

Analysing FEMA Provisions for Returning Indians - Part I

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The repatriation of Indians from abroad is an important aspect of India's financial and regulatory framework, particularly under the Foreign Exchange Management Act ("FEMA" or "the Act") 1999. FEMA regulates the inflow and outflow of foreign exchange in the country and governs the financial transactions of Indian residents and entities. For Returning Indians, the FEMA law plays a crucial role in determining the legal procedures for bringing back foreign assets, including currency, bank accounts, and investments. It ensures that repatriation is carried out in compliance with India's financial regulations while safeguarding the integrity of the country's foreign exchange reserves. Understanding the rules and guidelines under FEMA is essential for Returning Indians to navigate the process smoothly and legally.

The term "Returning Indian" does not have a specific legal definition, but it is commonly understood to refer to such non-residents who are expected to return to India from the country where they currently reside.

In this Article, we will cover the analysis of the provisions which are applicable to Returning Indian specifically section 6(4) of FEMA, 1999 and the rules & regulations made there under with the help of some illustrations.

1. RETURNING INDIANS UNDER FEMA PROVISIONS

As per the introduction paragraph, "Returning Indian" means such person who is going to become a "Person Resident in India ('PRI') from "Person Resident Outside India ('PROI')." It is crucial to understand the definition of a PRI in order to ascertain when a person can become a PRI.

As per Section 2(v) of FEMA, a person resident in India is defined as below,

"person resident in India" means —

1. *a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—*
 1. *a person who has gone out of India or who stays outside India, in either case—*
 1. *for or on taking up employment outside India, or*
 2. *for carrying on outside India a business or vocation outside India, or*
 3. *for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;*
 2. *a person who has come to or stays in India, in either case, otherwise than—*
 1. *for or on taking up employment in India, or*
 2. *for carrying on in India a business or vocation in India, or*
 3. *for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;*

2. *any person or body corporate registered or incorporated in India,*
3. *an office, branch or agency in India owned or controlled by a person resident outside India,*
4. *an office, branch or agency outside India owned or controlled by a person resident in India.*

The above definition under FEMA uses a dual test of physical stay and intention of a person. According to the above definition, if a person stays more than 182 days in India during the preceding financial year, then he is treated as a resident of India in the current financial year. However, there is an exception to this rule, that if a person who comes to India for the purposes of employment, business/vocation or for any reason that would indicate his/her intention to stay in India for an uncertain period, then such a person would be treated as a person resident in India from the date on which he/she visits India for such purposes.

2. ANALYSING THE APPLICABILITY OF SECTION 6(4) OF THE ACT FOR RETURNING INDIANS

FEMA includes both general provisions and specific regulations for individuals who transited from being non-residents to residents.

The general permission under Section 6(4) of FEMA provides that “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.”

Further as per the RBI Circular No. 90 dated 9th January 2014, a clarification was issued by the RBI on types of assets and income which are covered under section 6(4). Below are the extracts of the circular:

It is clarified that Section 6(4) of FEMA, 1999 covers the following transactions:

1. *Foreign currency accounts opened and maintained by such a person when he was resident outside India;*
2. *Income earned through employment or business or vocation outside India taken up or commenced while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;*
3. *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.*
4. *A person resident in India may freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/ or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transaction is not in contravention to extant FEMA provisions.”*

An Indian resident returning India and becoming a person resident in India should assess their assets in India to determine what course of action is required.

3. ILLUSTRATIONS UNDER SECTION 6(4) OF FEMA, 1999

1. Inheritance of Foreign Security from Father who is an NR (Non-Resident):

Facts: Resident Daughter wants to inherit foreign security (Gambling Company) from her father who is a non resident. Will she be able to do so as per FEMA?

Ans: As per Section 6(4), A PRI may hold, own, transfer or invest in foreign security outside India if

such security was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

However as per Rule 4(b)(iii) of Overseas Investment Rules, 2022, Nothing in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022 shall apply to—

a)...

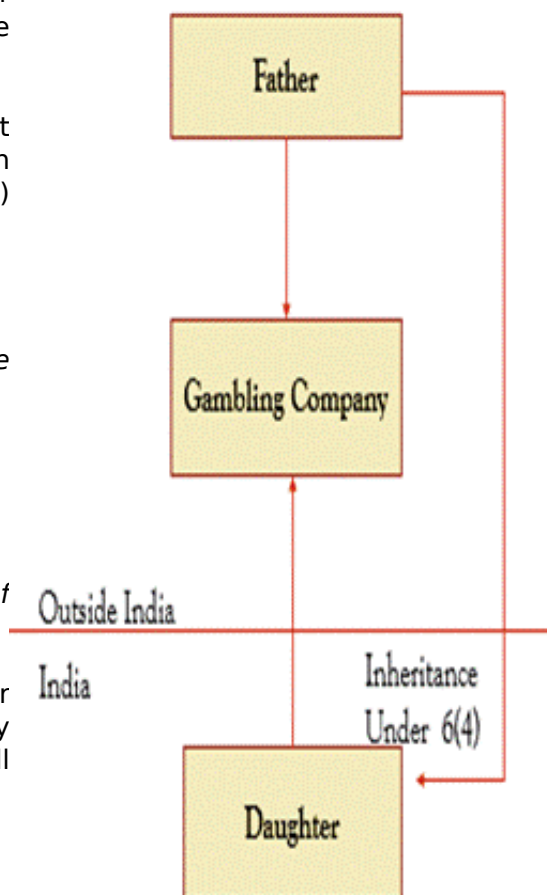
b) acquisition or transfer of any investment outside India made, —

i)...

ii)...

iii) in accordance with sub-section (4) of section 6 of the Act.

