



IMMOVABLE PROPERTY TRANSACTIONS: DIRECT TAX AND FEMA ISSUES FOR NRIS

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INTRODUCTION

This article is the fourth part of a series on “Income Tax and Foreign Exchange Management Act (FEMA) issues related to NRIs”. The first article focused on the provisions of the Income Tax Act, whereas the second one was on the applicability of the treaty on the definition of Residential Status. The third one was focused on the Residential Status under FEMA Regulations and this one deals with the “Immovable property Transactions – Direct Tax and FEMA issues for NRIs.

BACKGROUND

Immovable property refers to any asset, which is attached to the earth and is immobile, and includes land. Typically, the term “immovable property” is used to mean land and/or buildings attached to the land. Owning an immovable property, especially a residential house, in India has often been considered an aspirational goal. The lure of owning a property in India also attracts Non-resident Indians (“NRIs”), who have moved out of India but have an investible surplus available with them. Additionally, many NRIs also inherit ancestral or family properties and continue to hold them and enjoy the passive income therefrom. As these NRIs identify better or alternative opportunities outside India, the properties are sold, and sale proceeds are sought to be repatriated outside India.

This article seeks to touch upon the tax and FEMA aspects of the various transactions surrounding investment in Immovable Property by NRIs ranging from investment and passive income to sale and repatriation of the proceeds.

TAXABILITY OF INCOME FROM IMMOVABLE PROPERTIES

As a thumb rule, rent income or passive income arising from an immovable property is taxable in India. Rent income received by the owner of a property from the letting out of any building or land appurtenant thereto is generally taxable under the head “Income from House Property”, irrespective of whether the property in question is a residential property or a commercial one. In fact, section 22 of the Income-tax Act seeks to tax the Annual

Value of such property as “Income from House Property”, which is determined on the basis of the higher of the actual rent received or receivable for a property or the sum for which the property might reasonably be expected to be let. Thus, a property is taxed on the basis of its capacity to earn rent even though it is not actually let out or generating rent income.

Section 23, however, provides for considering the Annual Value as Nil in case of up to two properties, which are occupied by the owner for his own residence or which cannot be so occupied by the owner on account of his employment, business or profession is carried on at any other place and he has to reside at that other place in a building which is not owned by him. Where the NRI owns more than two properties which have not been let out, then, he can opt for the Annual Value of two of the properties to be considered as Nil and the Annual Value of the remaining properties will be computed as if they have been let out. Further, if the property is used or occupied by the owner for the purposes of any business or profession carried out by the owner and the profits of such business or profession are chargeable to income-tax, then, its Annual Value is not taxable.

If, however, that leasing or renting of the property is only one of the elements of a composite contract, under which various services are provided, then, the entire income from such composite services is taxable as business income¹. For instance, leasing of shops by a mall or renting of rooms by a hotel. When the rent income is taxable as Income from House Property, only specific deductions are allowable from the Annual Value in respect of municipal taxes paid, standard deduction of 30 per cent and interest on borrowings. As against this, in case of income taxable as business income, the taxpayer can claim any expense incurred for the purposes of the business, including depreciation on capital expenditure.

¹ Krome Planet Interiors (P.) Ltd. 265 Taxman 308 (Bom HC); Plaza Hotels (P) Ltd. 265 Taxman 90 (Bom HC); City Centre Mall Nashik Pvt. Ltd. 424 ITR 85 (Bom HC)

The tax rate on income from the property for NRI in either case would be the applicable slab rate.

In the case of jointly owned properties, the income from the property would be taxable in the hands of all the owners in the ratio of their ownership. If the deed does not mention the ratio of ownership of the property between the joint owners, it would be assumed to be an equal share of each joint owner². If, however, the name of any joint owner is added merely for convenience and such joint owner has neither paid for any of the purchase consideration nor has any source of income to do so, then, it would be appropriate to consider the entire income as taxable in the hands of the remaining owners³, following the principle laid down by the Apex Court that in the context of section 22, owner is a person who is entitled to receive income from the property in his own right⁴.

