sections 37A and amendments in Section 13
- Regulated by Central Government & RBI
- Enforced by Directorate of Enforcement
- FEMA is a small Act
  - Prohibits almost everything
  - Essence is in the Rules, Regulations, Directions, AP Circulars, FAQs

Basics of FEMA

- Policy law
  - Government policy drafted in a legal language
  - Technical interpretation does not work
  - Intention of the regulator is important
- Incomplete drafting
  - No rules at all for certain assets
  - Basic provisions missing for assets with detailed framework
- Multiple notifications apply to a single transaction
  - FEMA law, Notifications, Rules, Master Directions, FAQs
  - Interpretation of RBI and ED
    - Even that can change over time
    - Principles keep changing as individuals keep changing

What cannot be done <u>directly</u>, cannot be done <u>indirectly!</u>

Foreign assets held by a Resident – under FEMA

- **Section 4 of FEMA:** "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 37A of FEMA introduced vide FA 2015:** Foreign asset suspected to be held in violation of FEMA
  - Value exceeding INR 1 crore
- Equivalent Indian assets can be seized
- Can lead to penalty and prosecution

- Foreign assets acquired from "white money" remitted through banking channels are also exposed to S. 37A
  - Venkateshwara Hatcheries Pvt. Ltd.
  - ED Press Release dated 9th October 2023

Foreign assets held by a Resident – under Income-tax Act

- Penal provisions under Black Money Act
  - Even for non-disclosure of foreign assets acquired lawfully
    - Flat penalty of INR 10 lakhs
  - Can lead to prosecution as well

- Recent long-awaited and welcome moves:
  - Threshold of INR 20 lakhs for assets except immovable property
    - Provides relief from penalty
    - Exposure to prosecution if the officer alleges wilful non-disclosure
  - Compliance-awareness campaign by CBDT pertaining to disclosure of foreign assets & incomes

Resident + Foreign assets = **Be careful!**

Relevant statutory documents for NRIs under FEMA

Document	Short Form	Coverage
FEM (**Non-debt Instruments**) Rules, 2019	**NDI Rules**	Investment in shares, non-debt securities, immovable property in India
FEM (**Debt Instruments**) Regulations, 2019 [FEMA Notification No. 396]	**DI Regulations**	Investment in debt securities in India
FEM (**Mode of Payment and Reporting of Non-debt Instruments**) Regulations, 2019 [FEMA Notification No. 395]	**---**	Provisions regarding mode of payment; remittance of sale proceeds and reporting requirements in case of non-debt instruments
FEM (**Remittance of Assets**) Regulations, 2016 FEMA Notification No. 13(R)	**---**	Limits, conditions, etc. for remittance of funds from India by non-residents
FEM (**Deposit**) Regs., 2016 FEMA Notification No. 5(R)	**---**	Bank accounts and deposits in India by Non-residents
FEM (**Borrowing & Lending**) Regulations, 2018 FEMA Notification No. 3(R)	**---**	Cross-border Borrowing & Lending

Residential Status under Income-tax Act

Background

- Section 6 defines Residential status under Income-tax Act
- One of the most clear provisions across the world for a long time for determining residential status
- Simple and objective "number-of-days" test
- Threshold for NRIs visiting India increased from 90 days to 150 to 182 days over the years

- Led to abuse where persons carried out substantial economic activities from India while claiming NRI status

- Changes brought in from Finance Act 2020 w.e.f AY 2021-22 (FY 2020-21) to counter such abuse
  - But effectively very less income brought to tax
  - Mountain made out of a molehill

Residential status under Section 6(1)

Resident

- 182-days Test
- 60 + 365 days test
  - **60 days substituted by 182 days in following cases**
    - IC **leaving India**:
      - for purposes of **employment outside India; or**
      - as **crew member** on an **Indian ship**
    - **IC or PIO,** **being outside India**, comes **on a visit to India**
      - **Since FY 2020-21**
      - **182 days** relief reduced to **120 days** if Total Income from Indian sources > INR 15 lakhs

Residential status under Section 6(1)

- **Erstwhile conditions:**
- Resident if:
  - In India for more than 181 days during PY - 6(1)(a)
  - In India for more than **60 days** during PY **and** 365 days during preceding 4 PYs - 6(1)(c)

- Relief provided by increasing threshold of 60 days to **181 days** for:
  - Citizen of India or PIO who, being outside India, comes on a visit to India in any PY
  - Resident leaving India for the purposes of employment outside India
  - Resident Indian Citizen who has left India as member of crew on Indian ship

- **New condition applicable from 1st April 2020:**
  - 181 days relaxation now reduced to **120 days** for Indian citizens and PIOs who have total income from sources other than foreign sources of more than Rs. 15 lakhs

Section 6(1)

6. For the purposes of this Act,—

(*1*) An individual is said to be resident in India in any previous year, if he—

(*a*) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

(*b*) [***]

(*c*) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

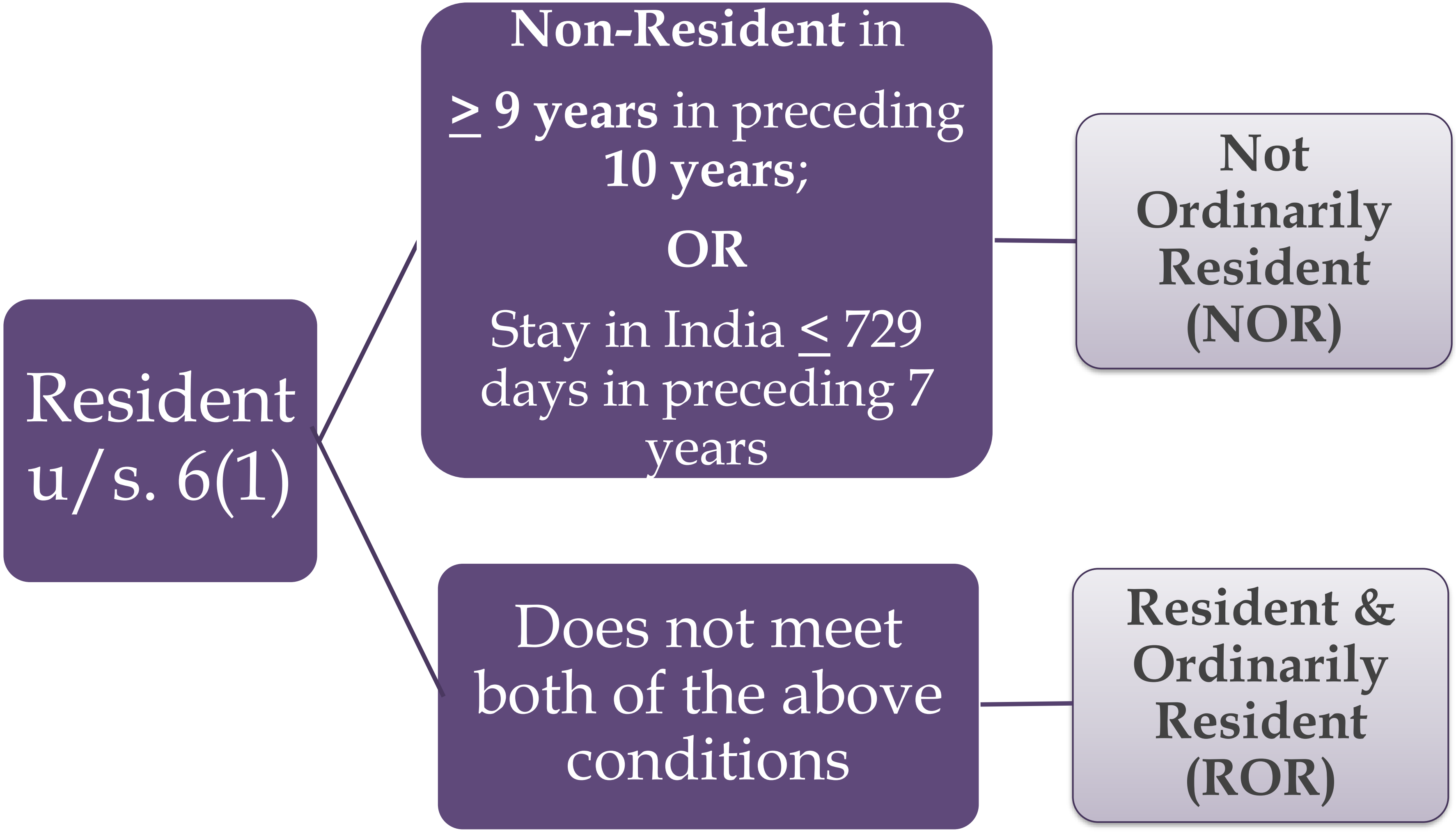
Explanation 1—In the case of an individual,—

(*a*) …….;

(*b*) being a citizen of India, or a person of Indian origin within the meaning of *Explanation* to clause (*e*) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (*c*) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted and in case of the citizen or person of Indian origin having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, for the words "sixty days" occurring therein, the words "one hundred and twenty days" had been substituted

Explanation.-For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Not Ordinarily Resident or Resident & Ordinarily Resident



Residential status under Section 6(1A)

Not qualifying as a Resident u/s. 6(1)

+

Indian Citizen

+

Total Income from Indian sources > INR 15 lakhs

+

<u>Not liable to tax in any other country</u> or territory <u>by reason of his domicile or residence</u> or any other criteria of similar nature.

→ Resident under Section 6(1A)

Section 6(1A)

- **New sub-section introduced from 1.4.2020**
- Notwithstanding anything contained in clause (1) an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.
  - Explanation.—For the removal of doubts, it is hereby declared that this clause shall not apply in case of an individual who is said to be resident in India in the previous year under clause (1).

Amended Section 6(6) – RNOR Status expanded

- 6. For the purposes of this Act,—
- (6) A person is said to be "not ordinarily resident" in India in any previous year if such person is—
- (a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or
- (b) a Hindu undivided family….; or
- (c) a citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or
- (d) a citizen of India who is deemed to be resident in India under clause (1A).
- Explanation.-For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

NRI visiting India – tax status

- Citizen or PIO who, being outside India, comes on a visit to India in any PY

0 to 119 days

- Non-Resident

- **But** RNOR if Indian sourced incomes is 15 lakhs or more; **and** not liable to tax in any other country by reason of domicile, residence, etc.

120 days or more

- Non-resident

- **But** RNOR if Indian sourced incomes is 15 lakhs or more

182 days or more

Resident and ordinarily resident

Impact of FA 2020 amendments

- Paired with introduction of new category of NOR status
- Persons becoming residents due to these 2 amendments will be NORs in each such year

- **Consequence:**
- Someone who would have been NR – becomes NOR.

- Let us see the implications.

