

GIFTING OF ASSETS BETWEEN RESIDENT AND NON-RESIDENT

The concept of exchanging gifts is not new to us. Gift out of natural love and affection, as a mode of transfer, is customary between close relatives and friends. It is essential to realize that when this gift involves exchange between a resident and non-resident, the provisions of Foreign Exchange Management Act, 1999 ("FEMA") and its various rules and regulations thereunder need to be adhered to. In order to assess whether gift of money or assets between a resident and non-resident is permissible or not, and if permissible, what are the applicable terms and conditions applicable to such gift transaction, one needs to understand the nature of such gift transaction.

Under FEMA, gift of money is a current account transaction since on exchange of money, the transaction concludes. However, in order to manage the forex reserves and keep control on unlimited gifts, thresholds are introduced under FEMA. On the other hand, gift of immovable property and shares & securities are capital account transactions since they result in change in cross border assets held by a resident and non-resident.

Since different terms denoting Non-residents are used in different notifications, it is important to understand the following definitions:

- **Non- Resident Indian (NRI)**: NRI is a person resident outside India who is a citizen of India.
- **Overseas Citizen of India (OCI)**: OCI is a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.
- **Relative**: Since gifting is largely permitted between relatives, one must note that FEMA uses the definition of relative as per the Companies Act, 2013 and not as per the Income Tax Act, 1961. 'Relative' referred under FEMA means relative as defined in Section 2(77) of Companies Act, 2013 i.e. **father, mother, brother, sister, son, daughter, son's wife and daughter's husband**.
- **Person of Indian Origin (PIO)**¹: PIO means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:
 - a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; or
 - b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or
 - c) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in above (a) or (b); or
 - d) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in above (a) or (b) or (c)

¹Though PIOs still find a place in certain regulations, vide Government of India's Gazette Notification No. 26011/01/2014-IC.I dated 09.01.2015, all registered PIO cardholders will be deemed to be OCI cardholders w.e.f 09.01.2015. No fresh PIO cards were issued since that date.

GIFT OF SHARES & SECURITIES

GIFT OF SHARES OF AN INDIAN COMPANY

An NRI/OCI has an option to invest into the shares of an Indian Company on repatriation basis or non-repatriation basis. Investment on repatriation basis means an investment, sale or maturity proceeds of which (net of taxes), are eligible to be repatriated out of India. In case of investment on non-repatriation basis, the proceeds cannot be freely repatriated outside India. Investment on non-repatriation basis is treated at par with domestic investment.

Provisions relating to gift of shares of an Indian Company

Donor	Donee	Permissibility	Reporting* & Sector caps applicable
Non-resident (including NRI/OCI) holding on repatriation basis	Resident	Automatic	Only reporting, Sectoral caps would not apply
	NRI/OCI who will hold on non-repatriation basis	Automatic	Only reporting, Sectoral caps would not apply
	Non-resident (including NRI/OCI) who will hold on repatriation basis	Automatic subject to condition**	Not applicable (Manual changes needed in Entity Master Form)
NRI/OCI holding on non-repatriation basis	Resident	Automatic	Not applicable
	NRI/OCI holding on non-repatriation basis	Automatic	Not applicable
	Non-resident (including NRI/OCI) holding on repatriation basis	Prior RBI Approval subject to conditions***	Both
Resident	NRI/OCI who will hold on non-repatriation basis	Prior RBI Approval subject to conditions***	Not applicable
	Non-resident (including NRI/OCI) holding on repatriation basis	Prior RBI Approval subject to conditions***	Both

* In case reporting is applicable, Form FC-TRS is required to be filed with supporting documents on FIRMS portal. The onus of compliance is on donor or donee who is resident in India.

** Prior Government approval is needed if the company is engaged in a sector which requires Government approval

*** Following are the conditions:

- Donee is eligible to acquire such shares under the Rules
- The gift does not exceed 5% of the paid up capital of the Indian company or each series of debentures or each mutual fund scheme on cumulative basis by a single person to another single person
- The applicable sectoral cap in the Indian company is not breached by such gift
- The donor and the donee should be relatives as described above
- The value to be transferred by the donor together with any shares transferred to any person residing outside India as gift during the financial year does not exceed INR equivalent of 50,000 US Dollars;
- Such other conditions as considered necessary in public interest by the Central Government.

GIFT OF FOREIGN SECURITIES

1. A resident is permitted to accept gift of foreign securities from a Non-resident.
2. A resident individual is permitted to purchase shares of listed as well as unlisted companies, units of Mutual Funds, debt securities etc under LRS for portfolio investment. Securities acquired under LRS can be gifted to a non-resident.

GIFT OF MONEY

Currently, a resident individual is permitted to remit USD 250,000 abroad per financial year for permissible capital and current account transactions. Gift of money under LRS is a permissible current account transaction. The amount of gift has to be within the upper limit of USD 250,000 when considered along with the other remittances done or to be done in the said year for the other permitted capital account or current account transactions. For example, in FY 2021-22, if Mr. A, a resident, has utilized USD 25,000 for business travel in May 2021 and USD 50,000 for purchase of shares of Apple Inc. in June 2021. In such a case, Mr. A has utilized USD 75,000 and balance LRS limit of USD 1,75,000 is available for gift and other permissible transactions for remaining FY 2021-22.