If the immovable property in question is simply plot of land, without any building thereon, then the charge under section 22 would not be triggered and the income from the land would instead be taxable as “Income from Other Sources” under section 56. Any expenses incurred to earn the said income can be claimed as a deduction under section 57 from the said income. The income from the land would, however, be exempt under section 10(1) if it is an agricultural income in terms of section 2(1A), which refers to rent or revenue derived from land in India used for agricultural purposes; income derived from the land by agriculture, or by the performance of any process by the cultivator or receiver of rent-in-kind to render the produce fit to be taken to the market, or sale of the produce by the cultivator or receiver of rent-in-kind; as also income derived from a building on or in the immediate vicinity of the land, subject to certain conditions.

TAXABILITY OF CAPITAL GAINS

The gains arising from the sale or transfer of immovable property, i.e., land or building or both, are taxable under section 45 as Capital Gains, classified as short-term or long-term depending on the period for which the property was held. Where the property is held by the owner for a period of more than twenty-four months immediately preceding the date of its sale or transfer, it is considered a long-term asset and the gains are taxable as Long-Term Capital Gains (“LTCG”). Where the period of holding does not exceed twenty-four months, the property is treated as

a short-term asset, with the gains taxable as Short-Term Capital Gains (“STCG”). In the case of non-residents, STCG is included in the total income for the period and taxable as per the applicable slab rate, whereas LTCG is taxable under section 112 at a rate of 20 per cent, excluding applicable surcharge and cess.

The term “transfer” includes the transfer of immovable property on account of compulsory acquisition, redevelopment of old property, or even receipt of the insurance claim on account of damage to or destruction of the property, but does not include the transfer of property under a gift, will, irrevocable trust or distribution upon the partition of a Hindu Undivided Family (“HUF”). In the case of a property transferred by way of a gift, will, irrevocable trust or distribution upon the partition of an HUF and similar other situations as enumerated in section 47, the Capital Gains is taxable only in the event of a final sale or transfer and at the point of taxability, the amount of gain is computed with reference to the purchase price for the previous owner.

Further, the period of holding of the previous owner is also included while determining whether the gain on the property is Long Term or Short Term.

Section 48 lays down the computation of the amount of Capital Gain as under —

Sale Consideration
Less: Expenses incurred wholly and exclusively in connection with the transfer
Less: Cost of Acquisition
Less: Cost of Improvement
Taxable Capital Gain

As per the second proviso to section 48, in case the property is a long-term asset, the cost of acquisition and cost of improvement are indexed for the period of holding as per the cost inflation index notified by the Central Government in relation to each year. Thus, LTCG is computed with reference to a stepped-up cost, allowing for rising costs.

The various elements relevant to the computation of gains are discussed hereunder —

Sale Consideration: The transaction price at which the property is sold shall be considered to be the sale consideration, including the value of any consideration

² Saiyad Abdulla v. Ahmad AIR 1929 All 817

³ Ajit Kumar Roy 252 ITR 468 (Cal. HC)

⁴ Podar Cement (P.) Ltd. 226 ITR 625 (SC)



in kind. In a situation where a property is sold at a consideration, which is lower than the value adopted or assessed for the purposes of payment of stamp duty, section 50C would come into play, requiring that such value adopted or assessed for stamp duty payment should be assumed to be the full value of sale consideration and the capital gains should accordingly be calculated with reference to such higher value.

Expenses incurred wholly and exclusively in connection with the transfer: In claiming deduction of the expenses from sale consideration, attention should be paid to the requirement that such expenses are “incurred wholly and exclusively in connection with the transfer.” Expenses such as transfer fees paid to society, brokerage expenses, and legal expenses connected to the transfer such as fees for drafting of the agreement, would be allowable expenses. Further, in the case of non-residents, expenses incurred on travel to India as well as stay if incurred specifically for the purposes of executing and registering the sale agreements can also be considered as incurred wholly and exclusively in connection with the transfer.

Cost of Acquisition: As a general rule, the actual purchase price paid for acquiring a property would constitute the cost of acquisition of the property. It would include the expenses incurred at the time of purchase of the property towards stamp duty, registration fee, and brokerage. However, any payment made at the time of purchase towards recurring expenses, which form part of the purchase price, such as advance maintenance for a certain period or outstanding property taxes or electricity charges, etc. would not form part of the cost of acquisition.