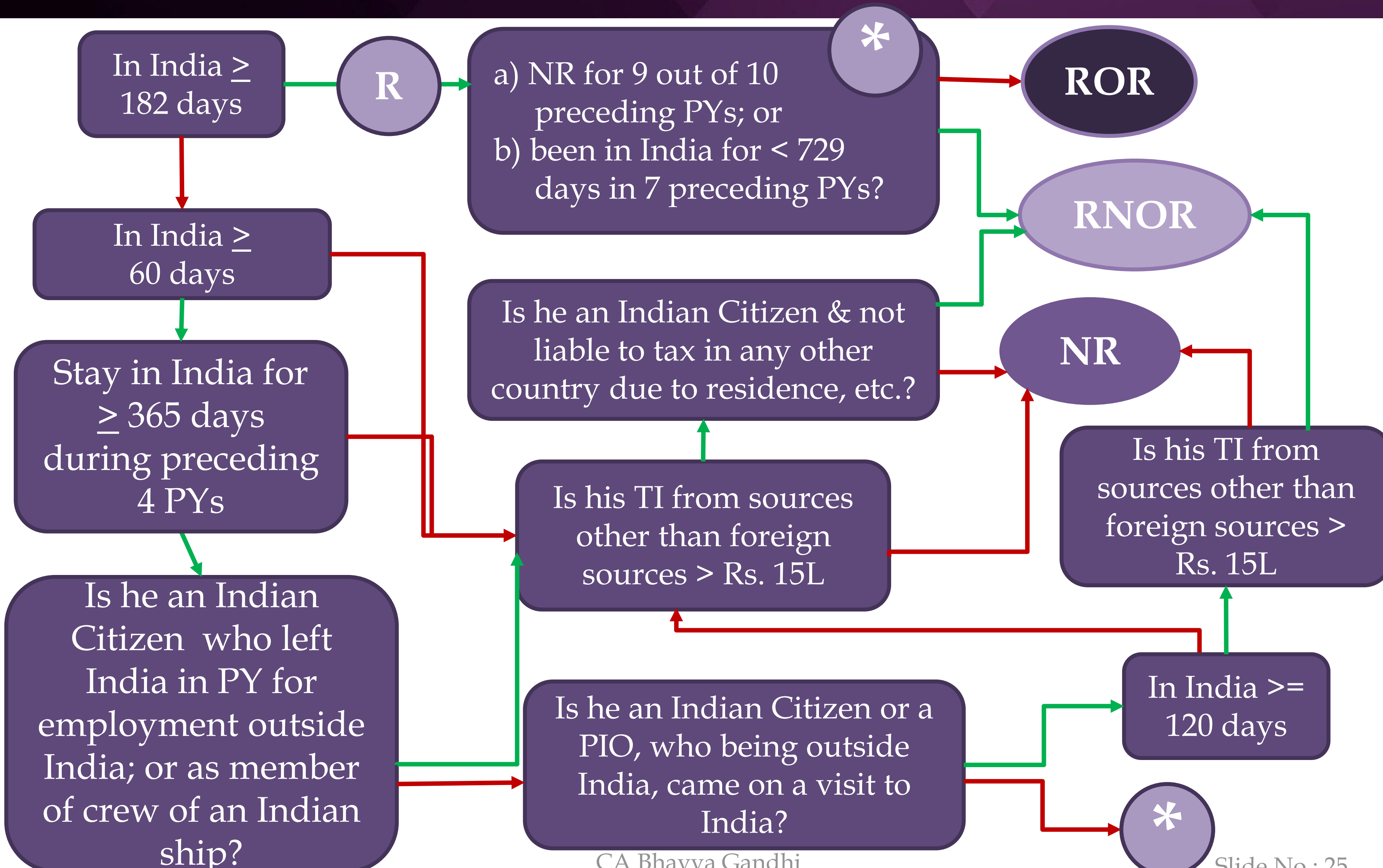
NR vis-à-vis NOR

Adverse Points	Favourable Points
• Limited increase in scope of income – income from **business controlled or profession set-up in India.** • **Some exemptions** & **Chap. XIIA benefit** are available only to NR & not to RNOR. • **DTAA benefit** available **only through tie-breaker test** • **Dilution in NOR status** on returning.	• **Benefits to senior citizens available only if they are Residents:** Relief from advance tax payment, higher threshold for slab rates, higher deduction u/s. 80D, 80TTB, etc. • **TDS** Deduction as per rates **for Residents**; and not as per Section 195 **lowering rates in most cases**. • Payer need not file Form 15CA-CB.

Neutral Points

- No obligation to report foreign assets
- Assessee continues to be treated as NR for determining the AE relationship for transfer pricing regulations and for the purposes of Section 93.
- It would not impact FEMA's non-residential status automatically.

Residential Status for Individuals under Income Tax – Flow Chart



Residential Status under FEMA

Residential status under FEMA – Background

- Different from residential status under ITA
- First & foremost step while applying FEMA
  - Like under ITA first step is to determine RS
- Determines what the person can do and what he cannot
  - Like ITA determines scope of income – what is taxable & what isn't

- Residential status under FEMA is not an annual exercise
- Largely dependent on facts & circumstances
  - Rarely affected by stay in India during a FY

- Ignored by lot of people when they move cross-border
- Realised later when there is a violation or when a desired transaction is to be undertaken

Person resident in India

Section 2(v) of FEMA: A person resident in India means:

- (i) a person residing in India for more than 182 days during the course of the preceding FY but does not include –
  - (A) a person who has gone out of India or who stays outside India, in either case –
    - (a) for or on taking up employment outside India, or
    - (b) for carrying on outside India a business or vocation outside India, or
    - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
  - (B) a person who has come to or stays in India, in either case, otherwise than
    - (a) for or on taking up employment in India, or
    - (b) for carrying on in India a business or vocation in India, or
    - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Is FEMA residential status *qua* any specific period?

Since birth	06/02/2003	09/02/2013	14/08/2024
Resident	Non-resident	Resident	Non-resident
Person normally residing in India	Took up employment in Google Inc. and moved to USA	Returned to India to start his own software business	Takes an exit. Leaves India to settle abroad with wife & family.

Persons coming to India

- Involuntary stay during Covid lockdown
- Coming to India after resigning from employment abroad
- Coming to India on expiry of visa
- Coming to India for treatment of serious diseases with uncertain timelines

- Many people start residing in India but claim that they have "intention" to stay abroad
- Mere "claim" is not sufficient
- Substantiate through Facts + Actions + Documentation

Change of residential status under FEMA

- Better to have full clarity
- Have a clean break while shifting

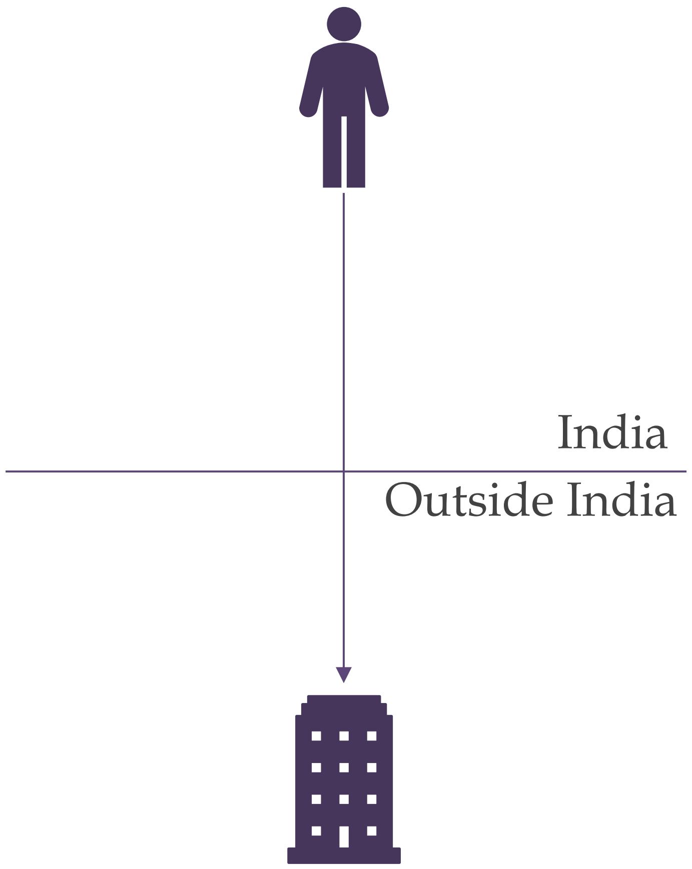
- Exposure of executing transactions in violation of FEMA
- Harsh consequences
- Exposure of actions by regulatory authorities

- No easy remedies of FEMA contravention
- Regularisation is time-consuming, difficult and complex
  - Sometimes impractical and not feasible

Common Tax & FEMA issues for NRIs – Case study analysis

Case Study 1 - When does a person turn Non-resident?

- Mr. X stays in India since birth.
- Mr. X wants to settle abroad.
- He left India on 1st January 2025 & settle in USA.
- Mr. X wants to know his residential status under ITA & FEMA.



Analysis of Case Study 1: ITA residential status

- **Resident u/s. 6(1)(a) for FY 2024-25:**
  - Stayed in India for $\geq$ 182 days

- What if Mr. X **left for** the purpose of **employment abroad**?
  - Still covered u/s. 6(1)(a)

- Mr. X will be **ROR** for FY 2024-25:
- Foreign incomes taxable
- Foreign assets to be disclosed

- This is missed by many
- Indians going abroad for education, settling, etc. after 29th May of FY
  - Generally, they meet 60 + 365 days test and are ROR in the year of migration
- Indians going abroad for employment after 30th September of FY
  - Generally, they are ROR in the year of migration

Analysis of Case Study 1: FEMA residential status

- Mr. X has left India to settle abroad
- **NRI from** the date of leaving India: **1st January 2025**

- Is mere "claim" sufficient?
- What are the circumstances indicating his intention to stay outside India for an uncertain period?

- How to substantiate?
- Facts + Actions + Documentation
  - Type of Visa;
  - Number of days of stay;
  - Transactions and Investments;
  - Location of Family;
  - Circumstances surrounding the person

- **Take holistic view!**

Analysis of Case Study 1: FEMA aspects – students going abroad

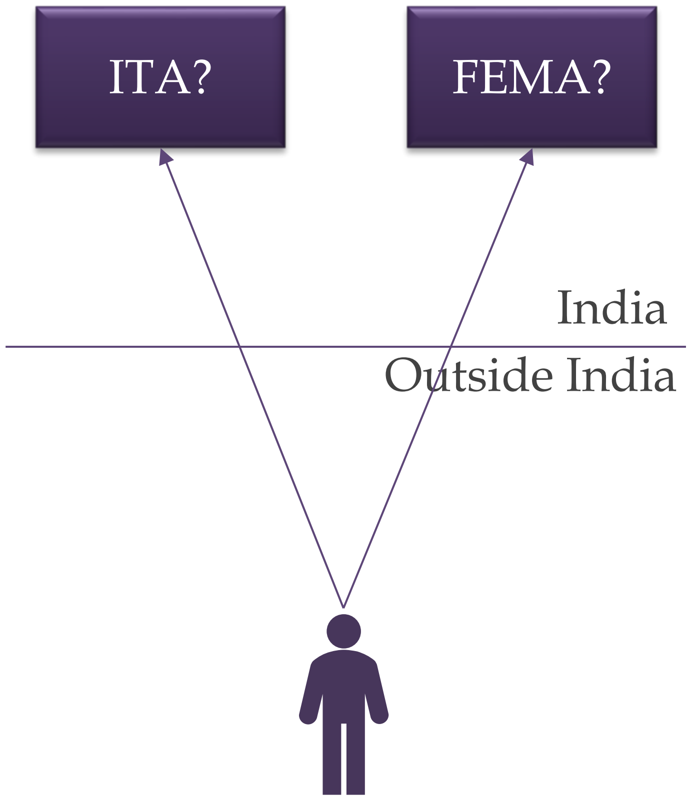
- **What if Mr. X left India for studies abroad?**
- Not going for employment or business
- Does it reflect circumstances indicating his intention to stay outside for an uncertain period?
- The visa & course are always for a "specified duration"
- What about the foreign transactions being undertaken by such students abroad
  - Bank accounts; credit cards; loans; part-time jobs, investments
  - If they are residents, FEMA prohibits many such transactions

- RBI has clarified that Indian students studying abroad can also be treated as NRIs
  - A. P. Circular No. 45 dated 8^{th} December 2003

Case Study 2 – What after turning NRI?

As an NRI, Mr. X wants to know the following:

- For how many days can he visit India during a year?
- As an NRI, what will be his taxable income in India?
- Does he need to disclose his foreign assets?
- Is there any other statutory requirement on turning NRI?



Analysis of Case Study 2: ITA aspects for NRs

- IC/ PIO, being outside India, coming on **visit** to India while **retaining NR status**:
  - **If TI from Indian sources > 15 Lakhs:** Till 120 + 365 days test is met
  - **Otherwise:** Upto 181 days in the FY

As NR:

- **Scope of Income:** Only Indian-sourced incomes are taxable
- **Foreign assets & incomes:** Need not be disclosed

- Indian-sourced incomes also include the following:
  - Salary for employment exercised from India (whether employer or receipt of salary is in India or abroad) [Section 9(1)(ii)]
  - Gift from a non-relative [Section 56(2)(x) & 9(1)(viii)]

Analysis of Case Study 2: ITA aspects for NRs

- Can Mr. X claim the relief of "visit" from 1st April 2025?
  - He left India only on 1st January 2025
  - He was ROR for FY 2024-25
  - He "claims" to have settled abroad
- ITO may challenge the relief
- It is ideal to become a clear NR in one year & then claim "visit"
  - Not a strict requirement. Depends on the facts & circumstances
- Visit is not defined
  - Person coming to India after resigning from job – May not qualify
    - Smita Anand 42 taxmann.com 336 (AAR)
  - Involuntary stay because of impounding of passport to be excluded from counting of days
    - Suresh Nanda 57 taxmann.com 448 (Delhi HC) – precedent value?
- What if a person had come to India for a short visit but got stranded due to Covid lockdown?

