1. Introduction

Need for the Act

Due to significant developments in the economic scenario such as substantial increase in our foreign exchange reserves, growth in foreign trade, rationalization of tariffs, current account convertibility, liberalization of Indian investments abroad, increased external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets, necessitated the need for an enforcement of the legislation to regulate foreign trade and investments. In order to facilitate world trade and easy and regulated inflow and outflow of foreign exchange, the Foreign Exchange Management Act, 1999 (FEMA) was enacted. This Act has paved way for consolidation and management of foreign exchange reserves for the country for promoting orderly development and maintenance of foreign exchange market in India.

Salient features of FEMA

FEMA provides:

(i) Free transactions on current account subject to reasonable restrictions that may be imposed
(ii) RBI control over capital account transactions
(iii) Control over realisation of export proceeds
(iv) Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/Money Changer/Off-shore banking unit
(v) Adjudication of Offences
(vi) Appeal provisions including Special Director (Appeals) and Appellate Tribunal
(vii) Directorate of Enforcement.

Broad Structure of FEMA

Now let us have a glance at the broad structure the new Act. The Act consists of 7 Chapters dealing with following areas:
2. **Preamble, Extent, Application and Commencement of FEMA, 1999**

(A) **Preamble:** This Act aims to consolidate and amend the law relating to foreign exchange with the objective of —

(i) facilitating external trade and payments and

(ii) for promoting the orderly development and maintenance of foreign exchange market in India.

(B) **Extent and Application [Sections 1]:** FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.

Accordingly, FEMA does not apply to citizens of India who are outside India unless they are resident of India. The scope of the Act has been further extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words “Owned or Controlled”. Even contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.

(C) **Commencement:** The Act, 1999 came into force with effect from 1st June, 2000 G.S.R. 371(E), dated 1.5.2000.

3. **Definitions [Section 2]**

In this Act, unless the context otherwise requires:

(a) “**Adjudicating Authority**” means an officer authorised under sub-section (1) of section 16;

(b) “**Appellate Tribunal**” means the Appellate Tribunal for Foreign Exchange established under section 18;

(c) “**Authorised person**” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;

(cc) “**Authorised Officer**” means an officer of the Directorate of Enforcement authorised by the Central Government under section 37A;
(d) “Bench” means a Bench of the Appellate Tribunal;
(e) “Capital Account Transaction” means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in sub-section (3) of Section 6;
(f) “Chairperson” means the Chairperson of the Appellate Tribunal;
(g) “Chartered Accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949;
(gg) “Competent Authority” means the Authority appointed by the Central Government under sub-section (2) of section 37A;
(h) “Currency” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank
(i) “Currency Notes” means and includes cash in the form of coins and bank notes;
(j) “Current Account Transaction” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,
   (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.
   (ii) payments due as interest on loans and as net income from investments.
   (iii) remittances for living expenses of parents, spouse and children residing abroad, and
   (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;
(k) “Director of Enforcement” means the Director of Enforcement appointed under section 36(1);
(l) “Export”, with its grammatical variations and cognate expressions means;
   (i) the taking out of India to a place outside India any goods.
   (ii) provision of services from India to any person outside India;
(m) “Foreign Currency” means any currency other than Indian currency;
(n) “Foreign Exchange” means foreign currency and includes:
   (i) deposits, credits and balances payable in any foreign currency,
   (ii) drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
   (iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;
(o) “Foreign Security” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

(p) “Import”, with its grammatical variations and cognate expressions, means bringing into India any goods or services;

(q) “Indian Currency” means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934;

(r) “Legal Practitioner” shall have the meaning assigned to it in clause (i) of sub-section (1) of section 2 of the Advocates Act, 1961;

(s) “Member” means a Member of the Appellate Tribunal and includes the Chairperson thereof;

(t) “Notify” means to notify in the Official Gazette and the expression “notification” shall be construed accordingly;

(u) “Person” includes:
   (i) an individual,
   (ii) a Hindu undivided family,
   (iii) a company,
   (iv) a firm,
   (v) an association of persons or a body of individuals, whether incorporated or not,
   (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
   (vii) any agency, office or branch owned or controlled by such person;

(v) “Person resident in India” means:
   (i) a person residing in India for more than 182 days during the course of the preceding financial year 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;
(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India;

(w) “Person Resident Outside India” means a person who is not resident in India;

(x) “Prescribed” means prescribed by rules made under this Act;

(y) “Repatriate to India” means bringing into India the realised foreign exchange and

(i) the selling of such foreign exchange to an authorised person in India in exchange for rupees, or

(ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank. It includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly;

(z) “Reserve Bank” means the Reserve Bank of India constituted under section 3(1) of the Reserve Bank of India Act, 1934;

(za) “Security” means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944, savings certificates to which the Government Saving Certificates Act, 1959 applies, deposit receipts in respect of deposit of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

(zb) “Service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

(zc) “Special Director (Appeals)” means an officer appointed under section 17;

(zd) “Specify” means to specify by regulations made under this Act and the expression “specified” shall be construed accordingly;

(ze) “Transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.
4. Analysis of Important Definitions

(A) Authorised Person: Earlier there were two separate categories of persons namely authorised dealers and money changers who were licensed to deal in foreign exchange. Under FEMA, 1999 these terms have been clubbed together under the definition of the authorised person, which shall also include off-shore banking unit. The term “off shore banking unit” has not been defined in the Act.