The cost inflation index used for indexation of the cost follows FY 2001–02 as the base year with the index for the base year set at 100. Thus, if any property was purchased prior to 1st April, 2001, its cost cannot be indexed beyond FY 2001–02. To address this issue, in case of properties purchased by the taxpayer or the previous owner (in case of property acquired through gift, will, etc.) prior to 1st April, 2001, Section 55(2)(b) allows the taxpayer the option to adopt its original purchase price or its fair market value as on 1st April, 2001 as the Cost of Acquisition. This fair market value as of 1st April, 2001, however, cannot exceed the value of the property adopted or assessed for the purpose of payment of stamp duty as of 1st April, 2001. Where the property was purchased prior to 1st April, 2001, the original purchase cost would usually be lower than the fair market value as of 1st April, 2001. The option provided in Section 55(2)(b) would, therefore, let the taxpayer adopt the higher value as the cost of

acquisition (subject to the cap of stamp duty value as on 1st April, 2001) and index it from FY 2001–02 till the year of sale. Thus, when computing capital gains in respect of an immovable property purchased by the taxpayer or the previous owner prior to 1st April, 2001, a valuation report determining the fair market value of the property as on 1st April, 2001 as well as its value for the purposes of stamp duty on the same date shall be required to be obtained.

Often, in case of ancestral properties acquired by way of inheritance, will or such other modes, the details of original purchase cost of the property are not available, making it difficult to compute the capital gains. Section 55(3) provides that in cases where purchase cost of the previous owner cannot be ascertained, the fair market value of the property as on the date on which the previous owner became the owner of the property shall be considered as the Cost of Acquisition of the previous owner.

Cost of Improvement: Any cost that has been incurred by the taxpayer or the previous owner towards making additions or alteration to the property, which is capital in nature is considered as cost of improvement and is allowable as a deduction while computing the amount of capital gains. Examples of cost of improvement include cost incurred towards adding a room or a floor to an existing property, fencing a plot of land to secure its perimeter, installation of lift, incurring expenses to make the property habitable, incurring expenses to clear the legal title of a property, which is under dispute, etc. However, expenses such as routine repairs and renovation expenses, modifications to furniture, aesthetic expenses, etc. would not be considered as Cost of Improvement. Any cost of improvement incurred prior to 1st April, 2001 is not to be considered in the computation. This restriction is in line with the fact that the taxpayer has an option to adopt the fair market value as on 1st April, 2001 as the Cost of Acquisition, which would take into account any improvements done to the property prior to 1st April, 2001 and thus, separate deductions need not be claimed for such cost of improvements. Further, any expenditure that can be claimed as a deduction in computation of income under any other head of income, cannot be claimed as a Cost of Improvement.

In case of the purchase of property, while it was under construction, the determination of the period of holding and the year from which indexation should be allowed can be debatable. The date of allotment of the future property to the taxpayer by the builder, phase-

wise payment towards the purchase cost, the date of registration of the sale agreement and the date of possession would fall in different years in such cases, leading to significant differences in the computation of the amount of taxable capital gain depending on when the property is said to be acquired by the taxpayer. Several judicial pronouncements⁵ have held that where the taxpayer has been allotted a specific identified property and such allotment is final, subject only to the payment of the consideration, then, the date of allotment is to be considered as the date of acquisition of the property and the period of holding should be calculated from the date of allotment. Similarly, in the case of allotment of property along with shares in the co-operative society prior to the completion of construction or physical possession of the property, it has been held that the date of allotment should be considered as the date of acquisition of the property⁶. In fact, in the context of whether acquisition of a flat under the self-financing scheme of the Delhi Development Authority shall be considered as construction for the purposes of sections 54 and 54F, the CBDT Circular No. 471 dated 15th October, 1986 states that “*The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality.*”

Further, payments for an under-construction property are made by taxpayers over several years starting from the date of allotment in a phase-wise manner. It has been held by the Courts that the benefit of indexation in such cases should be allowed on the basis of payment⁷, i.e., payment made in each year should be indexed from that year till the date of sale of the property. In fact, in the case of *Charanbir Singh Jolly v. 8th ITO 5 SOT 89* and thereafter, in *Smt. Lata G. Rohra v. DCIT 21 SOT 541* the Mumbai Tribunal has held that indexation for the entire purchase cost of the property should be allowed from the year in which the first instalment was paid by the assessee. While the ratio of aforesaid judgements has not been further appealed against and is, thus, valid, indexation of the entire cost from the year of first payment irrespective of date of actual payments may be considered to be an aggressive tax position and open to litigation.