Analysis of Case Study 2: FEMA aspects – Bank & demat accounts

- Statutory requirement on turning NR?

- Convert bank & demat accounts to NRO
  - NRO becomes the primary account for Indian transactions

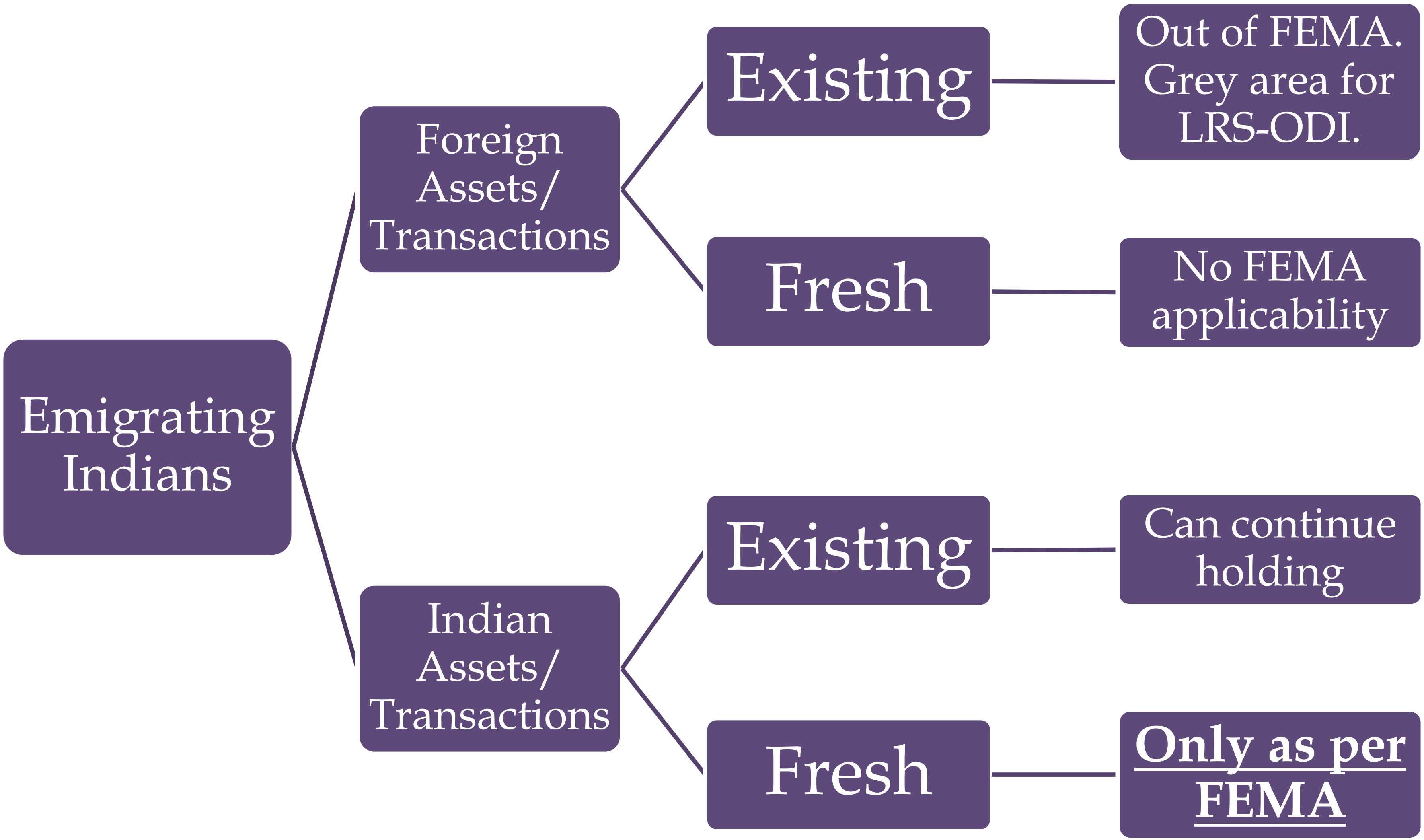
Significance of designating account to NRO:

- No formal procedure to claim or intimate NR status
- No NRI card (like OCI card)
  - Even OCI card does not imply NR status
- No mechanism of Tax Residency Certificate
- No return filing process where NR status is selected – like ITR

- **Converting to NRO:** Simplest manner of putting this claim forward
- Widely accepted claim, though not conclusive

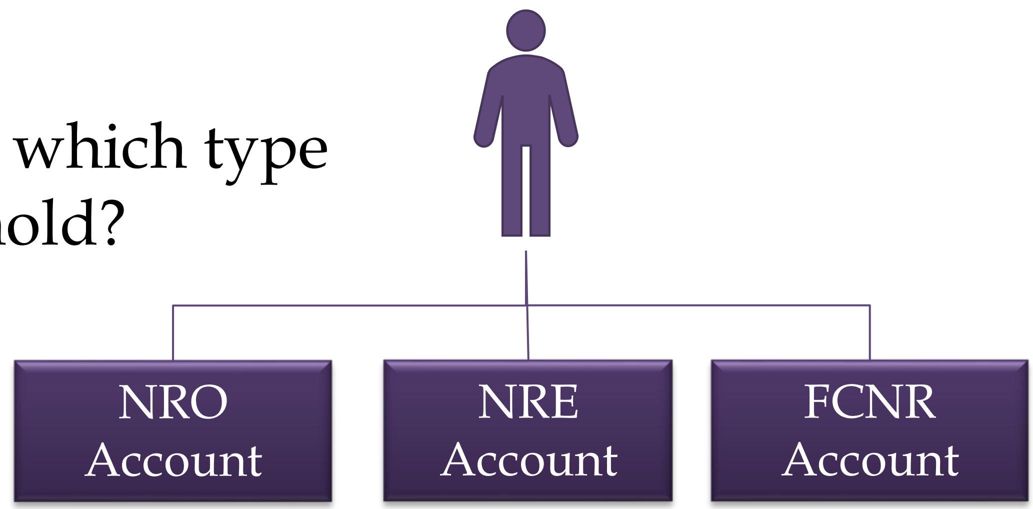
- NRI-PIO-OCI can also open other accounts like NRE & FCNR
  - Will be explained in detail in further case studies

Analysis of Case Study 2: FEMA aspects – Scope of FEMA after turning NRI



Case Study 3: NRI's Bank accounts & interest incomes

- Mr. X wants to hold funds in Indian banks.
- He wishes to understand which type of bank accounts he can hold?



- Issues:
  - What are the tax implications of interest income earned in these accounts?
  - Can he gift a large balance to his resident father in India?
  - How much can he remit abroad?

Comparative chart for NRO, NRE and FCNR Accounts

Point of Difference	NRO Account	NRE Account	FCNR Account
Full Form	Non-resident (Ordinary) Account	Non-resident (External) Account	Foreign Currency Non-Resident account Deposits
Repatriability	Not freely repatriable except current incomes	Freely repatriable	Freely repatriable
Type of Account	It can be – i. Savings Account; ii. Current Account; iii. Recurring Deposit; iv. Fixed Deposit	It can be – i. Savings Account; ii. Current Account; iii. Recurring Deposit; iv. Fixed Deposit	It is a Fixed Deposit account
Currency of Account	INR	INR	£ / $ / € / ¥ / AUD / CAD
Taxability of Interest earned in such account	Taxable	Exempt u/s 10(4)(ii) of for NRs under **FEMA**	Exempt u/s. 10(15)(iv)(fa) for NRs and NOR under **Tax**

Comparative chart for NRO, NRE and FCNR Accounts

Point of Difference	NRO Account	NRE Account	FCNR Account
Major Permissible Credits	• Remittance from Outside India (through bank) • Permitted currency tendered during temporary visit • Transfer from Rupee a/c. of NR banks • Legitimate dues in India • Transfer from other NRO Accounts • Any amount recd. in accordance with FEMA	• Remittance in permitted Foreign Currency • Proceeds of personal cheques, bank drafts, travellers' cheques, foreign currency or bank notes tendered during his temporary visit in India • Transfer from other NRE/FCNR accounts • Interest on the funds held in the account • Current income subject to taxes • Maturity, sale proceeds of eligible inv., refund of application money in securities or IPs of investment made out of the NRE/FCNR a/c or funds were remitted from outside India • Any amount recd. in accordance with general or special permission of the RBI	

Comparative chart for NRO, NRE and FCNR Accounts

Point of Difference	NRO Account	NRE Account	FCNR Account
Major Permissible Debits	• Local payments • Eligible investments • Current Incomes net of taxes • Transfer to other NROs • Settlement of charges on Intl. Credit Cards subject to limit provided in Remittance of Assets regulations	• Local disbursements • Remittances outside India • Transfer to NRE/FCNR of self or other person eligible to hold such account • For making eligible investments including investment in IPs • Any other transaction permitted generally or specially by the RBI	

Analysis of Case Study 3: DTAA benefit on interest incomes

- Normally, DTAAs provide for capping of tax rate in COS on interest incomes

- TDS on taxable interest can be capped to DTAA Rate
- If not at the time of TDS, DTAA benefit can be claimed while filing tax return

- In order to claim DTA benefit as NR of India
  - TRC from Country of Residence required
  - Form 10F to be filed online

- FTC on Indian taxes can be availed in foreign country as per DTAA

Tax Sparing Credit under DTAAs

- Let's say, Mr. X is a UK resident and earns NRE interest
  - Exempt u/s. 10(4)(ii)
- Tax in UK on Indian interest income at full rate
  - No FTC in UK since no tax has been paid in India

Tax Sparing Credit in DTAAs:

- Credit of "notional" COS tax in the COR
- UK Tax = Gross Tax **(-)** Credit for notional 15% Indian tax
  - As India-UK DTAA caps tax on interest @ 15% in COS

- NRE & FCNR interest – most common
  - Sections 10(4), 10(15)(iv), 10A, 10B, 80HHC, 80HHD, 80I

- **India's DTAAs with UK & Australia**
- **Unreal benefits but less awareness**

Gift of funds by NRIs to residents

- Practically, no limits
- However, should be reasonable
- Tax investigations where amounts are large and frequent
- Capacity of the donor – of paramount importance
- Proper documentation required regarding:
  - Source
  - KYC
  - Bank records

Remittance by RI *vs.* NRI/ PIO/ OCI

Particulars	NRI/ PIO/ OCI	Resident Individual
Investment made on **repatriable basis**	**Freely repatriable** without any limit	---
Current incomes: Salary, Rent, Interest and Dividends	**Freely repatriable** without any limit (after payment of due taxes)	Not allowed
Balance capital	Upto **USD 10,00,000** p.a. [FEMA Notification 13(R)]	Upto **USD 2,50,000** p.a. [LRS - includes trf. to NRs in India] (liable to TCS)
Use of **International Credit Cards** for meeting expenses while **on a visit abroad**	---	**Permitted without any limit.** (Limit on the card becomes the limit)

Can funds be transferred by one NRI to another NRI?

Account	To	Account	Permissibility
NRO	to	NRO	Permitted without limit
NRE	to	NRE	Permitted without limit
NRE	to	NRO	Not permitted
NRO	to	NRE	Not permitted

- X1 has INR 16 crores in his NRO account.
- X2 has nominal balance in her NRO account.
- X1 transfers INR 8 crores to NRO account of X2
  - NRO-to-NRO transfers are allowed
- X1 & X2 both remit USD 1 million each.