(B) Capital and Current account transactions: The definitions of “Capital Account Transactions” and its counterpart “current account transactions are contained in clauses (e) and (j) of Section 2. These transactions broadly outline the basics and whole approach of the Act. Basically these two transactions have to be understood as a concept of items relating to the profit and loss account (relating to current account transactions) and of Balance Sheet items (of those relating to capital account transactions).

“A transaction which alters the assets or liabilities including contingent liabilities outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction.” Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible. Capital and current account transactions are intended to be mutually exclusive. Also the concept of capital account transaction means differently for residents and non-residents. A transaction which alters the asset or liabilities in India of non-residents fall under the category of capital account. However, as far as residents are concerned transactions which alter the contingent liabilities outside India are also capital transactions. The Reserve Bank of India may by regulations place restrictions on various specified transactions for transactions deemed to be considered as capital in nature.

Current account transaction means a transaction other than a capital account transaction. In other words the current account transactions are the counterpart of capital account transactions and those transactions that are capital account in nature are not current account transactions and vice-versa.

(C) ‘Person’ and ‘Person resident in India’: The definitions are drafted in a manner with wordings of similar definitions contained in the Income-tax Act, 1961. The term ‘person’ includes entities such as companies, firms, individuals, HUF, AOP, artificial juridical persons agencies, offices and branches. The reason for including the agencies, offices and branches is that they do not have independent status separate from its owner.

As far as the definition of the term ‘person resident in India’ is concerned, the person should have resided in India in the preceding financial year for more than 182 days. Citizenship is not the criteria for determining whether or not a person is resident in India. However, the definition raises some points:

(i) The residence of a person is calculated not with reference to his stay in India during that year but with reference to his stay in an earlier financial year. Therefore, a person may come into India in a financial year and stay for that year only but still, for that year he would not be resident in India. He would have to wait for the end of the year and on the commencement of the next year he would be become resident in India.
(ii) Also, there may be situations where person may stay in India for more than 182 days, and leave India thereafter. In the next year, he may be out of India for that whole year still he would be treated as resident in India since in the preceding financial year he was in India for more than 182 days. Therefore, a person may have to wait for up to one and a half-year to become a resident.

If that person has gone out of India or who stays outside India in either case for taking up employment, or for carrying on business or vocation or for any other purpose which would indicate his intention to stay outside India for an uncertain period, he would be treated as resident outside India. From this, it is understood that this condition would apply only to individuals. It has not been specifically provided whether HUF, AOP or agencies etc., would also come within the ambit of the definition. These entities like HUF and AOP are not required to be registered or incorporated like corporate entities nor the definition can be far stretched to cover by applying the criteria of ‘owned or controlled’.

(D) ‘Service’: The term ‘service’ includes a variety of provision of facilities. However, it does not include service under contract of free charge or of personal service. The term ‘transfer’ includes transfer from the point of view of the seller and the purchaser.

Examples

(1) Mr. A had resided in India during the financial year 2015-2016 for less than 183 days. He had come to India on April 1, 2016 for employment. What would be his residential status during the financial year 2016-2017?

Answer: Mr. A had come to India for taking up employment. However, during the financial year 2015-2016, he was in India for less than 183 days. Since he has not fulfilled the condition of staying in India for more than 182 days, he cannot be considered as person resident in India during the financial year 2016-2017 notwithstanding the purpose or duration of his stay.

(2) Mr. X had resided in India during the financial year 2015-2016 for less than 183 days. He had come to India on April 1, 2016 for business. He intends to leave the business on April 30, 2017 and leave India on June 30, 2017. What would be his residential status during the financial year 2016-2017 and during 2017-2018 up to the date of his departure?

Answer: Mr. X cannot be considered ‘person resident in India’ during the financial year 2016-2017 notwithstanding the purpose or duration of his stay. As regards, financial year 2017-2018, Mr. X would have been in India in the preceding financial year (2016-2017) for a period exceeding 182 days. Accordingly, he would be ‘resident’ in India during financial year 2017-2018. However, if he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure. It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any of these purposes, he would be considered, ‘person resident in India’ during the financial year 2017-2018.

(3) Mr. Z had resided in India during the financial year 2015-2016. He left India on 1st August, 2016 for United States for pursuing higher studies for 3 years. What would be his residential status during financial year 2016-2017 and during 2017-2018?
**Answer:** Mr. Z had resided in India during financial year 2015-2016 for more than 182 days. After that he has gone to USA for higher studies. In other words, he has not gone out of, or stayed outside India for or on taking up employment, or for carrying a business or any other purpose, in not circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be ‘person resident in India’ during the financial year 2016-2017.

For the financial year 2017-2018, he would not have been in India in the preceding financial year (2016-2017) for period exceeding 182 days. Accordingly, he would not be ‘person resident in India’ during the financial year 2017-2018.

(4) Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?

**Answer:** Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines ‘person’. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such ‘person’. The term such ‘person’ appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a ‘person’.

Section 2(v) defines ‘person resident in India’. Under clause (iii) thereof ‘person resident in India’ would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person ‘resident outside India’. Hence, it would be ‘person resident in India’.

However, robotic unit in Mumbai, though not ‘owned’ controls Singapore branch, which is a person resident in India. Hence *prima facie*, it may be possible to hold a view that the Singapore branch is ‘person resident in India’.