As per our understanding, the Resident Daughter can inherit the shares of foreign gambling company from her non-resident father since the OI rules will not apply.



Gift of Foreign Security from Resident to another Resident Indian:

Facts: Mr. A, who is a resident Indian wants to Gift shares of foreign Gambling company to Mr. B, who is also a resident Indian. Will he be able to do so as per FEMA?

Ans: Gift of shares is not covered under Section 6(4), however as per Rule 2(2) of Foreign Exchange Management (Overseas Investment) Rules, 2022 gift of foreign securities from PRI to PRI is allowed provided they are relatives:

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

However, the point to be noted here is that since the gifting of shares of a foreign gambling company is prohibited under Rule 19 of OI rules 2022 hence the same would not be allowed:

“unless otherwise provided in the Act or these rules,



Outside India

India

Mr. A

Mr. B

no person resident in India shall make ODI in a foreign entity engaged in:

(a) real estate activity;

(b) gambling in any form; and

(c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank."

Hence Mr. A cannot gift shares to Mr. B of a Gambling company situated in an overseas country.

Inheritance of immovable property abroad:

Facts:

1. Mr. A who is a person resident outside India holds immovable property under section 6(4), can Mr. B who is an Indian resident inherit the immovable property from Mr. A at the time of his death.
2. Whether Mr. C son of Mr. B can acquire the said immovable property as inheritance from Mr. B.

Ans:

1. As per Section 6(4) of FEMA "a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property

was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India."

Hence Mr. B can inherit the immovable property from Mr. A at the time of his death as the same is allowed under section 6(4).

2. Mr. C cannot acquire the immovable property by way of inheritance from Mr. B under section 6(4) of FEMA, 1999, however he can acquire the said property by way of inheritance under Rule (21)(2)(i) of the Foreign Exchange Management (Overseas Investment) Rules, 2022 which is specified as below:

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

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

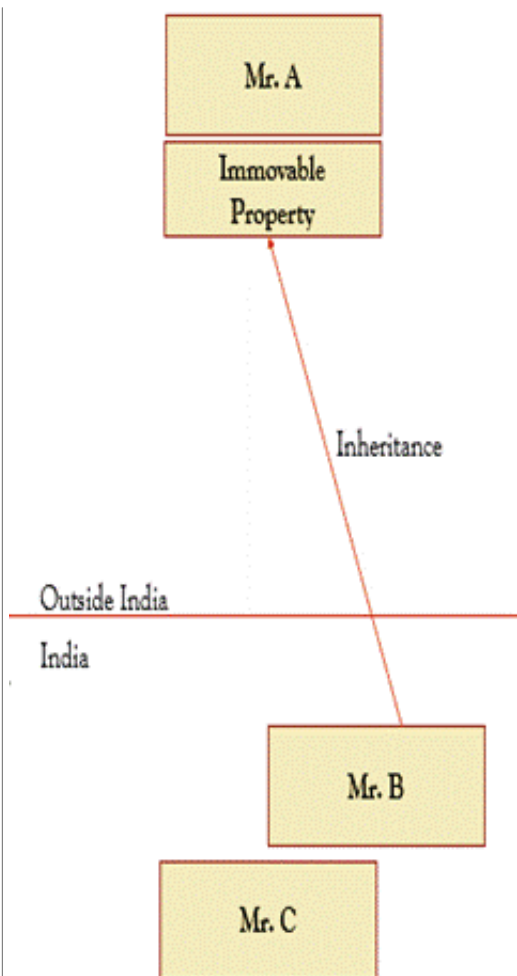
(i) held by a person resident in India who is a national of a foreign State;

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

(iii) acquired by a person resident in India on a lease not exceeding five years.

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

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



Conclusion:

Section 6(4) of FEMA 1999, ensures that Returning Indians have the right to manage and repatriate their foreign assets, including foreign currency, investments, and other financial instruments, in accordance with the regulations set forth by the Reserve Bank of India (RBI). This provision facilitates the smooth transition of individuals returning to India after residing abroad, ensuring compliance with foreign exchange norms while enabling the proper handling of their foreign exchange holdings and assets."

This section is integral to the framework of FEMA, helping to regulate the movement of assets and funds for

individuals who are re-establishing their residency in India.

The compliances to be done with respect to each asset as held by a Returning Indian will be captured in the next part of the Article.

[Click here](#) to read the Part II.