- **Is this permitted?**

Using NRO-to-NRO transfer facility for remitting funds abroad

FEMA 13(R) – Remittance of Assets Regulations

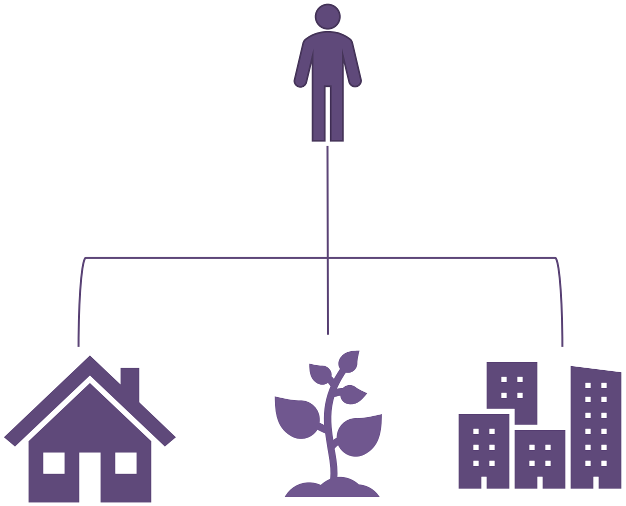
- **4. (2)** An NRI or a PIO may remit through an AD an amount, not exceeding USD 1,000,000 (US Dollar One million only) per financial year…
- **Provided further** that where the remittance is to be made from the balances held in the NRO account, the account holder shall furnish an undertaking to the AD 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 ….."

- Remittance cannot be facilitated by NRO-to-NRO transfers between NRIs

- **Practical issues with bankers:**
- Not permitting remittance if funds are transferred from another NRO A/c **of the same person!**
- Not permitting remittances where funds are gifted by residents under LRS

Case Study 4: Immovable properties

- Mr. X wants to do the following:
  1. Make investment in different types of immovable properties in India
  2. Sell 3 house properties and remit sale proceeds abroad.
  3. Sell 3 plots of lands and invest in a new agricultural plot of land.
  4. Lease out 10 flats and earn rental income.



- Issues:
  - NRI can invest in which type of properties?
  - Leasing of multiple properties possible?
  - Tax on rental incomes for NRIs
  - Sale of properties & earning of capital gains
  - Repatriability of gains and rental incomes

Immovable Property in India – FEMA provisions

- NR dealing with IP in India – Capital account transaction
  - Requires express permission

- NRIs and OCIs are permitted to acquire IP in India
  - No other non-resident individual permitted
  - OCI means OCI cardholder
  - PIOs do not automatically become OCI for the purpose of FEMA
  - Indians staying abroad + foreign citizens + will inherit Indian IP or securities later
    - FEMA violation if they do not hold OCI card

- Which type of IP can NRIs and OCIs acquire in India?
- NRIs and OCIs can acquire any IP in India **<u>except</u>**:
  - Agricultural Property
  - Farmhouse
  - Plantation property

Immovable Property in India – FEMA provisions

- Permitted IPs can be acquired by Purchase or Gift or Inheritance

- 3 restricted IPs:
  - Can be acquired only by way of **inheritance**
  - Cannot be acquired by Purchase or Gift;
    - Slew of compounding orders penalising NRIs for buying agricultural land without RBI permission are in public domain

- Agricultural Property can be sold or gifted only to a Resident
- No property can be transferred to outright Foreign Citizen

- Agricultural activities allowed on Agricultural land?
  - Not permitted earlier; it seems the view has changed now

- Cannot do Real Estate Trading, or trade in TDRs

Consequences

- Violations of IP rules taken seriously; not treated as technical violations
- Violator can apply for compounding to RBI
- Needs to regularise the violation before applying for compounding
  - Regularisation is generally by transfer of IP to Indian resident and 'citizen'
- Most cases are compounded by RBI by levying a compounding fee
  - If source of funds for acquisition are not via banking channels, matter is forwarded to ED
  - Compounding fee levied as per Computation Matrix in Master Direction on Compounding
  - Addition of **"Undue Gain"** to compounding fee
  - Review of compounding orders shows that Undue Gain can include both capital gain made by the violator, as also any other income made out of reinvestment of gain
    - Tax deducted at source has been reduced from undue gain in some cases
  - If Compounding Fee is not paid, matter is forwarded to ED for adjudication

Immovable Property in India – Specific Prohibitions

- Citizens of following countries not allowed to acquire IP without prior permission of RBI – <u>even if they are FEMA residents</u>:
  - **Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hongkong, Macau or North Korea**
  - Constitutional?
  - OCI Cardholder from these countries allowed to acquire IP on lease
    - Lease not exceeding 5 years
  - Citizen includes both natural persons and legal entities
  - Relaxation for minority communities of citizens of Afghanistan, Pakistan and Bangladesh residing in India and holding Long Term Visa

- Can FEMA residents being citizens of other countries, acquire IP in India?
  - No restriction under FEMA – can acquire any IP in India
  - However, other laws need to be checked: State laws, visa rules, OCI rules, etc.

- Violations are considered serious and matters are forwarded to Enforcement Directorate
  - Matters are generally sent to Home Ministry before any decision is taken
  - Certain States have specific restrictions & conditions which should be adhered to
  - Otherwise, title of land may not be clear

Immovable Property in India – FEMA provisions

What can NRI/OCI do?	Type of Property	From/ To which person
Acquire by **Purchase**	Any IP other than Agricultural Property, farmhouse & plantation	From Any person
Acquire by **Gift**	Any IP other than Agricultural Property, farmhouse & plantation	From Resident, NRI or OCI who is a relative as defined in Companies Act, 2013
Acquire by **Inheritance**	Any IP	- From PROI who acquired it in line with extant provisions; or - From a Resident
Transfer by sale or gift	Any IP	**To a Resident**
Transfer by sale or gift	Any IP other than Agricultural Property, farmhouse & plantation	**To an NRI or OCI**

Analysis of Case Study 4 – Sale of house properties

- **FEMA:**
  - **If IP was acquired from inward remittance or NRE/ FCNR account:** Proceeds can be remitted abroad without any limit
    - Not applicable for the 3 restricted IPs
    - In case of residential properties, limit of 2 properties
      - Controversy whether limit is annual or life-time
      - In absence of specific provision, consider lifetime
  - Tax needs to be paid before repatriation

- **Income-tax:**
  - Income taxable in India as property situated in India
  - **If held for > 24 months:** 12.5% without indexation.
    - For IPs sold on or after 23rd July 2024
    - If IP sold before 23rd July 2024, 20% with indexation
  - Indexation benefit on IP retained for only Residents
    - That too for tax purposes; not to claim a loss
  - **If held for ≤ 24 months:** Slab rates. No surcharge capping.

Analysis of Case Study 4 – Deduction u/s. 54/ 54F

- Should investment be made in a residential HP in order to avail deduction u/s. 54/ 54F?
- Generally, Country of Residence would also tax the NRI
- If credit of Indian tax is available in Country of Residence, no need to invest in new IP for Section 54/ 54F deduction
- If no tax in COR or if credit is not available in COR, only then invest in new IP to avail deduction

Analysis of Case Study 4 – Sale and Purchase of plots of land

- FEMA:
- Investment in agricultural land not allowed as NRI
  - Non-resident can continue holding agricultural land which was acquired as a Resident

- Sale of multiple plots of lands:
  - Business in real estate is prohibited. Trading in land would be considered Real Estate Business.

- Income-tax:
- Sale of NA land similar to that as sale of house property
  - Capital gains on sale of Agricultural land exempt if conditions met – thorough checking now

Analysis of Case Study 4 – Lease of House Properties

- FEMA:
  - Renting of property would not amount to Real Estate Business – Explanation (b) to definition in Schedule 1 to NDI Rules
  - No limit specified on the number of properties that can be leased
  - Repatriability – Current income like rent, interest, dividend, salary are allowed to be repatriated without any limit

- Income-tax:
- Rent earned taxable as Income from House Property
  - Flat deduction of 30% and interest on loans available
    - Several restrictions on interest deduction and loss from IHP
  - Rent from residential house taxable under IHP from FY 2024-25
    - Finance (No. 2) Act, 2024
  - Indian Tax should be available as credit in COR
  - Payer to obtain TAN and deduct tax at source @ 30% on gross amount unless ITO/CA Certificate available.

Case Study 5: TDS on sale of Immovable properties by NRIs

- Mr. X has made a deal to sell his residential house for INR 3 crores.
- The buyer informed that his CA has advised to deduct tax at source @ 12.5% plus SC & cess on the whole consideration.
- Mr. X is perplexed. Considering the cost of acquisition, the LTCG is only INR 1.5 crore.
- He requested the buyer to deduct TDS on the gain amount.
- However, the buyer disagreed.

Analysis of Case Study 5 – TDS on payment to NRs

- **Other Sums**
- **195.** (1) **Any person responsible for paying to a non-resident**, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) or **any other sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") **shall**, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, **deduct income-tax thereon at the rates in force**

Analysis of Case Study 5 – TDS on payment to NRs

- Deduction on gross amount or capital gain?
  - S. 195(1) applies where payment to NR entails a "**sum chargeable to tax**"
  - Section 195(2), 195(3) and 197 – Lower Deduction Certificate

- **Transmission Corp. 239 ITR 587 (SC).**
- Tax to be deducted not just from payments which are wholly incomes but also from payments where a portion is income [Income is embedded in the payment]

- **GE India Technology Cen. Pvt. Ltd. – (193 Taxman 234) 2010 SC)**
- Not correct to say the moment a remittance was made to a foreign party tax became deductible under the provisions of Section 195.
- **Tax is deductible only from income portion** of the payment
- Where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax is deductible at source and if so, what should be the amount thereof

Sum chargeable to tax

- **Instances where only a portion of payment would contain element of income**
- Capital Gains
  - On gains forming part of total sales consideration
- Business payment
  - On profit attributable to BC/PE in India forming part of revenue
- Reimbursement of expenses
  - General understanding - not taxable
  - However, the underlying payment to be analysed
  - Tax may still be deductible on:
    - Reimbursement by employer of payment made by employees
    - Routing of payments through group companies
      - C.U. Inspections (I) P. Ltd [2013] 34 taxmann.com 75 (ITAT Mumbai)

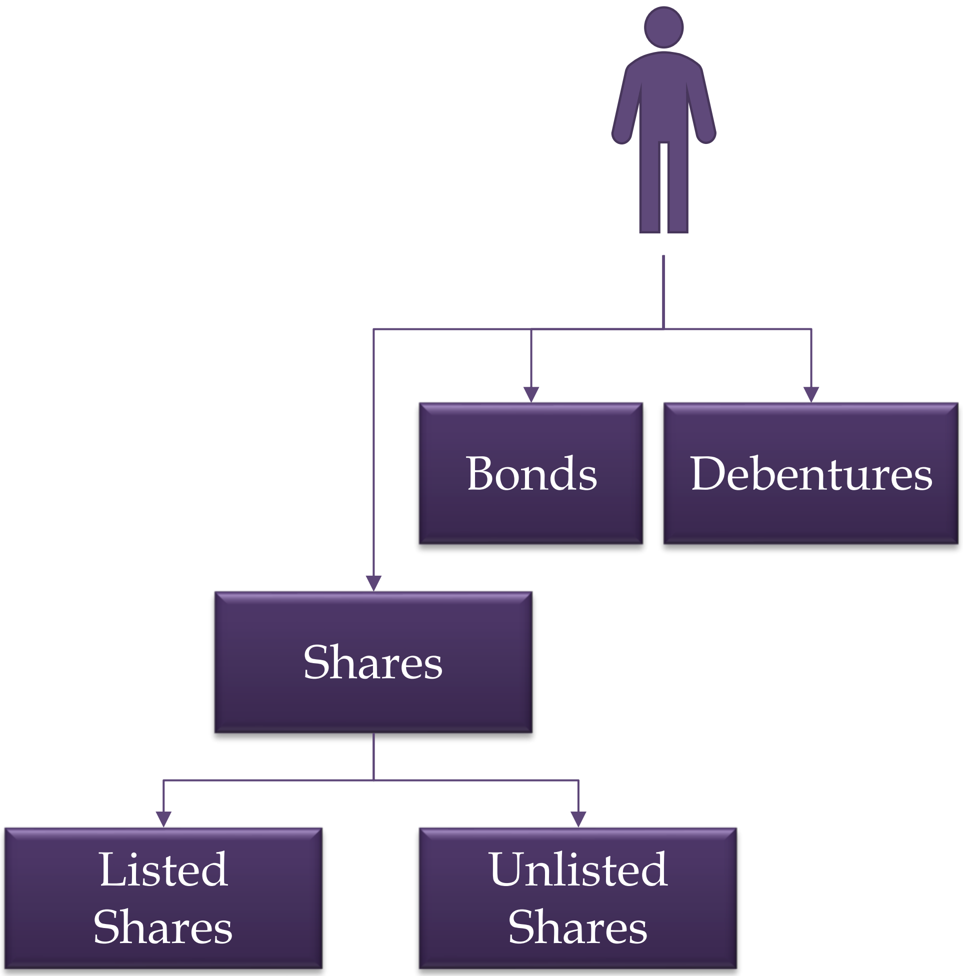
Analysis of Case Study 5 – TDS on sale of IP by NR

- Documents required to correctly compute gain
  - Purchase & Sale Deeds
  - Valuation Report
  - Detailed Application & Representation
  - If deduction to be claimed
    - Indemnity for investment in bonds
    - Purchase Agreement/ Capital Gain A/c statement if any deduction to be claimed
  - PAN Card and Passport
  - Tax Returns

- Technically, TDS only on gain portion is permitted
- However, big exposure on payer/ deductor
- Absolute certainty required regarding gain computation
- Practically, one applies to ITO & obtains Lower Tax Deduction Certificate (LDC)

Case Study 6: NRI's incomes from securities

- Mr. X wants to make portfolio investment in Indian securities.
- He wishes to have the flexibility of remitting the sale proceeds abroad.
- Issues:
  - What are the FEMA provisions for the same?
  - What are the tax implications of capital gains earned on sale of these securities?
  - What are the implications for dividends earned on shares?