(5) Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated of ‘base’, which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

**Answer:** Miss Alia stayed in India at Mumbai ‘base’ for more than 182 days in the preceding financial year. The issue here is whether staying can be considered ‘residing’. FEMA emphasises ‘residing’. ‘Stay’ is a physical attribute, while ‘residing’ denotes permanency. Thus, while Miss Alia may have stayed in India for more than 182 days, it is doubtful whether she can be said to have ‘resided’ in India for more than 182 days.

Further under section 2(v)(a), she would become resident only if she has come to or stayed in India for employment. It would be doubtful and debatable, whether by staying at Mumbai base during the break, Miss Alia can be said to have come to stay in India for or on taking up employment. Hence, Miss Alia would continue to be non-resident.
5. Regulation and Management of Foreign Exchange

❖ Dealing in foreign exchange, etc. [Section 3]

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

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

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

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

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

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

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

❖ Holding of foreign exchange [Section 4]

Except as 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.

❖ Current account transactions [Section 5]

Under FEMA, there are restrictions only on capital account transactions. Current account transactions are free unless there is specific restriction.

Any person may sell or draw foreign exchange to or from an authorised person if such sale or withdrawal is a current account transaction. Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

From the section, the intention is to permit receipts and payments freely on current account, though the Central Government may impose reasonable restrictions. On further analysis of the (Section 5) two aspects have to be considered:

1. the section states that any person may sell or draw foreign exchange to or from an authorised person,
2. They may do so if such sale or drawal is a current account transaction. However, the Central Government may impose reasonable restrictions.

The wording implies that the section does not intend to permit a person to carry out a current account transaction freely. If a current account transaction involves dealing with foreign exchange and other provisions of the Act also get attracted, then the concerned person has to take necessary approvals under the Rules and Regulations etc.

As per the FEM (Current Account Transactions) Rules, 2000, drawal of foreign exchange for certain current account transactions from an authorized person is prohibited, a few need permission of appropriate Govt. of India authority and some other transactions would require RBI permission if they exceed a certain ceiling. The three categories are:

I. SCHEDULE I

Transactions for which drawal of foreign exchange is prohibited:

(i) Remittance out of lottery winnings.
(ii) Remittance of income from racing/riding, etc., or any other hobby.
(iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
(iv) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
(v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
(vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
(vii) Payment related to “Call Back Services” of telephones.
(viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

Release of foreign exchange is not admissible for travel to and transaction with residents of Nepal and Bhutan. However, the prohibition related to the transaction with residents of Nepal and Bhutan may be exempted by RBI subject to such terms and conditions as it may consider necessary to stipulate by special or general order.

II. SCHEDULE II

Transactions, which require prior approval of the Government of India for drawal of foreign exchange:

1 Schedule I (Transactions which are prohibited)- FED Master Direction No. 8/2015-16 dated (Updated on 11th February, 2016)
2 Schedule II (Transactions which require prior approval of the Central Government)- FED Master Direction No. 8/2015-16 dated (Updated on 11th February, 2016)
The Foreign Exchange Management Act, 1999

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Provided that FEM (Current Account Transactions) Rules, 2000 shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

III. SCHEDULE III

Transactions which require RBI’s prior approval for drawal of foreign exchange:

With respect to the requirement of Prior approval of Reserve Bank— Every drawal of foreign

3 Schedule III- Notification no G.S.R. 426(E) dated 26th May 2015
exchange for transactions included in Schedule III shall be governed as provided therein:

Provided that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

1. **Facilities for individuals**—Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

   (i) Private visits to any country (except Nepal and Bhutan)
   (ii) Gift or donation.
   (iii) Going abroad for employment
   (iv) Emigration
   (v) Maintenance of close relatives abroad
   (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
   (vii) Expenses in connection with medical treatment abroad
   (viii) Studies abroad
   (ix) Any other current account transaction

   However, for the purposes mentioned at item numbers (iv), (vii) and (viii), the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (here in after referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

   Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

   Further, that for a person who is resident but not permanently resident in India and-

   (a) is a citizen of a foreign State other than Pakistan; or
   (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

   may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

   **Explanation:** For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:
Further, a person other than an individual may also avail of foreign exchange facility, *mutatis mutandis*, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

2. **Facilities for persons other than individual**—The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

   (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
       a. creation of Chairs in reputed educational institutes,
       b. contribution to funds (not being an investment fund) promoted by educational institutes; and
       c. contribution to a technical institution or body or association in the field of activity of the donor Company.

   (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

   (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

       *Explanation*—For the purposes of this sub-paragraph, the expression “infrastructure’ shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated the May 3, 2000.

   (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

3. **Procedure**—The procedure for drawal or remit of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

   Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 2,50,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both. The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.

   The limit of USD 2,50,000 per Financial Year (FY) under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015. Release of foreign exchange exceeding USD 2,50,000, requires prior permission from the Reserve Bank of India.
Capital account transactions [Section 6]

(1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

(2) The Reserve Bank may, in consultation with the Central Government, specify:
   (a) any class or classes of capital account transactions, involving debt instruments, which are permissible;
   (b) the limit up to which foreign exchange shall be admissible for such transactions;
   (c) any conditions which may be placed on such transactions.

Provided that the Reserve Bank or Central Government shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

(2-A) The Central Government may, in consultation with the Reserve Bank, prescribe—
   (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible;
   (b) the limit up to which foreign exchange shall be admissible for such transactions; and
   (c) any conditions which may be placed on such transactions.

(3) ommitted

(4) 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.

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 has issued a clarification on section 6(4) of the Act. This circular clarifies that section 6(4) of the Act covers the following transactions:

(i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;

(ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;

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

(iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent
payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

(5) 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 a such person when he was resident in India or inherited from a person who was resident in India.

