

Investment in Immovable Properties in India by Persons Resident Outside India

Brief Background

Large number of persons migrating out of India always desire to hold, own Immovable Property in India be it a permanent home or a fixed source of income or a sound investment. Under the existing regulatory framework, though there are substantial restrictions on engaging into real estate business activity, persons resident outside India are allowed to hold, own, transfer immovable property in India subject to various terms and conditions both under the automatic and approval route. Here persons resident outside India include persons who are not "persons resident in India" under the Foreign Exchange Management Act, 1999 (FEMA) and who could be persons with some Indian ties or totally a foreign person or a foreign entity which we shall deal with in more detail in following paragraphs.

Being a capital account transaction, the Investments in Immovable Property in India is generally prohibited, unless specifically permitted.

Acquiring immovable property in India by person resident outside India is regulated in terms of Section 6(3) (i) of the Foreign Exchange Management Act (FEMA), 1999 as well as by the regulations contained in Notification issued by RBI viz. Notification No. FEMA 21/2000 – RB dated 3rd May 2000 as amended from time to time.

As per the aforesaid notification, The Persons Resident Out side India is broadly divided in 3 categories as Non-Resident Indian, Person of Indian Origin and foreign Nationals of Non-Indian Origin. A person resident in India who is not a citizen of India is also covered under the said Notification for citizens of certain specific countries.

PART A : GENERAL PROVISIONS

1. Lease for the period not exceeding 5 years
2. It is worthwhile to note that, acquisition of Immovable Property by way of a lease for a period not exceeding 5 years is not covered under list of capital

account transactions that are prohibited /restricted by the RBI and hence, the restriction/prohibitions on acquiring immovable property in India by a person resident outside India would not apply where the immovable property is proposed to be taken on lease for a period not exceeding 5 years. However acceptance of deposit by the resident lessor from the non – resident lessee of the property is not permitted under automatic approval route and hence for acceptance of deposit by resident lessor from non-resident lessee should be done with permission of RBI .

3. **Express Prohibition:**

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan cannot acquire or transfer immovable property in India, (other than on lease, not exceeding five years) without prior permission of the Reserve Bank.

4. **Permission for Person Resident Outside India to hold / own / transfer Immovable Property acquired when he was a Resident in India**

Statutorily, under the provisions of Section 6(5) of FEMA, 1999, a person resident outside India can 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 a resident in India or inherited from a person who was a resident in India.

PART B – Non Resident Indians (NRI) / Person Of Indian Origin

1. **Definitions**

- a) **A Non Resident Indian:** is a person resident outside India ,who is a citizen of India or is a person of Indian origin .
- b) **Person of Indian Origin (PIO):** is an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan), who:
 - at any time, held Indian passport, or

- who or either of whose *father* or *mother* or *grandfather* or *grandmother* was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

2. General Permission to NRI / PIO to purchase Immovable Property in India

- NRI / PIO is permitted to purchase residential and commercial property without any permission.
- However, this general permission is not available to NRI / PIO for purchase of agricultural land / plantation property / farm house in India
- Proposals for purchase of agricultural land / plantation property / farm house in India by NRI / PIO will require specific approval of Reserve Bank and the proposals are considered in consultation with the Government of India.
- An NRI / PIO who has purchased residential / commercial property under general permission, is not required to file any documents with the Reserve Bank.
- There are no restrictions on the number of residential / commercial properties that can be purchased however the conduct of the investor and the volume of number of properties purchased should not be such as would indicate an intention on the part of investor to indulge in to the business of real estate.

3. Mode of Payment for purchase of residential / commercial property in India by NRI / PIO.

- a) Payment can be made by NRI / PIO out of
 - funds remitted to India through normal banking channels as inward remittance or
 - funds held in NRE / FCNR (B) / NRO account maintained in India
- b) No payment can be made either by traveller's cheque or by foreign currency notes.
- c) No payment can be made outside India.

4. Acquisition of Immovable Property by NRI / PIO by way of Gift.

- a) NRI / PIO can freely acquire only commercial or residential property by way of gift either from:
 - a person resident in India or

- an NRI or
 - a PIO.
- b) However, agricultural land / plantation property / farm house in India **cannot** be acquired by way of gift by NRI / PIO.