Analysis of Case Study 6 – FEMA aspects

Portfolio investment by NRIs/OCIs on repatriation basis:

- Schedule III of NDI Rules:
- Equity instruments of listed Indian company
  - Holding by any individual NRI/ OCI shall not > 5% PUSC
  - Total Holding of all NRIs/ OCIs shall not > 10% PUSC
  - Aggregate ceiling of 10% can be raised to 24% by passing SR
- Domestic MFs investing > 50% in equity
- Shares in PSEs being disinvested by CG s.t. conditions
- NPS as per PFRDA eligibility
- Investment out of inward remittances from abroad or out of funds held in NRE/account
  - Investment in domestic MFs can be done through FCNR(B) account
  - Subscriptions to NPS can be out of funds held in NRO account too
- Sale proceeds can be remitted abroad or credited in the NRE/ FCNR(B)/ NRO account

Analysis of Case Study 6 – Period of holding & Forex Fluctuation benefit

Type of Security	Listed Shares	Unlisted Shares	Listed Bonds	Unlisted Bonds	Listed Debentures	Unlisted Debentures
Period of holding for Long-term	12 months	24 months	**Listed –** 12 months **Unlisted –** 24 months	Deemed short term	**Listed –** 12 months **Unlisted –** 24 months	Deemed short term

- Foreign Fluctuation Adjustment available where investment was made from foreign currency in case of:

LTCG:

- Listed Debentures and
- Shares of a company, being a company in which the public are substantially interested (excluding shares referred to in S. 112A)

- **STCG:** All Debentures and Shares.

Analysis of Case Study 6 – LTCG & STCG rates

- **LTCG rates** without indexation:

Date of Transfer	Listed Shares	Unlisted Shares	Listed Bonds	Unlisted Bonds	Listed Debentures	Unlisted Debentures
Till 22.07.24	**10%**	**10%**	**10%**	**10%**	**10%**	**10%**
On or after 23.07.24	**12.5%**	**12.5%**	**12.5%**	**Applicable slab rate**	**12.5%**	**Applicable slab rate**

- **STCG rates:**
- On listed shares @15% till 22.07.24 & thereafter @20%
  - Section 111A
- On others: **At applicable slab rates**

Analysis of Case Study 6

Taxability of Capital Gains:

- Adjustment with unexhausted basic exemption limit not available
- No deduction under Chap. VI-A

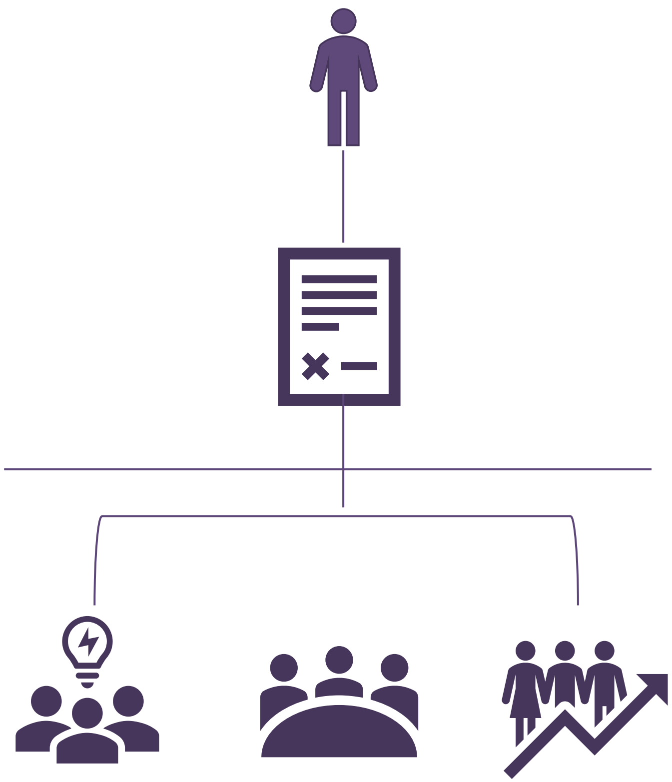
Taxability of dividends:

- Tax directly in hands of shareholder
- 20% flat tax rate – not as per slab
  - Can be helpful as well as burdening
- Adjustment with unexhausted basic exemption limit not allowed
- NRs can claim lower tax rate under applicable DTAA
  - TRC & Form 10F

Repatriation under FEMA:

- Dividends freely repatriable without any limit
- If investment made on repatriation basis, no limit on remittance
- Otherwise, remittance can be under USD 1 Million Scheme
- Tax to be paid before remittance

Case Study 7: NRI's non-repatriable investment in India



Mr. X wants to invest in India in:

- Equity shares of a startup company engaged in retail trading
- Capital of an Indian Firm engaged in Print Media
- In an AIF

Issues:

- He fears authorities will catch him in case of defaults and hence wants to invest through his foreign SPV.
- Can he do so?
- How can he exit in future?

Case Study 7 – Analysis of NRI's Non-repatriable investment

- **Schedule IV of Foreign Exchange Management Non-Debt Instruments (NDI) Rules :**
- Brings NRI investment at par with domestic investment
- NRI can invest directly, or through his foreign SPV - company, trust or firm
- The SPV should be owned & controlled by NRIs/ OCIs.
- OCB concept re-introduced - in a more liberal manner
  - Possibility of misuse

Analysis of Case Study 7 – FEMA aspects

Portfolio investment by NRIs/OCIs on non-repatriation basis:

- Minimal restrictions
- Considered at par with domestic investment
- Investment can be made by way of inward remittance/ NRE/ FCNR/ NRO account

- **Main issues:**
- Repatriability is lost
- Current incomes can be remitted without limit
- Other funds can be remitted under USD 1 million scheme

Case Study 7 – Analysis of NRI's Non-repatriable investment

- Investment can be in equity instruments, equity-oriented MF units, capital of LLP without any limit

- Investment can be in units of Investment vehicle (old VCF, AIF, REITs, InvIts)

- Investment can be in convertible notes issued by startups

- Investment in the company and Investment Vehicle can be direct or through stock market
  - Portfolio investment scheme **on non-repatriable basis** abolished

- Investment can also be in the capital of a Firm or Proprietory concern

Case Study 7 – Analysis of NRI's Non-repatriable investment

- Investment considered at par with domestic investment – investee entity can do any business in India

- Only restrictions are:
  - Nidhi company
  - Agricultural / plantation
  - Real estate business
  - Construction of farmhouses
  - Trading in TDRs
  - For Firms and Proprietory concerns - **print media**

- Retail trading is permitted.
- Development of townships; construction of residential or commercial premises, roads or bridges – Permitted
  - Excluded from definition of real estate business
  - Real estate leasing?

Case Study 7 – Analysis of NRI's Non-repatriable investment

- **Real estate leasing:**

- Construction mandatory in FDI route
  - Construction & selling permitted
  - Construction & leasing permitted
  - Buying and leasing; or buying and selling not permitted

- Under Sch. IV: Buying and leasing is permitted

- Should Mr. X acquire IPs in his personal name or set up an LLP for the same?

Case Study 7 – Analysis of NRI's Non-repatriable investment

- No lock-in period
- No filing of any documents
  - However, details may need to be given to bank
- No valuation norms
  - Section 56 and 50CA of Income-tax Act to be considered
- No sectoral cap

Investment on non-repatriable basis by NRIs - Transfers

- Is transfer by way of <u>sale</u> from NRI/OCI/SPV to Non-resident permitted?
  - Yes, subject to sectoral caps, pricing guidelines & other conditions – if NR buyer is investing as FDI under Sch. I
  - If buyer is NRI/OCI/SPV acquiring under Sch. 4, no conditions.
  - Reg. 13(2) permits transfer from NR to NR.

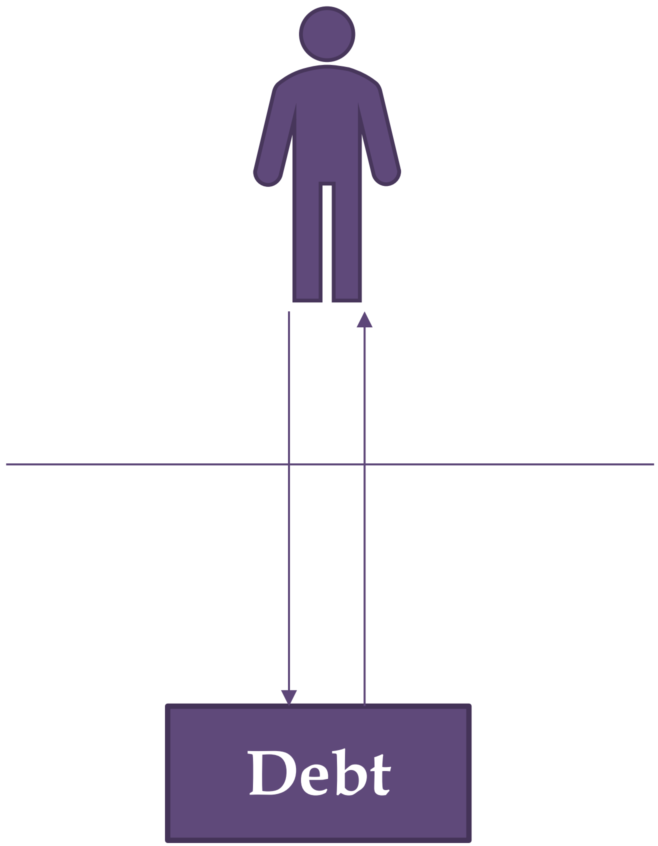
- Is transfer by way of <u>gift</u> from NRI/OCI/SPV to Non-resident permitted?
  - Yes, to another NRI/OCI/SPV without any conditions if investment made on non-repatriation basis as per Reg. 10(6)
  - Yes, to another NR relative with prior approval of RBI and subject to conditions as per Reg. 13(3)

Investment on non-repatriable basis by NRIs – Sale proceeds

- Sale proceeds should be credited to NRO account

- US$ 1 mn. scheme for repatriation available?
  - NRI can transfer sale proceeds of his investment outside India under the US$ 1 Million Scheme freely
  - Incomes freely repatriable within the limit
  - However, SPV not entitled to US$ 1 mn. scheme as the **scheme is only for Individuals**
    - SPV can transfer funds to NRI as distribution
    - NRI can then remit under US$ 1 mn. scheme.
    - Consider tax implications on distribution

Case Study 8: Investment in or through Debt



Mr. X wants to:

- Invest in Debt securities in India
- Fund his Indian startup through debt
- Give loan to another resident
- Take loan from another resident

- Can he do so?

Investment in Debt Instruments under FEMA – repatriable basis

- Regulated by FEM (Debt Instruments) Regulations, 2019
- Administered by RBI

- NRI/OCI can invest in the following on **Repatriation basis**:
  - Government dated securities (other than bearer securities) or treasury bills
  - Units of domestic MFs or ETFs which invest $\leq$ 50% 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 in terms of Regulation 6 of these Regulations;
  - Debt instruments issued by banks, eligible for inclusion in regulatory capital.
  - National Pension System governed and administered by PFRDA, provided such person is eligible to invest as per the provisions of the PFRDA Act.

