

IMMOVABLE PROPERTIES vis-à-vis FEMA REGULATIONS

Introduction:

Transactions involving acquisition and transfer of immovable properties in India by non-residents are governed by Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, which were issued vide Notification No. 21(R)/2019-RB, dated March 26, 2018 (“Immovable Property in India Regulations”).

Similarly, transactions involving acquisition and transfer of immovable properties outside India by persons resident in India are governed by Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015 which were issued vide Notification No. 7(R) / 2015-RB, dated January 21, 2016.

Both these regulations replaced corresponding earlier regulations issued in May 2000.

Along with these Regulations, such transactions are also governed by Master Direction No. 12/2015-16 on Acquisition and Transfer of Immovable Property under FEMA, dated January 1, 2016, which consolidates all the instructions and circulars issued by Reserve Bank.

For the purpose of these regulations,

- a. An NRI (Non-Resident Indian) means a person resident outside India who is a citizen of India. He continues to hold Indian Passport.
- b. An OCI (Overseas Citizen of India) means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under section 7A of the Citizenship Act, 1955.

In parity with NRIs, OCIs have also been granted all rights in economic, financial and education fields in India except for right to acquire agricultural and plantation properties as discussed in subsequent paragraphs. OCIs are entitled to a multipurpose, multiple entry and lifelong visa allowing them to visit India at any time, for any length of time and for any purpose.

Immovable Properties In India

A. Acquisition or Transfer by NRI or OCI

Acquisition:

An NRI or an OCI may acquire immovable property in India other than agricultural land/ farm house/ plantation property either by purchase or in the form of a gift. Such gift can be from any person resident in India or an NRI or an OCI, who is a relative as per section 2(77) of Companies Act, 2013.

An NRI or an OCI may acquire any immovable in India by way of inheritance from a person resident outside India who had acquired such property (i) in accordance with the extant provisions of the foreign exchange law in force or (ii) from a person resident in India. It may be noted that restriction on acquisition of immovable property in the form of agricultural land / farm house / plantation property is not applicable acquisition in the form of inheritance.

Spouse of an NRI or an OCI, who is a person resident outside India other than an NRI or an OCI, can acquire one immovable property in India (other than agricultural land / farm house / plantation property) jointly with his / her NRI or OCI spouse, subject to condition that their marriage has been registered and subsisted for a continuous period of two years or more immediately preceding the acquisition of such property and such non-resident spouse is otherwise not prohibited for acquisition.

Transfer:

An NRI or an OCI may transfer, without prior approval of RBI, any immovable property in India to a person resident in India or transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

It implies that an NRI or an OCI can transfer their immovable properties to either a person resident in India or another NRI or OCI but cannot be to any other person resident outside India.

It further implies that immovable property being agricultural land/farm house/ plantation property acquired through inheritance by an NRI or an OCI cannot be transferred to another NRI or an OCI but can be transferred only to a person resident in India.

Though prior approval of RBI is not required for transfer of immovable properties, repatriation of proceeds is subject to conditions which are discussed in subsequent details.

B. Acquisition or Transfer by other than NRI or OCI

As per Section 6(5) of FEMA, any person resident outside India may hold, own, transfer or invest in any immovable property situated in India if such immovable property was acquired, held or owned by such person when he was resident in India or inherited from a person resident in India. Accordingly, a non-resident cannot acquire any immovable property in India unless there is a change in his residential status as resident in India or it is acquired by way of inheritance. It may be noted even agricultural land / farm house / plantation properties can be acquired by such person (other than non-residents who are residing in India as a temporarily resident), as the section uses 'any immovable property'.

As per Section 6(6) of FEMA, RBI may by regulations prohibit, restrict or regulate the establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business, which shall be without prejudice to the provisions of that section (ie., section 6).

Accordingly, Immovable property in India Regulations allow a branch, office or other place of business of a person resident outside India (other than liaison office) to

- i. Acquire any immovable property in India which is necessary for or incidental to carrying on such business activity
- ii. Transfer by way of mortgage to an authorized dealer as a security for any borrowing the immovable property acquired in pursuance to clause (i) above.