(6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate 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.

(7) For the purposes of this section, the term "debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

A capital account transaction as said earlier is a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or persons resident outside India. The section gives a liberty by providing that any person may sell or draw foreign exchange to or from an authorised person for capital account transactions. However, the liberty to do so is subject to the provisions of sub-section (2), which states that the Reserve Bank may in consultation with the Central Government specify class or classes of capital account transactions, which are permissible, and the limit upto, which the foreign exchange shall be admissible for such transactions.

As per the FEM (Permissible Capital Account Transactions) Regulations, 2000, capital account transaction is basically split into the following categories:

(I) transaction, which are permissible in respect of persons resident in India (Specified in Schedule I) and outside India (Specified in Schedule II).

(II) transaction on which restrictions cannot be imposed; and

(III) transactions, which are prohibited.

I. Permissible Transactions

Subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

SCHEDULE I

The list of permissible classes of transactions made by persons resident in India is:

(a) Investment by a person resident in India in foreign securities.

(b) Foreign currency loans raised in India and abroad by a person resident in India.

(c) Transfer of immovable property outside India by a person resident in India.

(d) Guarantees issued by a person resident in India in favour of a person resident outside
(e) Export, import and holding of currency/currency notes.

(f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.

(g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.

(h) Taking out of insurance policy by a person resident in India from an insurance company outside India.

(i) Loans and overdrafts by a person resident in India to a person resident outside India.

(j) Remittance outside India of capital assets of a person resident in India.

(k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

SCHEDULE II

The list of permissible classes of transactions made by persons resident outside India is:

(a) Investment in India by a person resident outside India, that is to say,

(i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and

(ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.

(b) Acquisition and transfer of immovable property in India by a person resident outside India.

(c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.

(d) Import and export of currency/currency notes into/from India by a person resident outside India.

(e) Deposits between a person resident in India and a person resident outside India.

(f) Foreign currency accounts in India of a person resident outside India.

(g) Remittance outside India of capital assets in India of a person resident outside India.

II. Transactions with no restriction

They are:

(1) For amortisation of loan and

(2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan instalments.
III. Prohibited Transactions

On certain transactions, the Reserve Bank of India imposes prohibition.

(a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction,

provided that-

(i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I.

Explanation: Drawal of foreign exchange as per item number 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above.

(ii) Where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 250,000 per financial year, or as decided by Reserve Bank from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

(b) The person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:

(i) In the business of chit fund; 

\[\text{Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated}\]

\[\text{The Foreign Exchange Management (Permissible Capital Account Transactions) (Third Amendment) Regulations, 2015 vide Notification No. FEMA. 341/2015-RB dated May 26, 2015 substituted the existing proviso contained in Regulation 4 sub-regulation (a) of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 with the above provisos in the principal regulations.}\]

\[\text{Vide Notification No. FEMA. 337/2015-RB dated 2nd March, 2015, the Reserve Bank of India, in consultation with the Central Government through the Foreign Exchange Management (Permissible Capital Account Transactions) (Second Amendment) Regulations, 2015 added a explanation with respect to the business of chit fund.}\]
by the Reserve Bank of India from time to time], or

(ii) As Nidhi company, or

(iii) In agricultural or plantation activities, or

(iv) In real estate business, or construction of farm houses, or

In “real estate business” the term shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.; or

(v) In trading in Transferable Development Rights (TDRs).

Transferable Development Rights means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole.

*ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA

Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India

Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India;

'Overseas Citizen of India (OCI)' means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955;

'Repatriation outside India' means the buying or drawing of foreign exchange from an authorised dealer in India and remitting it outside India through banking channels or crediting it to an account denominated in foreign currency or to an account in Indian currency maintained with an authorised dealer from which it can be converted in foreign currency;

Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India

An NRI or an OCI may-

(a) acquire immovable property in India other than agricultural land/farm house/plantation property:

Provided that the consideration, if any, for transfer, 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.

6 FEM (Acquisition and transfer of immovable Property in India) Regulations, 2018 was enforced with effect from 26th March, 2018 through FEMA 21(R), Dated 26.3.2018
Provided further that no payment for any transfer of immovable property shall be made either by traveller’s cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

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

(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;

(d) transfer any immovable property in India to a person resident in India;

(e) transfer any immovable property other than agricultural land/farm house/plantation property to an NRI or an OCI.
Acquisition of Immovable Property for carrying on a permitted activity
A person resident outside India who has established in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, as amended from time to time, a branch, office or other place of business for carrying on in India any activity, excluding a liaison office, may—
(a) acquire any immovable property in India, which is necessary for or incidental to carrying on such activity;
Provided that
(i) all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and
(ii) the person files with the Reserve Bank a declaration in the form IPI as prescribed by Reserve Bank from time to time, not later than ninety days from the date of such acquisition.
(b) transfer by way of mortgage to an authorised dealer as a security for any borrowing, the immovable property acquired in pursuance of clause (a).
Provided no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, other than on lease not exceeding five years, without prior approval of the Reserve Bank.

Joint acquisition by the spouse of an NRI or an OCI
A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/farm house/plantation property), jointly with his/her NRI/OCI spouse.
Provided that
(i) The consideration for transfer, 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 and the regulations made by the Reserve Bank;
(ii) 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 under this clause;
(iii) Provided that the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;
(iv) Provided further that the non-resident spouse is not otherwise prohibited from such acquisition.