- No limit to investment
- Shall be paid out of inward remittances from abroad through banking channels or out of funds held in NRE/FCNR(B) account
  - Subscriptions to NPS which can be out of funds held in NRO account too

Investment in Debt Instruments under FEMA – non-repatriable basis

- Regulated by FEM (Debt Instruments) Regulations, 2019
- Administered by RBI

- NRI/OCI can invest in the following on **Non-Repatriation basis**:
  - Government dated securities (other than bearer securities) or treasury bills
  - Units of domestic MFs or ETFs which invest $\leq$ 50% in equity;
  - National Plan/ Savings Certificates
  - Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 6 of these Regulations;

- No limit to investment
- Can be paid out of inward remittances from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account

Investment in Debt Instruments under FEMA – Sale proceeds

- NRI/OCI may sell/ redeem the instruments subject to such terms and conditions as may be specified by the RBI and the SEBI
- The net sale/ maturity proceeds (net of taxes) of instruments held by NRIs or OCIs, may be:
  - Remitted abroad or at the NRI/ OCI investor's option, credited to his NRE/ FCNR(B)/ NRO account, where the instruments were purchased on repatriation basis;
  - Credited to the NRO account person concerned where the payment for the purchase of the instruments sold was made out of funds held in NRO account; or
  - Credited to the NRO account person concerned where the instruments were held on non-repatriation basis

Borrowing from NRIs – Borrowing & Lending Regs. – FEMA 3(R)

- FEMA Notification 3 and 4 allowed certain borrowing and lending subject to terms and conditions which were specified.
- FEMA Notification 3(R) was issued superseding Not. 3 and 4

- An Indian resident can borrow from a NR relative upto US$ 250,000 *"subject to such terms and conditions as specified by RBI…."*
  - Regulation 4(B)(v) of FEMA Notification 3(R)
- An Indian entity can borrow from an NRI/ OCI *"subject to such terms and conditions as specified by RBI…."*
  - Regulation 6(B)(vi) of FEMA Notification 3(R)

- Terms and conditions not notified by RBI since 2018
- Is it allowed without any terms and conditions?
- Can one follow terms and conditions prescribed in erstwhile FEMA Notification 3 or 4?

Borrowing from NRIs – Deposit Regulations – FEMA 5(R)

- Indian company, body corporate, proprietary concern or a firm in India may accept deposits from an NRI/ PIO/ OCI on non-repatriation basis as per Schedule 7
  - Reg. 6(2) of Deposit Regulations

- **Schedule 7 of Deposit Regulations**
- Maturity period should not exceed 3 years.
- Rate of interest shall not exceed 12.50%
  - Ceiling rate prescribed under Companies (Acceptance of Deposit) Rules, 2014
  - Acceptance of Deposit Rules refers to the ceiling rate for NBFCs

- Deposit shall be given only from Indian-sourced funds
  - Only through debit to NRO account,
  - Should not represent inward remittances or transfers from NRE/ FCNR(B) accounts to NRO account.

Borrowing from NRIs – External Commercial Borrowing

- **Eligible borrower:** Indian entity eligible to receive FDI.
- **Eligible lender:**
  - Resident of FATF or IOSCO compliant country
  - Individuals are permitted to be lenders only if they are foreign equity holders or for subscription to bonds/ debentures listed abroad
- **Foreign equity holder means:**
  - Direct foreign equity holder with minimum 25% direct equity holding; or
  - Indirect equity holder with minimum indirect equity holding of 51%.
- Does Mr. X qualify as a foreign equity holder if his investment is on non-repatriation basis?

Borrowing from NRIs – ECB – other conditions

- **Minimum average maturity period:** 5 years
  - For ECB raised from foreign equity holder for working capital or general corporate purposes

- **All-in-cost ceiling p.a.:** Benchmark rate plus 550 bps.

- **Conversion of ECB into equity** is allowed subject to certain conditions
  - ECBs which are not matured yet and those which are matured but unpaid – can be converted into equity

Borrowing by NRIs from resident individuals

- Extending loans including loans in INR to NRIs who are relatives as per Companies Act
- Conditions for granting INR loans to NRI relatives:
  - Interest free and minimum maturity of 1 year
  - Loan should be utilised for personal requirement of borrower or for his own business purpose in India
  - Loan shall not be utilised for any activity prohibited for NRs
  - Loan amount should be credited to NRO Account
  - Loan amount should not be remitted abroad
  - Repayment of loan shall be made through inward remittance or by debit to NRO/ NRE/ FCNR account or out of sale proceeds of shares/ security/ immovable property against which such loan was granted

Borrowing by NRIs from resident individuals

- What if a resident individual wants to give loan abroad to a non-resident?
- Extending loans <u>including</u> loans in INR to NRIs who are relatives as per Companies Act

- Under LRS, resident individuals were allowed to enter into "permissible capital account transactions"
- Over the years, the Scheme has been diluted.
  - Now, only those capital account transactions which are permitted in specific notifications are allowed.
  - LRS scheme does not have any weightage in itself
- RBI view is that it is not permitted

Summary – Common Indian transactions for NRI/ OCI

Transaction	Remarks
Buying **agricultural land, farmhouse, plantation property**	Prohibited
Buying **other immovable property**	Permitted
Investing in **Business**	Requires separate session. **Non-repatriable route:** Sectoral restrictions of real estate, Nidhi company, agricultural activity. Print media restricted in firm and proprietorship
Loan by NRI/ OCI to Indian companies	Deposits permitted subject to several terms and conditions [Schedule 7 to FEMA 5(R)].
Loan by NRI/ OCI to Resident Individuals	Not possible. T&C not specified.
Loan from R to NRI/ PIO relative	Allowed in NRO account s.t. terms & conditions.
Gift of funds from R to NR in India	Permitted only if the donee is NRI/PIO and is a relative. LRS limit applies. TCS applies.
Gift of funds from R to NR abroad	Permitted without conditions. LRS limit applies. TCS applies.

Summary – Fresh Indian transactions for NRI/ OCI

Transaction	Remarks
Gift of Indian IP from R to NRI/ OCI (except agricultural land; farmhouse or plantation property)	Allowed. LRS limit does not apply and does not get exhausted. **Don't use it to circumvent the law.**
Gift of Indian company's shares by resident to NRI	Not feasible due to several conditions.
Remitting funds abroad + taking assets outside India	Current incomes without limit + USD 1 million p.a.
Taking jewellery, etc. abroad on migration	No rules specified under FEMA. Don't breach LRS limit conservatively. (Baggage rules under Customs law; Immigration laws of foreign country)
Gift of **funds between NRs** in **India**	NRO-to-NRO & NRE-to-NRE transfers allowed. **Cannot make additional remittance through it.**
Gift of **Foreign IP or Foreign securities** from **R to NR**	Not permitted

DTAA benefits for NRs

Basics of DTAA

- Access to DTAA:
- Should be Resident of one of the countries <u>as per DTAA</u>
  - Generally, the residency test of DTAA is being Resident under the domestic law of the respective country
  - Certain exceptions like India-UAE DTAA
    - 183 day-test in calendar year for being considered a resident of UAE

- Dual Residency
  - Tie-breaker rules for individuals
  - **4 tests:** Permanent Home, Center of Vital Interests, Habitual Abode and Nationality

- Tax Residency Certificate (TRC) & Form 10F

Common DTAA benefits for NRs

Country	Interest	Dividend	CG other than IP & shares	Other Income
USA	15%	**---***	**---**	Social security benefits not taxable even if Indian Resident
UK	15%	10%	**---**	Pension & annuities taxable only in COR
UAE	12.5%	10%	Not taxable	Other sources (including MF dividend): **Taxable only in COR**
Singapore	15%	15%	Not taxable^	Private Pensions & annuities taxable only in COR
Australia	15%	15%	Not taxable	Private Pensions & annuities taxable only in COR
Canada	15%	15% (if voting power $\geq$ 10%)#; Else 25%	**---**	Pension taxable in the country where payer is resident

Common DTAA benefits for NRs

- * Rate capping for dividend in India-US DTA is 25%
- Exceeds 20% rate provided u/s. 115A of ITA
  - Highest rate under ITA will be 23.92%
- Hence, rate capping under India-US DTA not beneficial
  - Except in cases where the person is a resident under ITA but claims DTA benefit as a non-resident under DTA

- # India-Canada DTA provides rate capping on dividend at 15%, if the voting power is $\geq$ 10%
- This has been amended by Multi-lateral Instrument (MLI) and a condition has been added that such voting power should be held for 365 days or more.

- ^ Shares of Indian company acquired by Singapore resident before 1st April 2017 not taxable in India

Basics of DTAA – for residents

- For residents with foreign incomes:

- Global income is taxable for RORs under ITA
- Normally, all incomes are taxable in COR under DTAAs

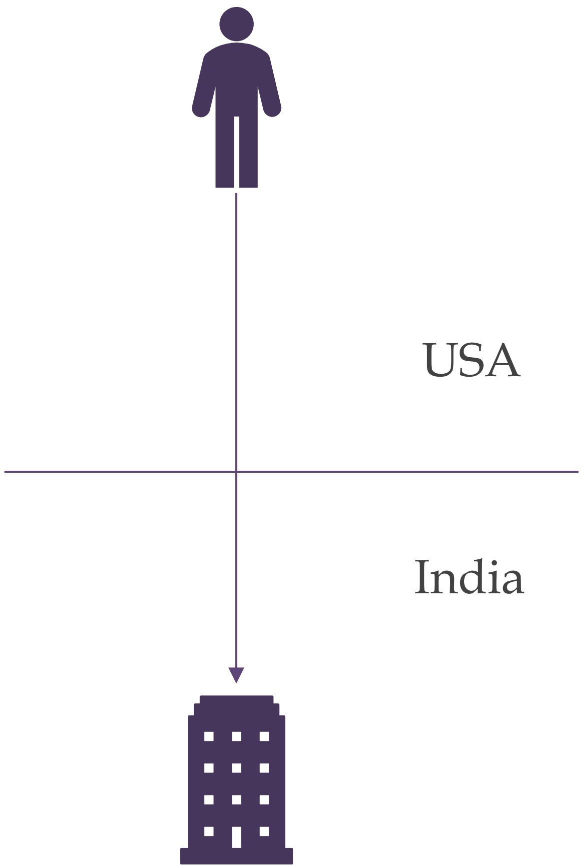
- Certain incomes may be taxable only in COS – specifically provided in the DTAA
  - Like pension, social security benefits

- If DTAA provides that an income can be taxed by both countries, credit for tax paid abroad available against Indian taxes
  - As per DTAA and Rule 128
  - Form 67 to be filed

Returning Indians

Case Study 9 - When does a person become resident?

- Mr. Y stays in USA since 20 years.
- He returns to settle in India on 31st January 2025.
- His total stay in India during FY 2024-25 is 60 days.
- Earlier, he used to visit India for 100 days every year.
- Mr. Y wants to know his residential status under FEMA & ITA.