However, this view is supported by the form of return of income. The form of return of income does not provide mechanism to index cost of acquisition with reference to payments made in various years. Therefore, if an assessee chooses to index cost of acquisition with reference to years in which instalments of purchase price are paid then such instalments will need to be reported in the form of return of income as cost of improvement which is technically not correct.

Where the property in question is an agricultural land, one would need to examine whether the same is a “rural” agricultural land or an “urban” agricultural land, as is referred to in common parlance. The former is excluded from the definition of a capital asset under section 2(14) and thus, gains arising from its sale would not give rise to taxable Capital Gains. An “urban” agricultural land, however, does not enjoy such an exclusion and would be subject to capital gains taxation like any other property. The distinction between “rural” or “urban” agricultural land is drawn on the basis of the location of the land with reference to local limits of municipalities and the population of such municipalities as per the latest census. Accordingly, agricultural land which is situated within any of the following areas shall be considered to be an “urban” agricultural land and thus, included within the definition of capital asset —

- i) Within the jurisdiction of a municipality or any such governing body, having a population exceeding 10,000, or
- ii) Within 2 km of the local limits of a municipality or any such governing body, having a population exceeding 10,000 but not exceeding 1,00,000, or
- iii) Within 6 km of the local limits of a municipality or any such governing body, having a population exceeding 1,00,000 but not exceeding 10,00,000, or
- iv) Within 8 km of the local limits of a municipality or any such governing body, having a population exceeding 10,00,000.

EXEMPTIONS FROM CAPITAL GAINS

The Income-tax Act contains certain beneficial provisions to provide relief from tax on the capital gains upon reinvestment into certain specified assets if the conditions laid down in those provisions are satisfied. A summary of the relevant exemption provisions applicable for capital gain arising on the sale of immovable property is given in the table below —

5 Praveen Gupta v. ACIT 137 TTJ 307 (Delhi – Trib.); CIT v. S.R.Jeyashankar 228 Taxman 289 (Mad.); Vinod Kumar Jain v. CIT 195 Taxman 174 (Punjab & Haryana)

6 CIT v. Anilaben Upendra Shah 262 ITR 657 (Guj.); CIT v. Jindas Panchand Gandhi 279 ITR 552 (Guj.)

7 Praveen Gupta (supra); ACIT v. Michelle N. Sanghvi 98 taxmann.com 495 (Mumbai-Trib.); Ms. Renu Khurana v. ACIT 149 taxmann.com 160 (Delhi-Trib.)



Section	Nature of Gain	Type of New Asset	Amount to be reinvested for full exemption	Time period for reinvestment	Lock-in period for New Asset	Capital Gain Deposit Account Scheme	Other provisions
54	LTCG on transfer of residential property	One residential property in India	Amount of Capital Gains	Purchase of new property within 1 year before, or 2 years after date of transfer; or Completion of construction of new property within 3 years after date of transfer	3 years from purchase or construction, failing which cost of the new asset shall be reduced by the amount of exemption already claimed	To be deposited before the date of filing / due date of filing the return of income	- Taxability in case of unutilised balance in CG Deposit Account - One time option to small taxpayers having LTCG less than ₹ 2 crores - Exemption capped at ₹ 10 crores
54D	Gain on compulsory acquisition of land or building or rights therein, forming part of industrial undertaking	Any other land or building or rights therein	Amount of Capital Gains	Purchase or construction within 3 years from date of transfer	3 years from purchase or construction, failing which cost of the new asset shall be reduced by the amount of exemption already claimed	To be deposited before the date of filing / due date of filing the return of income	- Use of asset for 2 years immediately prior to the date of transfer for business of the industrial undertaking - Taxability in case of unutilised balance in CG Deposit Account
54EC	LTCG on transfer of land or building or both	Specified Bonds issued by NHAI, RECL or as maybe notified	Amount of Capital Gains, subject to a maximum of ₹ 50 lakhs	Within 6 months after the date of transfer	5 years. Transfer of New Asset or monetisation other than by way of transfer within the lock-in period will result in revocation of exemption in the year of such transfer or monetisation	Not Applicable	- Interest received on Bonds is taxable. - No deduction can be claimed under section 80C in respect of the investment in bonds
54F	LTCG on transfer of any asset other than a residential property	One residential property in India	Full amount of net sale consideration. Proportionate exemption is allowed in case of lower reinvestment	Purchase of new property within 1 year before, or 2 years after date of transfer; or Completion of construction of new property within 3 years after date of transfer	3 years from purchase or construction, failing which the amount of exemption already claimed shall be deemed to be LTCG in the year of transfer of new asset	To be deposited before the date of filing / due date of filing the return of income	- Taxability in case of unutilised balance in CG Deposit Account - Added condition relating to ownership of residential house on the date of transfer of original asset or purchase or construction of one more residential house within 1 year / 3 years after the date of transfer - withdrawal of exemption in case of violation of condition. - Exemption capped at ₹ 10 crores