Acquisition by a Long-Term Visa holder
A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central
Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment restricted to the conditions prescribed under the FEM (Acquisition and transfer of immovable Property in India) Regulations, 2018.

Sale of immovable property so acquired is permissible only after such person has acquired India citizenship. However, transfer of such immovable property before acquiring Indian citizenship requires the prior approval of the Deputy Commissioner of Police (DCP) or Foreigners Registration Office (FRO) or Foreigners Regional Registration Office (FRRO) concerned.

**Repatriation of sale proceeds**

A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of such immovable property without the prior permission of the Reserve Bank.

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

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

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

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

In the event of failure in repayment of external commercial borrowing availed by a person resident in India under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time, a bank which is an authorised dealer may permit the overseas lender or the security trustee (in whose favour the charge on immovable property has been created to secure the ECB) to sell the immovable property on which the said loan has been secured only to a (by the) person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

**Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries:**

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years.

Provided this prohibition shall not apply to an OCI.
Explanation: For the purpose of this regulation the term "citizen" shall include natural persons and legal entities.

**Mode of transaction for acquisition or transfer of property:** Any transaction involving acquisition or transfer of immovable property under these regulations shall be undertaken:

(a) through banking channels in India;
(b) subject to payment of applicable taxes and other duties/levies in India.

**Prohibition on transfer of immovable property in India:**
Save as otherwise provided in the Act or Regulations, no person resident outside India shall transfer any immovable property in India:

Provided that

(i) The Reserve Bank may, for sufficient reasons, permit the transfer, subject to such conditions as may be considered necessary.

(ii) A bank which is an authorised dealer may, subject to the directions issued by the Reserve Bank in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as amended from time to time.

(iii) An Authorized Dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the Reserve Bank in this regard, create a mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender.

Provided

(a) the funds shall be used by the borrowing company only for its core business purposes overseas;
(b) in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.

(iv) A person resident outside India who has acquired any immovable property in India in accordance with foreign exchange laws in force at the time of such acquisition or with the general or specific permission of the Reserve Bank may transfer such property to a person resident in India provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.

**ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA**

The FEMA empowers the Reserve Bank to frame regulations to prohibit, restrict or regulate the acquisition or transfer of immovable property outside India by persons residents in India.

**Restriction on acquisition or transfer of immovable property outside India.**

A person resident in India can, acquire property outside India if so permitted under the FEMA
or the regulations framed thereunder or with the general or special permission of the Reserve Bank.

These restrictions, however, do not apply to the property held by a person resident in India who is a foreign national or if the property was acquired by a person resident in India on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank.

The restrictions also do not apply to acquisition of property outside India by a person resident in India on a lease not exceeding five years.

Key terms used in the regulations are:

Relative in relation to an individual 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

Liberalized Remittance Scheme is a facility available to resident individuals for making remittances outside as per the conditions mentioned in the master direction on Liberalized Remittances Scheme.

Modes of acquiring property outside India by a resident

According to section 6(4) of the 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 him/her when he/she was resident outside India or inherited from a person resident outside India.

(i) A resident can acquire immovable property outside India by way of gift or inheritance from:
   a. a person referred above; or
   b. a 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 the Reserve Bank.
   c. a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.

(ii) A resident can purchase immovable property outside India out of foreign exchange held in his/her Resident Foreign Currency (RFC) account.

(iii) 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.

Acquisition under the Liberalised Remittance Scheme (LRS)

A resident individual can send remittances under the Liberalised Remittance Scheme for purchasing immovable property outside India.

Companies having overseas offices

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 do not exceed the following limits prescribed for initial and recurring expenses, respectively:

a. 15 per cent of the average annual sales/income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth, whichever is higher;
b. 10 per cent of the average annual sales/income or turnover during the last two financial years.

(1) **Declaration representing export value of the goods:** Every exporter of goods shall-
   
   (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;
   
   (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.

(2) **Reserve Bank may direct to exporter for compliance:** The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

(3) **Declaration in relation to payment for such services:** Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Reserve Bank of India enforced the Regulations to regulate the Export of Goods and Services from India. These Regulations called as the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015.

**Relevant key terms:** In these Regulations, unless the context requires otherwise, -

(i) 'export' includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;

(ii) 'export value' in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;

(iii) 'form' means form annexed to these Regulations;

(iv) 'software' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium;

(v) 'specified authority' means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;
Declaration of exports:

(1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –

(i) the full export value of the goods or software; or

(ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

(2) Declarations shall be executed in sets of such number as specified.

(3) In respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

(4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

Exemptions: Export of goods / software may be made without furnishing the declaration in the following cases, namely:

(a) trade samples of goods and publicity material supplied free of payment;

(b) personal effects of travellers, whether accompanied or unaccompanied;

(c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;

(d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value

(e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;

(f) goods imported free of cost on re-export basis;

(g) the following goods which are permitted by the Development Commissioner of the
Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:

(1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;

(2) goods imported from foreign suppliers/collaborators on loan basis;

(3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.

(ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs

(h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

(i) goods sent outside India for testing subject to re-import into India;

(j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

(k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

Indication of importer-exporter code number:
The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

Authority to whom declaration is to be furnished and the manner of dealing with the declaration:

A. Declaration in Form EDF
(i) The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.

(ii) After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

B. Declaration in Form SOFTEX
(i) The declaration in Form SOFTEX in respect of export of computer software and audio/video/television software shall be submitted in triplicate to the designated
official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.