Analysis of Case Study 9: ITA residential status

- **Resident u/s. 6(1)(a) for FY 2024-25:**
  - "60 + 365 days Test" met
  - Benefit of being on a Visit to India – not available
- Mr. Y will be **NOR** for FY 2024-25 if:
  - He was non-resident for $\leq$ 9 years in preceding 10 years; or
  - His stay in India was $\leq$ 729 days in preceding 7 years
- If any 1 of the condition is met, Mr. Y will be NOR
- As NOR:
- Foreign incomes are not taxable
  - except if derived from business controlled in India or profession set up in India
- Foreign assets need not be disclosed
- Returning Indians are NOR for 0 to 3 years depending on facts & circumstances

Analysis of Case Study 9: ITA residential status

- If both the conditions are not met, Mr. Y will be ROR

- If ROR:
- Foreign incomes taxable
- Foreign assets to be disclosed

- This is missed by many

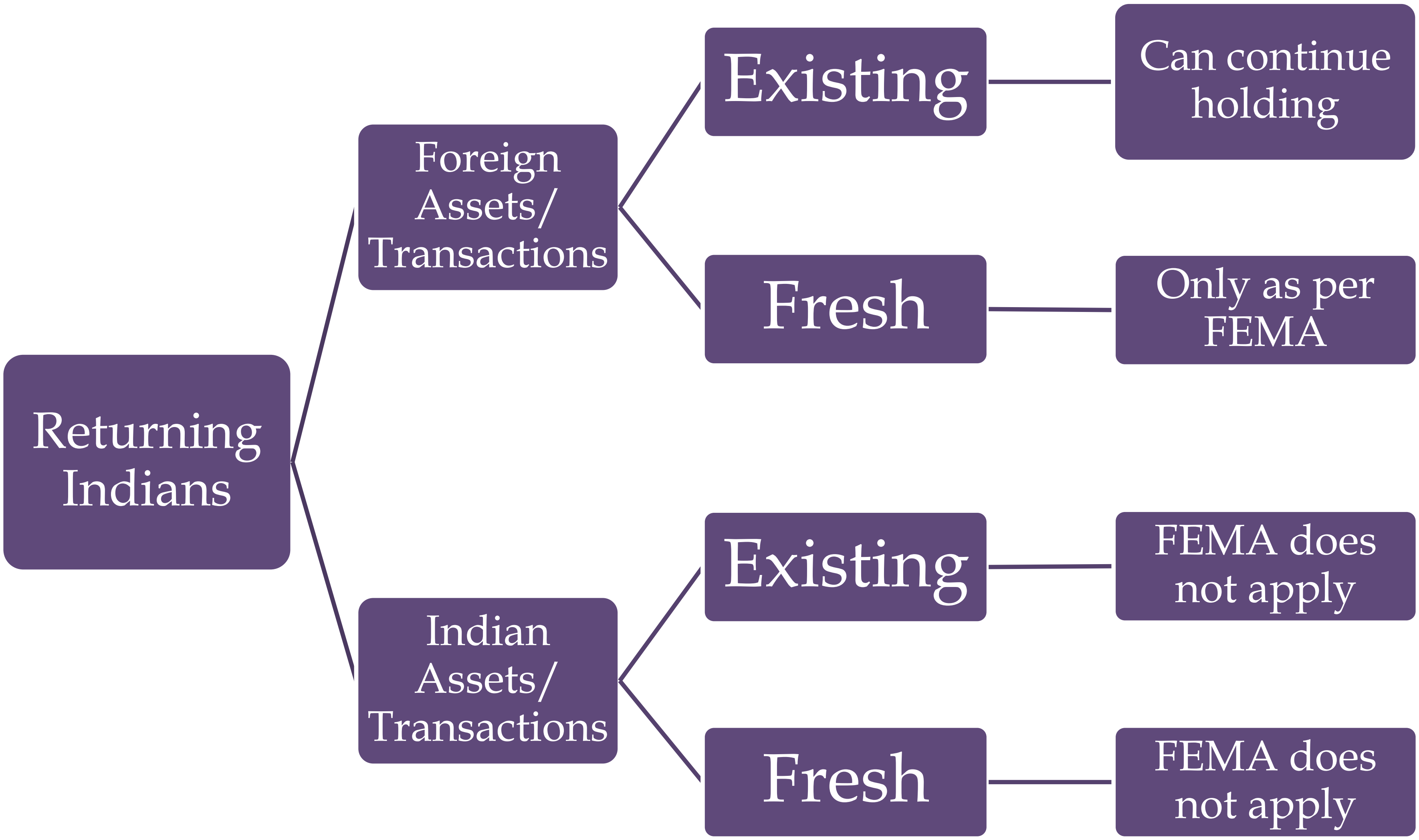
- May be a resident of the foreign country under its domestic law
- Check for tie-breaker rules of DTAA

Analysis of Case Study 9: FEMA residential status

- Mr. X has returned to **settle** in India
- **FEMA resident from the** date of coming to India: **31st January 2025**

- 182-days test is quite insignificant under FEMA

Analysis of Case Study 9: FEMA aspects – Scope of FEMA on becoming Resident



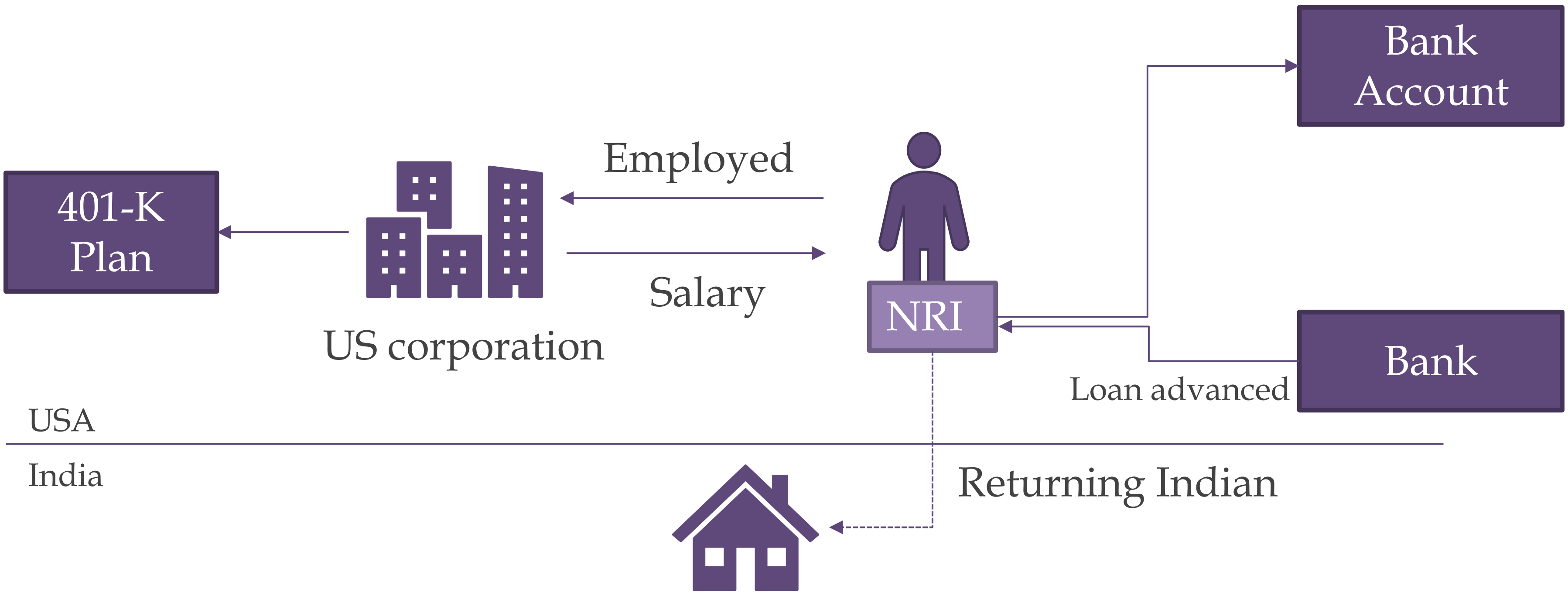
Change of Residence under FEMA

- From R to NR:
- Section 6(5) of FEMA: 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

- From NR to R:
- Section 6(4) of FEMA: 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.

Case Study 10: Returning Indian

- Mr. Y is having employment in USA and receives salary. Certain amount is being contributed to Pension Plan also. He has also taken some loan from overseas bank.



Analysis of Case Study 10 – Returning Indian

- Salary will be taxable in India under ITA as well as DTA (India is COR)
- Normally, DTAAs provide that employment incomes can be taxed by COS only if the employment is exercised in COS
  - If the person has not stayed in US for any day during the year, US does not have taxing rights
  - In that case, India will not allow credit for US taxes on salary
  - Refund of US WHT on salary to be claimed in US

- PF Accounts (401-K)
  - Income credited to PF Account – Taxable in India in same year
  - On withdrawal of Capital on maturity – Capital not taxable
  - Issue of Foreign Tax Credit for taxes paid in USA on withdrawal while incomes offered to tax every year
  - Disclosures required in Schedule FA of investments made under 401-K plan
  - Section 89A relief now available for matching taxability of incomes in foreign country and India

Analysis of Case Study 10 – Returning Indian

- Foreign assets need to be disclosed
  - In Sch. FA and if applicable in Sch. AL as well
- Foreign incomes submitted to tax to be disclosed in Sch. FSI
- Schedule EI: Incomes not taxable due to DTAA

- Can Income-tax officer ask about the source of funds of foreign assets acquired as NR?
- Unexplained investments, unexplained money…
- Abuse of provisions has led to onus on assessee to prove the bonafide of wealth

- **Practical scenario!**

Analysis of Case Study 10 – Returning Indian

FEMA Issues

- Section 6(4):
  - Returning Indians permitted to continue holding foreign assets abroad
  - Incomes earned thereon and sale proceeds thereof can also be retained abroad
  - One can say that S. 6(4) wealth is out of FEMA
- Fresh incomes as a Resident to be repatriated back to India within 180 days – monthly salary earned, royalty, consultancy fees, etc.
- Life Insurance policies taken from abroad
  - Can be continued
  - Premiums to be paid from foreign account, RFC account or LRS
- Foreign loans can be continued (as a practise)
- Repayment of foreign loans
  - No objection from RBI if payment from Section 6(4) funds
  - **Using LRS for service loans taken abroad as NR:** Grey area

Comparative chart for NRO, NRE and FCNR Accounts

Point of Difference	NRO Account	NRE Account	FCNR Deposits
On becoming Resident	Designate as Resident account.	To be closed.	Can be held till maturity.
Repatriability on becoming Resident	Not freely repatriable. Funds to be continued in the Resident account.	Funds can be transferred to RFC account <u>or</u> Resident account.	On maturity, funds can be shifted to RFC account or resident INR deposits.

- Other Indian investments like FDI in Indian company or LLP become non-repatriable

Specific reporting requirements in Tax Return for NRIs

Requirement to file Tax Return vis-à-vis DTAA benefits

- Tax Return filing requirement u/s. 139(1)
- Several conditions added leading to requirement of filing tax return
  - Section 139 read with Rule 12AB

- Even if DTAA benefit is considered in TDS, file tax return
  - Except if S. 139(1) does not apply or specific relief from filing ITR

- Claim of DTAA relief in tax return
  - Dedicated format in certain schedules like Capital Gains (CG), Other Sources (OS).
  - Other disclosures in Schedule Exempt Incomes (EI) – **Incomes exempt or not chargeable to tax under DTAA**

Unlisted equity shares

- NRs & NORs:
- Unlisted equity shares of Indian companies

- For RORs:
- Unlisted equity shares of foreign companies also!

(I)	Whether you have held unlisted equity shares at any time during the previous year? If yes, please furnish following information in respect of equity shares									√ Yes		No	
Name of company	Type of Company	PAN	Opening balance		Shares acquired during the year					Shares transferred during the year		Closing balance	
			No. of shares	Cost of acquisition	No. of shares	Date of subscription / purchase	Face value per share	Issue price per share (in case of fresh issue)	Purchase price per share (in case of purchase from existing shareholder)	No. of shares	Sale consideration	No. of shares	Cost of acquisition
1	2	3	4	5	6	7	8	9	10	11	12	13	14

Directorships for NRs & NORs

- Directorships in Indian companies

- Directorships in foreign companies also!!
  - Provided such foreign company has:
    - Nexus with India; or
    - Incomes accruing/ deemed to be accruing in in India
  - Nexus not defined!
  - Circular No. 21/2019 dated 27th August 2019

(j)	Whether you were Director in a company at any time during the previous year?				☐ Yes ☑ No
Sl. No.	Name Of Company	Type of Company	PAN	Whether its shares are listed or unlisted	Director Identification Number (DIN)
1	2	3	4	5	6

Type of Bank account

- Details of Indian bank accounts asked in Tax return
- "Type of bank account" to be mentioned
  - **From AY 2024-25 onwards**
  - Savings, Current, CC, OD, Non-resident.
  - NRO & NRE accounts to be disclosed as "Non-resident" account

a	Details of all bank accounts held in india at any time during the previous year(excluding dormant accounts)			
Sl. No.	**IFSC Code of the bank in case bank account held in India**	**Name of the Bank**	**Account Number**	**Type of Account**
1	**2**	**3**	**4**	**5**

- Many Returning Indians have continued NRO-NRE accounts
- Similarly, there are NRIs continuing their Resident accounts

- **FEMA violation!**

Details asked on selecting Non-resident status

C. Non-resident

☐ You were a non-resident during the previous year.