5. Acquisition of Immovable Property by way of Inheritance by NRI / PIO:

- a) NRI / PIO can inherit Immovable Property from:
- a person resident in India.
 - a person resident outside India
- b) However, the person from whom the property is inherited should have acquired the same in accordance with the foreign exchange regulations applicable at the point of time of original purchase of the said property.
- c) Since citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan are not covered within the scope of PIO, citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan should seek specific approval of Reserve Bank.
- d) Further, in respect of Immovable Property inherited which is in the nature of Agricultural land / plantation property / farm house in India by NRI / PIO, intimation of such inheritance should be given to RBI, as RBI may put restriction as regards use of such Agricultural land / plantation property / farm house in India as also transfer and repatriation of sale proceeds of such inherited property.

6. Mortgage of residential / commercial property held by NRI / PIO

NRI / PIO can mortgage the residential or commercial property to:

- a) an authorised dealer / housing finance institution in India – without the approval of Reserve Bank.
- b) A party abroad - with prior approval of Reserve Bank.

7. Transfer of Property by way of sale by NRI/ PIO with/without RBI approval.

(I) Residential / Commercial Property

- a) NRI can sell property in India without approval of RBI to :-
- a person resident in India or
 - an NRI or

- a PIO.
- b) PIO can sell property in India to :-
 - a person resident in India without approval of RBI.
 - an NRI without approval of RBI.
 - a PIO – *with the prior approval* of RBI.

(II) Agricultural land / plantation property / farm house in India

NRI / PIO may sell agricultural land /plantation property/farm house to a person resident in India **who is a citizen of India.**

Note : Foreign national of non-Indian origin can not be a second holder to immovable property purchased by NRI / PIO.

8. **Transfer of Immovable Property by gift by NRI / PIO**

NRI / PIO may gift residential / commercial property to –

- a) person resident in India or
- b) an NRI or
- c) PIO.

NRI / PIO can gift agricultural land / plantation property / farm house in India only to a person resident in India **who is a citizen of India.**

Note : A citizen of a foreign state who has acquired residential immovable property with the specific approval of RBI during FERA regime ,has to obtain prior approval of RBI before transfer of such property.

9. **Terms and conditions applicable to Repatriation of sale proceeds of a property in India by NRI / PIO:**

- In case the amount has been received from direct inward remittance or by way of a debit to NRE/FCNR(B) account then amount equivalent to the foreign exchange invested at the time of original purchase will be allowed to be repatriated from NRE/ FCNR(B) Account. And any sum received in excess of the same i.e. the capital gains on sale shall have to be deposited into NRO Account.

- However in case of residential properties repatriation of such principal amount is restricted to sale of only two such residential properties. Hence, sales proceeds of residential properties in excess of two such properties as also sale proceeds of all the residential / commercial properties invested through NRO Account should be deposited in NRO Account and shall be allowed to be repatriated outside India out of the balances held in NRO account under the USD One Million Scheme, per financial year.
- In case of sale of commercial and residential properties which were acquired when such person was a resident in India or which were received by way of Inheritance or a gift the sales proceeds have to be deposited in NRO Account only and are eligible for repatriation out of the balances held in NRO account under USD One Million Scheme, per financial year.
- For all remittances out of NRO Account proper documentary evidences in support of such acquisition of the property and the Chartered Accountant's certificate in the prescribed form shall be necessary.
- If there is refund of application money / payment made by the building agencies / seller because of non-allotment of flat / plot / cancellation of bookings / contracts the amount of refund, together with interest (net of income tax) can be credited to NRE account. This is subject to condition that the original payment was made by way of inward remittance or by debit to NRE / FCNR (B) account.
- When Commercial / Residential Properties are acquired by persons PIO / NRIs out of housing loans from Authorised Dealers or Housing Financial Corporations and the repayment where of is made by such NRI / PIO from his FCNR(B)/ NRE account or through Direct Inward Remittance, then repayment of such principal amount of loan amounts to investment in Immovable Property through FCNR(B) / NRE or Direct Inward Remittance and is subject to same treatment as mentioned for the purpose of repatriation of sale proceeds.
- In case the property is acquired out of Rupee resources and/or the loan and where such loan is repaid by close relatives in India (as defined in Section 6 of the Companies Act, 1956), the amount can be credited to the NRO account of the NRI. The amount of capital gains, if any, arising out of sale of

the property can also be credited to the NRO account. NRI/PIO are also allowed by the Authorised Dealers to repatriate out of the balance held in NRO account an amount up to USD one million ,per financial year to the satisfaction of the authorised dealers, subject to tax compliance.

- As FEMA specifically permits transactions only in Indian Rupees with citizens of Nepal and Bhutan, the question of repatriation of the sale proceeds in foreign exchange to Nepal and Bhutan would not arise.