INCOME UNDER SECTION 56(2)(X)

Section 56(2)(x) seeks to bring into the tax net, any transactions of receipt of money or movable or immovable property without consideration or for inadequate consideration. Where any person receives an immovable property having a stamp duty value exceeding ₹50 thousand without consideration, the stamp duty value of such property is deemed to be an income of the recipient. Similarly, where a person purchases an immovable property at a consideration lower than its stamp duty value, where the difference is more than the higher of ₹50 thousand or 10 per cent of actual consideration, then, such difference between the actual consideration and stamp duty value of the property is deemed to be the income of the recipient. In other words, if any person, including a non-resident, is purchasing an immovable property in India for a value lower than its stamp duty value, then, the difference is assumed to be a benefit to the purchaser and sought to be taxed in the hands of the purchaser.

This provision intends to target property transactions that are intentionally undervalued so as to reduce the burden of stamp duty and involve cash payments. However, practically, the price of any transaction varies depending on various factors which may not reflect in the stamp duty value of the property, and it is likely that the actual transaction may genuinely take place at a value lower than the stamp duty value. To address such situations, the provisions allow a safe harbour of higher ₹50 thousand or 10 per cent of the actual consideration. If the difference in the consideration and the stamp duty value is within this safe harbour, then, it will not have any implication for the purchaser. However, if the difference exceeds the safe harbour limit, then, the entire difference will be treated as income of the purchaser.

In practice, parties may agree upon the consideration for property sale when the initial token or advance is given and enter into an agreement or MOU to document the same, but the actual registration of the sale agreement may take place subsequently after a gap, by which time the stamp duty value of the property may have increased. In such a case, the first proviso to section 56(2)(x) allows for stamp duty value as on the date of the initial agreement or MOU to be adopted provided the advance or token is paid on or before that date by account payee cheque or bank draft or electronically. Thus, if for any reason the registration of the final sale deed is delayed, the purchaser will not have to suffer taxation merely due to an increase in the stamp duty value of the property during the period of delay.

TAXABILITY UNDER A TAX TREATY

Article 6 of the OECD Model Convention deals with Income from Immovable Property, while Paragraph 1 of Article 13 deals with Gains from alienation of Immovable Property. Both these articles give the right to tax the income and capital gains relating to immovable property to the Source State where such property is situated. This is considering the fact that there is always a close economic connection between the source of income relating to immovable property and the State of source⁸. Further, the definition of the concept of immovable property as also the manner of taxation and computation is left to the Source State to decide. This helps to remove any ambiguity regarding the classification of an asset as immovable property.

Thus, in the case of NRIs having income or capital gains from immovable property in India, the manner of taxation and computation would be determined as per the domestic tax laws, which have been briefly discussed above. The NRIs can then offer to tax or report these incomes in their Residence State and claim credit for the taxes paid in India as per the provisions of the applicable tax treaty and domestic tax laws of the state of residence.

TAX DEDUCTION AT SOURCE

Section 195 requires any person making payment to a non-resident or a foreign company of any sum chargeable to tax under the Act, to deduct tax at source on such payment and deposit the same with the Government. Unlike the TDS provisions applicable in case of rent payments or property purchases amongst residents, Section 195 does not provide a fixed rate of TDS. Thus, the person making payment in respect of income from property or sale consideration to the non-resident would be required to deduct tax at source as per the applicable rate of tax on the respective transactions. In order to do so, the payer would have to obtain a Tax Deduction Account Number ("TAN"), which is often not required in case of property transactions between residents. Additionally, the payer would also have to file quarterly TDS statements in Form 27Q so as to enable the NRI to get credit of tax deducted.