(ii) After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

C. Duplicate Declaration Forms to be retained with Authorised Dealers

On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

Evidence in support of declaration:

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –

(a) the exporter is a person resident in India and has a place of business in India;
(b) the destination stated on the declaration is the final place of the destination of the goods exported;
(c) the value stated in the declaration represents –
   (1) the full export value of the goods or software; or
   (2) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in the overseas market.

‘final place of destination’ means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

Manner of payment of export value of goods:

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

For the purpose of this regulation, re-import into India, within the period specified for realisation of the export value, of the exported goods in respect of which a declaration was made, shall be deemed to be realisation of full export value of such goods.

Period within which export value of goods/software/services to be realised:-

(1) Period within which amount representing the export value shall be realized & repatriated: The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided.
(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

(b) Extension of period: further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

(2) (a) Export in special circumstances: Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

(b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

(c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.

For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

Submission of export documents:

The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorized dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

Transfer of documents:

An authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3):

Provided that before accepting such documents for negotiation or collection, the authorised dealer...
The Foreign Exchange Management Act, 1999 22.29

dealer shall –

(a) where the value declared in the declaration does not differ from the value shown in the
documents being negotiated or sent for collection, or

(b) where the value declared in the declaration is less than the value shown in the documents
being negotiated or sent for collection, require the constituent concerned also to sign such
declaration and thereupon such constituent shall be bound to comply with such requisition and
such constituent signing the declaration shall be considered to be the exporter for the purposes
of these Regulations to the extent of the full value shown in the documents being negotiated or
sent for collection and shall be governed by these Regulations accordingly.

Payment for the Export:

In respect of export of any goods or software for which a declaration is required to be furnished
under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject
to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from
doing anything or take or refrain from taking any action which has the effect of securing –

(i) that the payment for the goods or software is made otherwise than in the specified manner; or

(ii) that the payment is delayed beyond the period specified under these Regulations; or

(iii) that the proceeds of sale of the goods or software exported do not represent the full export
value of the goods or software subject to such deductions, if any, as may be allowed by
the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised
dealer;

Provided that no proceedings in respect of contravention of these provisions shall be
instituted unless the specified period has expired and payment for the goods or software
representing the full export value, or the value after deductions allowed under clause (iii),
has not been made in the specified manner within the specified period.

(iv) Export of services to which no Form specified in these Regulations apply, the exporter may
export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

Certain Exports requiring prior approval

Exports under trade agreement/rupee credit etc.

(i) Export of goods under special arrangement between the Central Government and
Government of a foreign state, or under rupee credits extended by the Central Government
to Govt. of a foreign state shall be governed by the terms and conditions set out in the
relative public notices issued by the Trade Control Authority in India and the instructions
issued from time to time by the Reserve Bank.

(ii) An export under the line of credit extended to a bank or a financial institution operating in
a foreign state by the Exim Bank for financing exports from India, shall be governed by the
terms and conditions advised by the Reserve Bank to the authorised dealers from time to
time.
Delay in Receipt of Payment:
Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,
(a) the payment therefor if the goods or software has been sold and
(b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf;
Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Advance payment against exports:
(1) Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
(i) the shipment of goods is made within one year from the date of receipt of advance payment;
(ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
(iii) the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;
In the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

(2) An exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

Issue of directions by Reserve Bank in certain cases:
(1) Where the full export value is received in proper time: Without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters,
the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely;

(a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order;

(b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.

(c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.

(2) **No direction and approval unless given reasonable opportunity given to exporter:**

No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

**Project exports:**

(1) **In the case of deferred payment:** Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.

(2) **In case of giving guarantee to award approval:** In case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements.

For the purpose of this Regulation, *approving authority* means the EXIM Bank of India or the authorised dealer.

- **Realisation and repatriation of foreign exchange [Section 8]**

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.
Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015

The Reserve Bank makes the Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015, relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

Relevant terms:

'foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange;

'surrender' means the selling of foreign exchange to an authorised person in India in exchange of rupees;

1. Duty of persons to realise foreign exchange due:

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

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

2. Manner of Repatriation:

(1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and—

(a) sell it to an authorised person in India in exchange for rupees; or
(b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
(c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

3. Period for surrender of realised foreign exchange:

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4 [Regulation 4 deals with manner of repatriation as discussed in above point], within the period specified below:-

1. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
2. in all other cases within a period of ninety days from the date of its receipt.

4. **Period for surrender in certain cases:**

1. Any person (not being an individual resident in India) who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.

2. Notwithstanding anything contained in sub-regulation (1), where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -

   (a) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

   (b) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

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

   ✠ **Exemption from realisation and repatriation in certain cases [Section 9]**
The provisions of sections 4 and 8 shall not apply to the following, namely:

(a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;

(b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;

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

(d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising there from;

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

(f) such other receipts in foreign exchange as the Reserve Bank may specify.

For the purposes of clauses (a) and (e) of Section 9 of the Act, the Reserve Bank specified the following limits for possession or retention of foreign currency or foreign coins, namely:

As per the FEM (Possession and Retention of foreign currency) Regulations, 2015 following are the limits for possession and retention of foreign currency or foreign coins :-

(i) possession without limit of foreign currency and coins by an authorised person within the scope of his authority;

(ii) possession without limit of foreign coins by any person;

(iii) retention by a person resident in India of foreign currency notes, bank notes and foreign currency traveller's cheques not exceeding USD 2,000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques:

(a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or

(b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or

(c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or

(d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

However, a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and traveller's cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and,
has been brought into India in accordance with the regulations made under the Act. “Not permanently resident” means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

6. Authorised Person [Section 10]

(1) **Authorization by Reserve Bank:** The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. [Sub-section (1)].