(i)Please specify the jurisdiction(s) of residence during the previous year -

S.No.	Jurisdiction(s) of residence	Taxpayer Identification Number(s)
1		
2		

(ii) In case you are a Citizen of India or a Person of Indian Origin (POI), please specify -

Total period of stay in India during the previous year (in days)	Total period of stay in India during the 4 preceding years (in days)

- Jurisdiction of Residence
- Taxpayer Identification No. (TIN) in Foreign Jurisdiction
- In absence of TIN, Passport No. to be entered
- Stay in India during relevant PY & 4 preceding PYs
  - Only for NRs being Indian Citizens or PIO

ITR disclosures

Particulars	ROR	NOR	NR
Unlisted equity shares	To be disclosed of all companies	To be disclosed only of Indian companies	
Directorships	To be disclosed in all companies across the globe	To be disclosed in all Indian companies & only in such foreign companies which have income accruing or deemed to be accruing in India	
Schedule FA	Foreign assets to be disclosed	Not applicable	
Schedule AL	Global assets	Indian assets	
Schedule FSI	Foreign-sourced incomes are included in the Total Income (largely relevant only for RORs.)		
Schedule EI	Incomes exempt under the Income-tax Act or DTAA.		

Remittances

Remittances – Form 15CA

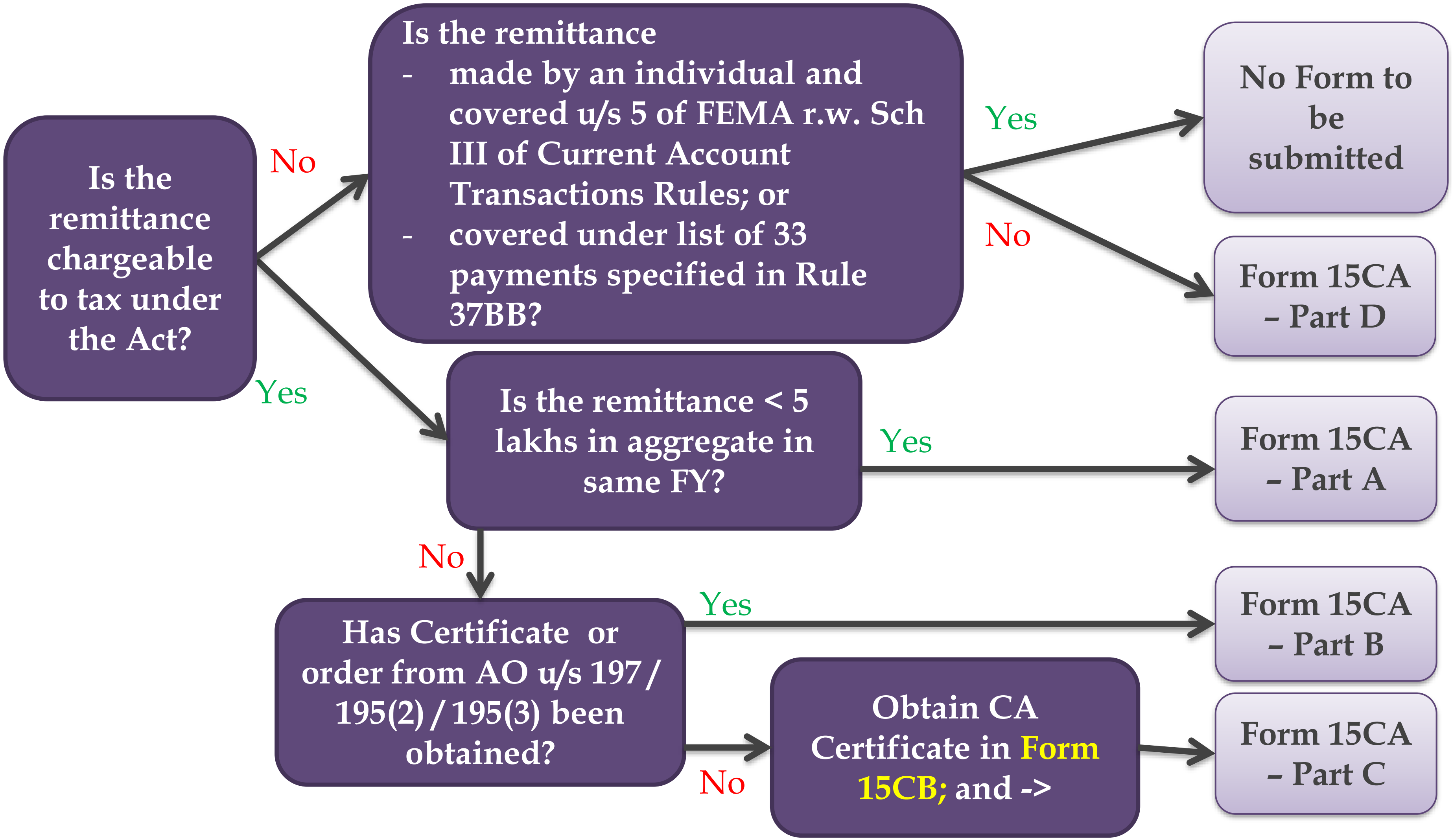
- Payment to any non-resident
  - Whether in India or abroad

- **Preliminaries:**
- Form to be submitted prior to remittance.
- Form can be withdrawn only within 7 days.

- Online submission necessary. Filed form to be submitted to bank.

- Remittance can be made to a country different from residence of payee.

Form 15CA – Which part applies?



Form 15CA - Information

- Even if remittance is chargeable to tax, **following remittances do not require the form filing:**

- By individual under Schedule III of Current Account Transactions Rules of FEMA.
- Payment for 33 listed items which include:
  - Business payments – import of goods, airlines passages.
  - Investment abroad.
  - Personal payments – medical, education.
  - Gifts and donations.
- By an IFSC Unit
  - Quarterly statement reporting all remittances to be filed

Form 15CA - Information

- If income is taxable under the ITA but exempt under DTAA, is filing required? (E.g. Capital gain on shares earned by non-resident is not taxable due to DTA).

- Better to submit.

- Part C or Part D?

- Part C includes detailed format to declare taxability of the income under the ITA and as per DTA.
- Purpose is to provide logical information to Government. Part C should be filled up. (Part D applies if sum is not chargeable to tax under ITA.)

Form 15CA - Information

- Remittance by non-resident from Indian account to his own foreign bank account. This transfer is not a taxable transfer since it is from one pocket to another.
- Part D applies if sum is not chargeable to tax.
- However, source of funds was taxable in India.
- Do we look at the taxability of the remittance transaction or the source of funds being remitted?
- Part C or Part D?
- Fill Part C & disclose underlying tax treatment of incomes

TDS on transfers by NRIs

- **Transfers from NRI's own NRO account to own NRE account:**
- Majority of remittances by an NRI are from his own NRO account
- Transfers from one's own bank account to another bank account
  - No element of income involved
  - Akin to transfer of money from one pocket to another
  - Deduction of tax at source is not required at all
- However, this is still a payment to NR (though from the same NR). Plus, the funds are going into NRE account. Hence, banks want certainty that taxes are paid on the source of funds
  - Hence CA certificate becomes essential

- CA must look at the following before issuing a certificate for such transfer:
- Find out the source of funds lying in NRO account
  - Trace them back to the incomes comprised therein
  - Can be a cumbersome task if funds are lying since years; or churned a lot
- Income-tax returns filed by the NRI in India for the period concerned
- Relevant years' Form 26-AS or TDS certificates
- Documents and issues pertaining to each type of income

TDS on transfers to NRIs

- **Transfers directly from third-parties into NRI's NRE Account:**
- Apart from documents listed above, third-parties can ask for following additional documents depending on facts:
  - a certificate from the NRI's assessing officer under section 197;
  - an undertaking or indemnity bond from the NRI;
  - an opinion from a consultant in case of controversial issues; etc.
- Payer would also need to obtain a CA certificate and provide Forms 15CA & 15CB

- **Transfers from third-parties into NRO Account of NRI:**
- Bank crediting the amount to the NRO account does not ask for compliance under Sec. 195(6) as no remittance is being made outside India
- However, as per Sec. 195(6), information is to be furnished by the payer - irrespective of whether the amount is remitted outside India or not
  - Payer must keep on record the Form 15CB as the tax officer can always call for it later
- Forms filed at this stage can be helpful in transferring the funds by NRI from NRO to NRE account
  - NRIs should ideally obtain and keep on record Forms filed by the payer at the time of payment to NRO account itself

Change of citizenship

Change of Citizenship

- Availing better opportunities
- Avoiding visa issues
- Ease of entry in other countries

- India does not permit dual citizenship
- Hence, such people renounce Indian citizenship

- Close to 8,40,000 Indians renounced their citizenship between 2018 to June 2023.

Citizens of other countries – FEMA aspects

- PIO scheme replaced with OCI
  - For bank accounts, deposits and remittance facilities - both PIO and OCI are recognised
    - FEMA 5(R) and 13(R)
  - For loan transactions, investment in Indian securities & IP in India, only OCIs are recognised
    - FEMA 3(R) and NDI Rules
- Better to obtain OCI card
- Citizens of 11 specified countries, though FEMA residents – not permitted to acquire IP in India
  - Practical issues for citizens of other countries as well

Citizens of other countries – Tax and FCRA implications

- Non-applicability of S. 6(1A) of ITA to citizens of other countries
- Benefit of leaving for employment outside India – not available
- Citizenship-based taxation in USA
  - Dual residency
  - Global incomes taxable in both countries
  - Differences in basic principles in domestic laws of both countries
  - Issues in double tax relief
  - Foreign assets disclosure important in both countries
- Conditional relief from disclosing foreign assets in Sch. FA
  - **Foreign citizens who become tax residents while they are in India on a business, employment or student visa:** Assets acquired when they were NR not required to be disclosed if no income is accrued during the relevant year
- FCRA compliance required for making donations

Other issues

ITA provisions to be kept in mind

- **Foreign incomes & assets:** Offering incomes to tax & disclosure of assets

- Residential status
- POEM
- Business Connection & PE
- Section 9(1)(viii), 50CA and 56(2)(x)
- Transfer Pricing
- Section 93, 94A and 94B
- GAAR
- Anti-avoidance provisions under DTAA
- Multi-lateral Instrument (MLI)

- Tax return filing
- Change of PAN jurisdiction; updating IT profile
- Conditions for claiming DTAA benefit
- TDS/ TCS obligations
- Reporting requirements – Form 15CA-CB

Peculiar situations

- Different residential status under ITA and FEMA
  - Technical issues
  - Practical difficulties

- Change of residence for a short period of time
  - Exercise caution before taking benefits
  - For instance – a person goes abroad; claims NRI status; claims DTAA benefit & remits USD 1 million abroad and returns to India – all within 1-2 years
  - Exposure of regulator questioning the whole arrangement
  - Keep clarity on residential status, bonafides and genuineness
  - **Ideal to claim benefits only after the status is established**

Jurisdictional factors

- Road to citizenship in the foreign country
- Tax, corporate and regulatory laws of the host country
- Disclosure of foreign incomes and assets
- Gift Tax
- Estate Duty/ Inheritance Tax
- Exit Tax/ Departure Tax
- Succession laws

Miscellaneous issues

- Succession Planning
  - Isn't just about Wills
  - Money, business, psychology, philosophy, practical realities
  - Personal laws, corporate law, tax laws, stamp duty, SEBI
  - FEMA takes the complexities to another level

- ITA can go back 10 years
- BMA has no time limit
- FEMA has no time limit
- Documentation and record-keeping
  - Passport copies, agreements, transaction statements, source of funds, tax returns filed abroad.

- 360° profiling by government
- Facilities for officers to analyze and investigate
- Sharing of information between agencies

Conclusion

- 180° turn in the legal position of the person
  - On change of residence

- Two or more countries involved
- Multiple laws involved
- Grey areas
- Multiple people interpreting the law
  - Government
  - Regulator
  - Consultant
  - Regular CA/ In-house legal team
  - The clients themselves!

- Consider all legal implications & take informed decisions.

Business aspects

- **FEMA:**
- FDI by NR/ NRIs on repatriation basis
- ECB framework

- **Income-tax:**
- Business connection & Permanent Establishment
- Transfer Pricing
- Royalty, FTS
- Equalisation Levy
- Withholding Tax on payment to NRs

Thanks!

- Questions?

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