As discussed earlier, the income from property, computed after claiming deductions, would be taxable for the NRI at the applicable slab rates. However, the tax would be required to be deducted at source by the payer on the entire rental income at the rate of 30 per cent as per the residuary entries for "other income" under Serial No. (1)

⁸ Paragraph 1 of Commentary on Article 6



(b) of Part II of the Finance Act. Further, STCG on transfer of property would also be taxable at the applicable slab rates, while LTCG would be taxable at a rate of 20 per cent plus applicable surcharge and cess. The person making the payment to the NRI in respect of the sale of the property would not be in a position to conclusively determine either the slab rate applicable to the NRI or the computation of taxable capital gains. Consequently, the payer would not be in a position to determine the appropriate rate at which the TDS obligation should be discharged.

In the above scenarios, the payer or the NRI payee can make an application to the Assessing Officer under section 195(2) or section 197 to determine the sum chargeable to tax or the rate at which tax should be deducted at source, respectively. Based on the application made, the Assessing Officer would issue a certificate determining the sum chargeable to tax or the rate at which tax deduction should be done and the payer can deduct tax under section 195 accordingly.

While no time limit has been prescribed in the provisions for the Assessing Officer to deal with such an application and issue the certificates, a 30-day timeline was provided for this process in the Citizen's Charter 2014, which was further endorsed by the CBDT in its office memorandum of 26th July 2018. Thus, the overall process of making an application for lower or nil deduction of tax, responding to queries, if any, of the tax offices and obtaining the certificate can take from 5-8 weeks. In a time-sensitive transaction and considering the logistics of transacting with an NRI, the payer or the NRI payee may not be in a position to follow the process of obtaining a lower or nil deduction certificate. In such a scenario, the payer may deduct tax at source at the rate applicable to the transaction (20 per cent plus applicable surcharge and cess in case of LTCG on sale of property and 30 per cent plus applicable surcharge and cess in other cases) on the entire amount payable to the NRI, who would be required to claim a refund of the excess tax deducted by filing a return of income.

REPORTING OF HIGH-VALUE TRANSACTIONS

Section 285BA requires various reporting persons to file a statement of financial transactions ("SFT") to report certain transactions above the specified thresholds, referred to as high-value transactions, to the Income-tax authorities, which enables the latter to evaluate if the incomes reported by the persons transacting are in line with such high-value

transactions and whether there could have been any tax evasion. One of the transactions required to be reported by the Registrar or Sub-Registrar is the purchase or sale of immovable property for an amount of ₹30 lakh or more or valued at ₹30 lakh or more by the stamp valuation authority. It is a common scenario where non-residents may not have filed a return of income in India for several years as they have negligible income less than the maximum amount not chargeable to tax, and consequently, no tax liability. However, if they have entered into a transaction of purchase or sale of immovable property, the same would be reported in the SFT and would reflect against the PAN of both the buyer and the seller. This would lead to the issuance of notice by the assessing officer to investigate the reason for non-filing of return of income even though a high-value transaction was entered into during the year. It is, thus, advisable for a person entering into any of the specified high-value transactions, including the purchase or sale of immovable property, to file a return of income for the year in which such transaction is undertaken, so as to avoid unnecessary proceedings merely on the premise of such a transaction.

INVESTMENT IN IMMOVABLE PROPERTY UNDER FEMA

Acquisition or transfer of immovable property by Non-residents in India is regulated by sub-sections 2(a), (4) and (5) of section 6 of the Foreign Exchange Management Act, 1999 ("FEMA") read with Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and is subject to applicable tax laws and other duties and levies in India.

NRI and Overseas Citizens of India ("OCIs") have general permission to invest in immovable property in India subject to certain conditions and restrictions. They can purchase residential or commercial property, other than agricultural land, plantation property, or farmhouse. NRIs and OCIs can also receive an immovable property other than agricultural land, plantation property, or farmhouse as a gift from a relative as defined in section 2(77) of the Companies Act, 2013. A NRI or OCI can also receive any immovable property as inheritance from a resident or from any person, who had acquired the property in accordance with the laws in force.

Payment for the purchase of immovable property can be made in India through normal banking channels by way of inward remittance. It can also be made out of funds held by the NRI or OCI in their NRE, FCNR(B) or NRO accounts. However, the payment cannot be made

through travellers' cheques and foreign currency notes or any other mode.