(2) **In writing and subject to conditions:** An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein [Sub-section (2)].

(3) **Revocation of authorization:** An authorisation granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that:

(a) it is in public interest so to do; or

(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction order made thereunder;

Provided that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

(4) **To act under the directions of the Reserve Bank:** An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

(5) **In case of refusal to undertake the transaction:** An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonable satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason the believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

(6) **Commission of Contravention of the provision of the Act:** Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does
not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provision of the Act for the purpose of this section.

 Reserve Bank’s powers to issue directions to authorised person [Section 11]

(1) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications or directions made thereunder, give to the authorised persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security.

(2) The Reserve Bank may, for the purpose of ensuring the compliance with the provisions of this Act or of any rule, regulation, notification direction or order made thereunder, direct any authorised person to furnish such information, in such manner, as it deems fit.

(3) Where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

 Power of Reserve Bank to inspect authorised person [Section 12]

(1) The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary or expedient for the purpose of:

(a) verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;

(b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;

(c) securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.

(2) It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and other documents in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.
7. Contraventions and Penalties in Brief

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<td>➢ Upto ₹ 10,000.</td>
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<td>➢ If continuing offence additional penalty upto ₹ 2,000 per day</td>
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<td>Section 13</td>
<td>Of any provision of the Act, or any rule, regulation, notification, direction or order or of any condition subject to which an authorisation issued</td>
<td>➢ Upto three times, the sum involved, if it is quantifiable.</td>
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<td>➢ If not quantifiable upto ₹ 2 lacs.</td>
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<td>Section 14</td>
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<td>– where demand is of an amount exceeding ₹ 1 crore.</td>
<td>➢ Upto 3 years</td>
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<td>– in any other case</td>
<td>➢ Upto 6 months.</td>
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Penalties [Section 13]

(1) If any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.

(1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.
(1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the person committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with directions made in this behalf.

Explanation: For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include:

(a) deposits in a bank, where the said property is converted into such deposits;
(b) Indian currency, where the said property is converted into that currency; and
(c) any other property, which has resulted out of the conversion of that property.

Enforcement of the orders of Adjudicating Authority [Section 14]

(1) Failure to pay penalty: Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.

(2) Serving of notice: No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied:

(a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred concealed, or removed may part of his property, or
(b) that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to the same.

(3) Issue of warrant: a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating authority is satisfied, by affidavit or otherwise,
that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.

(4) **In case of no appearance on the notice served:** Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter.

(5) **Execution of warrant by any other adjudicating authority:** A warrant of arrest issued by the Adjudicating Authority may also be executed by any other adjudicating authority within whose jurisdiction the defaulter may for the time being be found.

(6) **Presentment of defaulter before Adjudicating Authority:** Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey);

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Explanation: For the purposes of this sub-section, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.

(7) **Notice of show cause:** When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this Section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison.

(8) **Order of detention during the pending of inquiry:** Pending the conclusion of the inquiry, the adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.

(9) **Order of dentation:** Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or lease him on his furnishing security to the satisfaction of the adjudicating authority for his appearance at the expiration of the specified period if the arrears are not satisfied.

(10) **Order of release:** When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release.

(11) **Payment of amount mentioned in the warrant:** Every person detained in the civil prison in execution of the certificate may be so detained:

(a) where the certificate is for a demand of an amount exceeding rupees one crore, up
(b) in any other case, up to six months:

Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.

(12) Defaulter liable to discharge its liability: A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.

(13) Execution of detention order: A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973.

Power to recover arrears of penalty [Section 14A]

Save as otherwise provided in this Act, the Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.

The officer referred to in sub-section (1) shall exercise all the like powers which are conferred on the income-tax authority in relation to recovery of tax under the Income-tax Act, 1961 and the procedure laid down under the Second Schedule to the said Act shall mutatis mutandis apply in relation to recovery of arrears of penalty under this Act.

8. Compounding of Offences

Compounding Authority: Persons authorized by Central Government under section 15 i.e. classes of officers of the Enforcement Directorate and classes of officers of the RBI can act as Compounding Authority.

According to section 15:

(1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.
9. Adjudication and Appeal

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❖ Appointment of Adjudicating Authority [Section 16]

For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. [Section 16 (1)]

The Central Government while appointing the Adjudicating Authorities, also specify their respective jurisdiction in the order published in the Official gazette. Such Adjudicating authority shall hold an enquiry only upon a compliant in writing made by any officer authorized by general/special order by the Central Government. [Section 16(2)&(3)]

Every Adjudicating Authority shall dispose of the compliant finally within one year from the date of receipt of the compliant. In case of failure, it shall record periodically the reasons in writing.
within the said period. [Section 16(6)]

❖ **Appeal to Special Director (Appeals) [Section 17]**

(1) **Appointment of special directors by Central Government:** The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.

(2) **When aggrieved may prefer an appeal:** Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal of the Special Director (Appeals).

(3) **Time-limit for an appeal:** Appeal shall be filed within forty five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. However, appeal may be entertained after expiry of the said period on the basis of the sufficient cause for not filing it within that period.

(4) **Opportunity of being heard:** Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit confirming, modifying or setting aside the order appealed against.

(5) **Sending of Copy of order:** The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

(6) **Power of special director:** The Special Director (Appeals) shall have the same powers of a civil court which are conferred on the Appellate Tribunal under section 28(2).