Additional Conditions:

1. Such person resident outside India shall comply with all applicable laws, rules, regulations or directions for the time being in force

2. Such person resident outside India shall file with RBI a declaration in Form IPI within 90 days from the date of acquisition. However this Form IPI is not applicable for NRIs and OCIs if they acquire such immovable properties under automatic route
3. No person being citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan or North Korea, without prior approval of RBI, shall acquire or transfer immovable property in India, other than lease, not exceeding 5 years. However, this clause is not applicable to an OCI in those countries.
4. Persons being citizens of Afghanistan, Bangladesh or Pakistan belong to minority communities in those countries residing in India on Long Term Visa can acquire one residential property for self-occupation and only one immovable property for carrying out self-employment subject to conditions specified in this regard. Such persons shall be eligible to sell the property only after acquiring Indian citizenship. Prior approval of concerned Deputy Commissioner of Police or Foreigners Registration Office is required if they want to sell before acquiring Indian citizenship.

C. Manner of Payment for Acquisition / Transfer:

1. In case of acquisition, the consideration, if any, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.
2. No payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted as stated above.
3. The consideration shall be paid directly to the Seller bank account and not to route it through any other person (including his relatives)
4. Payment of applicable taxes and other duties/levies in India

D. Prohibition on transfer of immovable property in India:

1. Prior approval of RBI is required for any transfer of immovable property in India by any person resident outside India, other than by an NRI or an OCI as discussed earlier.
2. Subject to directions issued by RBI, an AD Bank may create a charge on an immovable property in India in favour of an overseas lender or security trustee, to secure any loan or borrowing availed under ECB Regulations.
3. Subject to directions issued by RBI, an AD Bank may create a charge on an immovable property in India owned by an NRI or an OCI in favour of an overseas lender towards a loan availed by the company outside India in which such NRI or OCI is a director.

E. Repatriation of sale proceeds:

1. Any person resident outside India, as referred in Section 6(5) of FEMA, as discussed earlier, shall not repatriate outside India the sale proceeds of any immovable property referred to in that section (ie., property acquired when he was resident in India or inherited from person resident in India).
2. An NRI or an OCI can repatriate out of India of sale proceeds of immovable property in India, other than agricultural land / farm house / plantation property, provided the property was acquired by seller in accordance with extant FEMA regulations and amount for acquisition was paid in foreign exchange received through banking channels or out of funds held in FCNR or NRE accounts. However, in case of residential properties, the repatriation is restricted to not more than two such properties. Sale

proceeds of agricultural land / farm house / plantation property can be repatriated only with prior approval of RBI, as they fall under category 1 above.

3. In the event of failure of repayment of ECB availed by a person resident in India, concerned AD Banker may permit the overseas lender or security trustee, in whose favour a charge on immovable property was created, to sell such property only to a person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of said loan and not any other loan.
4. Transfer of immovable property and repatriation of proceeds thereof is subject to payment of applicable taxes and other duties/levies in India.

Immovable Properties Outside India

- a. As per section 6(4) of FEMA, a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by such person when such person was resident outside India or inherited from a person resident outside India. Accordingly, a foreign national who is currently a person resident in India can hold a property outside India when he was a resident outside India.
- b. A person resident in India can acquire immovable property outside India by gift or inheritance from: i. Person referred in (a) above, ii. Person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of RBI and iii. A person resident in India who had acquired such property in accordance with extant foreign exchange provisions.
- c. A resident individual can send remittances under Liberalized Remittance Scheme ("LRS") for purchasing immovable property outside India (LRS limit is USD 250,000 currently).
- d. A resident can acquire immovable property outside India jointly with a relative who is a person resident outside India provided there is no outflow of funds from India
- e. A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, provided total remittances doesn't exceed the limits prescribed by RBI.
- f. Any sort of acquisition other than those mentioned above would require prior approval of RBI
- g. A resident can purchase immovable property outside India out of foreign exchange held in his / her Resident Foreign Currency (RFC) Account within the LRS amount.
- h. There is no limit on number of properties that can be held outside India as long as such acquisitions are in line with extant FEMA guidelines. However, it should be disclosed in Income Tax Returns of such resident.
- i. The resident Individuals shall not invest in Immovable Properties abroad with an intent to carry on real estate trading.