10. Borrowings by NRIs / PIO for acquisition of immovable property

An NRI or a PIO can avail loan from an Authorised Dealer for acquiring flat / house in India for his own residential use against the security of funds held in his NRE Fixed Deposit account/ FCNR (B) account. Such loans are subject to the terms and conditions as laid down in Schedules 1 and 2 to Notification No. FEMA 5/2000-RB dated May 3, 2000 as amended from time to time. However, banks cannot grant fresh loans or renew existing loans in excess of Rupees 20 lakh against NRE and FCNR(B) deposits .

Such loans can be repaid:

- by way of inward remittance through normal banking channel or
- by debit to his NRE / FCNR (B) / NRO account or
- out of rental income from such property.
- by the borrower's close relatives, as defined in section 6 of the Companies Act, 1956, through their account in India by crediting the borrower's loan account.

11. Renting of residential / commercial properties held by NRI / PIO

NRI/PIO can rent out the property without the approval of the Reserve Bank. **Rent received can be credited to NRO / NRE account or remitted abroad.** Powers have been delegated to the Authorised Dealers to allow repatriation of current income like rent, dividend, pension, interest, etc. of NRI/PIO who do not maintain an NRO account in India based on an appropriate certification by a Chartered Accountant, certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for.

PART C: Foreign Nationals of Non-Indian Origin

1. Acquisition of immovable property by foreign national of non-Indian origin who are persons resident outside India.

- a) A foreign national of non-Indian origin, resident outside India cannot **purchase** any immovable property in India.
- b) But, he/she may take residential accommodation on lease provided the period of lease does not exceed five years. In such cases, there is no requirement of taking any permission of or reporting to Reserve Bank.
- c) Foreign national of non-Indian origin cannot be a second holder to immovable property purchased by NRI / PIO.
- d) A foreign national of non-Indian origin resident outside India cannot acquire any immovable property in India through **gift without RBI permission**.
- e) A foreign national of non-Indian origin can **inherit** and hold immovable property in India from:
 - a person who was resident in India.
 - a person resident outside India

However, the person from whom the property is inherited should have acquired the same in accordance with the foreign exchange regulations applicable at that point of time.

However, a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan should seek specific approval of Reserve Bank to hold such property.

- f) In case of Inheritance of Immovable Property in the nature of agricultural land / plantation property / farm house in India intimation needs to be given to RBI as RBI may restrict the use and repatriation of sale proceeds of such property.

2. Transfer of Immovable Property by foreign national of non-Indian origin

Foreign national of non-Indian origin require RBI's prior permission for transfer / sale of residential / commercial and other properties under all the following circumstances.

- Sale of commercial and residential property by Foreign national of non-Indian origin including a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan

or China or Iran or Nepal or Bhutan to; i) person Resident in India, ii) an NRI, iii) a PIO.

- Sale of agricultural land/plantation property/ farm house in India
- Gift of any property held in India.
- Mortgage of Residential / Commercial Properties.

Repatriation of sale proceeds of such properties by foreign nationals of non-Indian origin also requires approval of RBI.

PART D: Special Situations:

1. Purchase immovable property in India by an office in India of a foreign company.

- a) A foreign company which has established a Branch Office or other place of business in India, in accordance with FERA / FEMA regulations, can acquire any immovable property in India, **which is necessary for or incidental to carrying on such activity.**
- b) The payment for acquiring such a property should be made by way of foreign inward remittance through proper banking channel.
- c) A declaration in form IPI should be filed with Reserve Bank within **ninety days** from the date of acquiring the property.
- d) Such a property can also be mortgaged with an Authorised Dealer as a security for other borrowings.
- e) On winding up of the business, the sale proceeds of such property can be repatriated only **with the prior approval of Reserve Bank.**
- f) Further, acquisition of immovable property by entities incorporated in Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan that had set up Branch Offices in India would require prior approval of Reserve Bank to acquire such immovable property.
- g) However, if the foreign company has established a Liaison Office, it can not acquire immovable property. In such cases, Liaison Offices can take property only by way of lease not exceeding 5 years.

2. Purchase / sale of Immovable Property in India by Foreign Embassies / Diplomats / Consulate General.

Foreign Embassies / Diplomats / Consulate Generals can ***purchase and sell*** any immovable property other than agricultural land / plantation property / farm house in India *with prior clearance from the Government of India*, Ministry of External Affairs. The payment should be made by foreign inward remittance through normal banking channel.

Disclaimer :

The information contained in this write up is to provide a general guidance to the intended user. The information is based on our interpretation of various prevailing laws, rules, and regulations, pronouncements under the Foreign Exchange Management Act, 1999 as amended and modified up to 15-09-2010. The information should not be used as a substitute for specific consultations.