❖ **Appellate Tribunal [Section 18]**

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

❖ **Appeal to Appellate Tribunal [Section 19]**

The Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section (1) of section 17[the Special Director (Appeals)], may prefer an appeal to the Appellate Tribunal.

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government. Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.
Procedure and Powers of Appellate Tribunal and Special Director (Appeals) [Section 28]

(1) The Appellate Tribunal and the Special Director (Appeals) shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal and the Special Director (Appeals) shall have powers to regulate its own procedure.

(2) The Appellate Tribunal and the Special Director (Appeals) shall have under this Act, the same powers as are vested in a civil court, while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) requisitioning any public record or document or copy of such record or document from any office;
(e) issuing commissions for the examination of witnesses or documents;
(f) reviewing its decisions;
(g) dismissing a representation of default or deciding it ex parte;
(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
(i) any other matter which may be prescribed by the Central Government.

(3) An order made by the Appellate Tribunal or the Special Director (Appeals) shall be executable by the Appellate Tribunal or the Special Director (Appeals) as a decree of civil court.

(4) The Appellate Tribunal or the Special Director (Appeals) may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

Appeal to High Court [Section 35]

Time limit for preferring an appeal to high court: Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order:

Extension of time period: Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation: In this section “High Court” means:

(a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
(b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

10. Directorate of Enforcement

- **Directorate of Enforcement (DoE) [Section 36]**

  (1) **Establishment of DoE:** The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

  (2) **Authorisation by Central Government:** The Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.

  (3) **Central Government may impose the restrictions on the exercise of power and duties of an officer of Enforcement:** Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

**Power of search and seizure:** The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13. [Section 37(1)]

- **Special provisions relating to assets held outside India in contravention of section 4 [Section 37-A]**

  (1) **Any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4:** Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:

  Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

  (2) **Presentation before the competent authority:** The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

  (3) **Time period for disposal of petition:** The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either
confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) **Validity of the order of competent authority:** The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure.

(5) **Passing of an appropriate order after hearing the parties:** Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure.

(6) **Appeal:** Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(7) **Provision related to compounding for contravention given under section 15, shall not apply to this section.**

**Empowering other officers [Section 38]**

(1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.

(2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961, subject to such conditions and limitations as the Central Government may impose.

**11. Miscellaneous**

**Presumption as to documents in certain cases [Section 39]**

Where any document-

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

(ii) has been received from any place outside India (dually authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any
contravention under this Act alleged to have been committed by any person. Such
document is tendered in any proceeding under this Act in evidence against him, or against
him and any other person who is proceeded against jointly with him, the court or the
Adjudicating Authority, as the case may be, shall:

(a) presume, unless the contrary is proved, that the signature and every other part of
such document which purports to be in the handwriting of any particular person or
which the court may reasonably assume to have been signed by, or to be in the
handwriting of any particular person, is in that person’s handwriting and in the case
of a document executed or attested, that it was executed or attested by the person
by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such
document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the
truth of the contents of such document.

❖ Suspension of operation of this Act [Section 40]

(1) If the Central Government is satisfied that circumstances have arisen rendering it
necessary that any permission granted or restriction imposed by this Act should cease to
be granted or imposed, or if it considers necessary or expedient so to do in public interest,
the Central Government may, by notification, suspend or relax to such extent either
indefinitely or for such period as may be notified, the operation of all or any of the provisions
of this Act.

(2) Where the operation of any provision of this Act has under sub-section (1) been suspended
or relaxed indefinitely, such suspension or relaxation may, at any time while this Act
remains in force, be removed by the Central Government by notification.

(3) Every notification issued under this section shall be laid, as soon as may be after it issued,
before each House of Parliament, while it is in session, for a total period of thirty days
which may be comprised in one session or in two or more successive sessions, and if,
before the expiry of the session immediately following the session or the successive
sessions aforesaid, both Houses agree in making any modification in the notification or
both Houses agree that the notification should not be issued, the notification shall there
after have effect only in such modified form or be of no effect, as the case may be; so,
however, that any such modification or annulment shall be without prejudice to the validity
of anything previously done under that notification.

❖ Power of Central Government to give directions [Section 41]

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve
bank such general or special directions as it thinks fit, and the Reserve bank shall, in the
discharge of its functions under this Act, comply with any such directions.

❖ Contravention by companies [Section 42]

(1) Where a person committing a contravention of any of the provisions of this Act or of any
rule, direction or order made thereunder is a company, every person who, at the time the
contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly [Sub-section (1)].

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purpose of this Section—

(i) “Company” means any body corporate and includes a firm or other association of individuals; and

(ii) “Director” in relation to a firm, means a partner in the firm.

Death or insolvency in certain cases [Section 43]

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

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

Bar Legal proceedings [Section 44]

No suit, prosecution or other legal proceeding shall lie against the Central Government or the Reserve Bank or any officer of that Government or of the Reserve Bank or other person exercising any power or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule, regulation, notification, direction or order made thereunder.

Repeal and saving [Section 49]

(1) The Foreign Exchange Regulation Act, 1973 is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman
or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal:

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act.

(c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general applications of Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

Students may note that though they are not expected to know the details of all the Rules/Regulations/Clarifications/Notifications issued by various authorities from time to time, however, they should familiarise with such Notifications and other significant rules/regulations having a bearing on such provisions of the Act and which are covered as part of the Study Material and Revisionary Test Papers published from time to time.