Provisions for Gift of Money between Resident and Non-Resident

Donor	Currency	Donee	Permissibility
Resident	Foreign currency	Non-resident	Allowed upto LRS limit of USD 250,000 per financial year
	Indian rupee	Non-resident	Allowed only to NRI/PIO relatives of the donor as per Companies Act, 2013 by credit in the NRO account of

			such relative upto LRS limit of USD 250,000 per financial year
	Foreign Currency	Resident	Not a permitted transaction
Non-Resident	Foreign Currency	Resident	Allowed without limit, but the amount should be repatriated to Resident's bank account in India
	Indian rupee	Resident	Allowed without limit
	Indian rupee	Non-resident	Not regarded as a permissible credit to NRO Account

Note: Remittances under LRS for gifts have to be out of own funds and not borrowed funds. Money received as gift by a Resident may be gifted to a non-resident under LRS later, but this should not lead to flouting of the limits directly or indirectly.

GIFT OF IMMOVABLE PROPERTY

The term immovable property is not defined explicitly under FEMA. It includes all type of immovable properties – agricultural land, commercial/residential properties, plantations etc.

GIFT OF IMMOVABLE PROPERTY SITUATED IN INDIA

Provisions for gift of immovable property in India as per Foreign Exchange Management (Non-debt Instruments) Rules, 2019 are summarized as under:

Donor	Donee	Permissible Type of Property
Person resident in India	NRI/OCI relative as defined above	Immovable property other than agricultural land / farm house / plantation property
NRI/OCI	NRI/OCI relative as defined above	Immovable property other than agricultural land / farm house / plantation property
NRI/OCI	Person Resident in India	Any immovable Property

Note: 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 can acquire or transfer immovable property in India without prior approval of RBI. This prohibition is not applicable to an OCI Cardholder.

GIFT OF IMMOVABLE PROPERTY OUTSIDE INDIA

The provisions relating to gift of immovable property outside India are covered under Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015 which are summarized as under:

Gift to a Resident

1. A resident individual can acquire immovable property outside India by way of gift from:
 - Another resident individual who acquired a property outside India while he was a Non-resident.
 - Another resident individual who had acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
 - A resident individual who had acquired such property on or before 08.07.1947 and continued to be held by him with the permission of the RBI.
2. There is no explicit permission to receive gift of immovable property outside India from a Non-resident by a resident individual. Resident receiving such property as gift would need to sell and bring the funds back to India.

Gift to a Non-resident

A resident individual is permitted to acquire an immovable property outside India under LRS. Once a property is acquired under LRS, the same can be gifted to a non-resident.

OTHER ASSETS

FEMA regulations are silent on gifting of assets other than those already listed above. A view would have to be taken on a case-to-case basis in such instances.

TAX IMPLICATIONS ON GIFT

Gifts within specified limits are not taxable. Similarly, gifts received from relatives are not taxable. 'Relative' as per Income Tax Act, 1961 ("Act") means

(i) In case of an individual—

- (A) spouse of the individual;
- (B) brother or sister of the individual;
- (C) brother or sister of the spouse of the individual;
- (D) brother or sister of either of the parents of the individual;
- (E) any lineal ascendant or descendant of the individual;
- (F) any lineal ascendant or descendant of the spouse of the individual;
- (G) spouse of the persons referred above

(ii) In case of a Hindu undivided family, any member thereof.

Class of Asset	Threshold	Taxable Income
Sum of Money	Aggregate amount \geq INR 50,000	Entire sum of money if aggregate value during a particular financial year if it exceeds the threshold limit
Immovable property	Stamp Duty Value (SDV) of Property \geq INR 50,000	Entire Stamp duty value
Movable property**	Fair Market Value (FMV) \geq INR 50,000	Entire Aggregate FMV

***This covers specified property viz. shares and securities, jewellery, archaeological collections, drawings, paintings, sculptures, any work of art or bullion.*

CONCLUSION

Keeping in view the relevant laws applicable to gift transactions in India, it becomes important to understand and analyse the possible implications that could arise from all the angles since what could be permissible from a FEMA perspective could result in substantial tax liability and transactions which are exempt from tax perspective may not be permitted from FEMA perspective. One should also be mindful of taxability of such gifts in India as well as in foreign country. If one feels there is an ambiguity in interpreting the law in a particular case, one can surely seek RBI's approval before entering into the transaction since non-compliance would result into compounding of offences and penal proceedings under FEMA as well as Income Tax Act.

Disclaimer:

The information contained in this write up is to provide a general guidance to the intended user. The information is based on our interpretation of various prevailing laws, rules, regulations, pronouncements as on date mentioned below. The information should not be used as a substitute for specific consultations. The information has been provided in simplified manner for general reference of the public which can lead to interpretation not intended under law. Hence, we recommend that professional advice is sought before taking any action on specific issues before entering into any investment or financial obligation based on this Content.

No part of this document should be distributed or copied by anyone without express written permission of the publisher.