A non-resident spouse of any NRI or OCI, who is not themselves an NRI or OCI, is permitted to acquire one immovable property in India, other than agricultural land, plantation property, or farmhouse jointly with their spouse, provided the marriage has been registered and has subsisted for a continuous period of at least 2 years immediately prior to acquiring the property. In such a case, the payment for the purchase can be made by the non-resident spouse, who is not a NRI or OCI either by way of inward remittance through normal banking channels or by debit to their non-resident account maintained as per the FEMA Act or rules thereunder.

SALE AND REPATRIATION OF FUNDS

The NRI or OCI can transfer the immovable property, other than agricultural land, plantation property, or farmhouse to a resident or another NRI or OCI. Transfer by way of gift can only be made to a relative as defined in section 2(77) of the Companies Act, 2013. Further, transfer of agricultural land, plantation property, or farmhouse can only be made to a person resident in India.

As a general rule, any person, who had acquired an immovable property when they were a resident in India or inherited from a person resident in India or their successor, requires RBI approval to remit the sales proceeds of the property. However, under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, NRIs and PIOs are permitted to remit up to USD 1 million per financial year, out of the sale proceeds of such assets in India. The limit of USD 1 million shall apply qua a financial year, irrespective of how many such assets may have been sold during the year.

In all other cases, the NRIs, OCIs and PIOs (in case of property acquired under the erstwhile Foreign Exchange Management (Acquisition and transfer of Immovable Property in India) Regulations, 2000, can repatriate the sale proceeds of immovable property outside India provided the following conditions are satisfied —

- i) The property was acquired by the NRI / OCI / PIO as per the laws in force at the time of acquisition;
- ii) The payment for the purchase of property was made by way of inward remittance through normal banking channels or out of balances in NRE / FCNR(B) account; and

- iii) The repatriation of sale proceeds for residential property is restricted to not more than two properties.

In the case of point ii) above, if the NRI / OCI / PIO had acquired the property through housing loans availed in accordance with the applicable FEMA regulations, then the repayment ought to have been made by way of inward remittance through normal banking channels or out of balances in NRE / FCNR(B) account.

PROPERTIES IN INDIA BY CITIZENS OF NEIGHBOURING COUNTRIES

Citizens (including natural persons and legal entities) of certain countries — Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong, and the Democratic People's Republic of Korea — cannot acquire or transfer immovable property in India, without the prior permission of RBI. They can, however, acquire the property on lease, which does not exceed 5 years. These restrictions do not apply in case of an OCI.

However, the regulations prescribe some relaxations in case of citizens of neighbouring countries Afghanistan, Bangladesh, or Pakistan, who belong to the minority communities in those countries, i.e., Hindus, Sikhs, Jains, Buddhists, Parsis and Christians. If such a person is residing in India and has been granted a Long-Term Visa ("LTV") by the Central Government, he can purchase only one residential immovable property in India for his own residence and only one immovable property for self-employment, subject to the following conditions —

- i) The property should not be located in, and around restricted / protected areas notified by the Central Government and cantonment areas.
- ii) A declaration should be submitted to the district Revenue Authority specifying the source of funds and that the person is residing in India on an LTV.
- iii) The registration documents of the property should mention the nationality and the fact that such a person is on an LTV.
- iv) The property of such a person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities.
- v) A copy of the documents of the property shall be submitted to the Deputy Commissioner of Police /



Foreigners Registration Office / Foreigners Regional Registration Office concerned and to the Ministry of Home Affairs (Foreigners Division).

vi) Sale of such property is permissible only after the person has acquired Indian citizenship. However, if the property is to be transferred before acquiring Indian citizenship, then, it would require the prior approval of the Deputy Commissioner of Police (DCP) / Foreigners Registration Office (FRO) / Foreigners Regional Registration Office (FRRO) concerned.

CONCLUSION

The acquisition and sale of immovable property in India by non-residents has several nuances under both the tax laws and FEMA. Several aspects discussed in the above

article may have different implications depending on the facts of each case. For instance, in order to decide which payments can be included in the Cost of Acquisition or Cost of Improvement would require one to understand the nature of payments as well as their context. Similarly, as discussed in this article, the determination of the period of holding and indexation of cost can have its own complexities in cases of purchase of under-construction property with phase-wise payment and the conclusion can vary on the basis of the facts of the case. The aim of this article is to highlight the various aspects to be considered by individuals involved in property transactions, especially non-residents, and to bring about awareness regarding the applicable provisions and regulations so that the detailed facts of each case can be examined in light of these. ■