

BANK ACCOUNTS AND REPATRIATION FACILITIES FOR NON-RESIDENTS

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In this article, we have discussed the rules and regulations related to NRO, NRE, FCNR and other accounts pertaining to Non-residents under Foreign Exchange Management Act, 1999 (FEMA).

BANK ACCOUNTS

Opening, holding and maintaining accounts in India by a person resident outside India is regulated in terms of section 6(3) of the FEMA, 1999 read with Foreign Exchange Management (Deposit) Regulations, 2016 ('Deposit Regulations') issued vide Notification No. FEMA 5(R)/2016-RB dated 1st April, 2016, Master Direction - Deposits and Accounts FED Master Direction No. 14/2015-16 dated 1st January, 2016 and FAQs on Accounts in India by Non-residents, updated from time to time, provides further guidance on the same.

An Authorised Dealer (AD) bank is permitted to open in India the following types of accounts for persons resident outside India:

- i) Non-Resident (External) Account Scheme (NRE account) for a **non-resident Indian (NRI)** – Schedule 1 of the Deposit Regulations;
- ii) Foreign Currency (Non-Resident) Account Banks Scheme, (FCNR(B) account) for a **non-resident Indian** – Schedule 2 of the Deposit Regulations;
- iii) Non-Resident (Ordinary) Account Scheme (NRO account) for **any person resident outside India** – Schedule 3 of the Deposit Regulations;
- iv) Special Non-Resident Rupee Account (SNRR account) for **any person resident outside India** having a business interest in India – Schedule 4 of the Deposit Regulations;
- v) Escrow Account for **resident or non-resident** acquirers – Schedule 5 of the Deposit Regulations.

Currently, a company or a body corporate, a proprietary concern or a firm in India may accept deposits from an NRI or PIO on a non-repatriation basis only¹ – Other

conditions that apply to such deposits include:

- Deposit should be for a maximum maturity period of three years.
- Deposit can be received from NRO account only.
- Rate of interest should not exceed the ceiling rate prescribed under the Companies (Acceptance of Deposit) Rules, 2014 / NBFC guidelines / directions issued by RBI.
- Deposit shall not be utilised for relending (other than NBFC) or for undertaking agricultural/plantation activities or real estate business.
- The amount of deposits accepted shall not be allowed to be repatriated outside India.

Under the current regulations, a company or a body corporate is not permitted to accept any fresh deposits on repatriation basis from an NRI or PIO. However, it is only permitted to renew the deposits which had already been accepted under the erstwhile Notification.

KEY FEATURES OF NRE, FCNR (B) AND NRO ACCOUNTS

NRIs usually have majority of their earnings in foreign currency and thus their financial and investment objectives differ from residents. NRIs and PIOs are permitted to open and maintain accounts with authorised dealers and banks (including co-operative banks) authorised by the Reserve Bank to maintain such accounts. The major types of accounts that can be opened by an NRI² or PIO³ in India include NRE, NRO and FCNR accounts. The key features of these accounts are as under:

NRE ACCOUNT

- This account is denominated in Indian rupees, wherein proceeds of remittances to India can be deposited in any

¹ Refer Schedule 7 of the Deposit Regulations

permitted currency;

- The monies held in this account can be freely repatriated outside India;
- Current income in India like rent, dividend, pension, interest, etc. can be deposited subject to payment of income taxes;
- This account is subject to exchange rate fluctuations since the foreign currency earnings deposited into this account are converted into INR using the current exchange rate of the receiving bank;
- Interest income earned from the NRE account is tax-free.

NRO ACCOUNT

• A resident account needs to be redesignated as a NRO account when a person becomes non-resident. For this, the person becoming non-resident needs to submit the documentary evidences to prove his intentions to leave India for the purpose of employment, business or vocation or an uncertain period. Additionally, NRO account can be opened by a non-resident for any bonafide transactions. For further details, refer to the table below.

- This account allows you to receive remittances in any permitted currency from outside India through banking channels or permitted currency tendered by the account holder during his temporary visit to India or transfers from rupee accounts of non-resident banks;
- Repatriation from the NRO account can be done to the extent of USD 1 million for every financial year;
- Income earned in India in the form of interest, dividend, rent, etc. can be deposited into this account;
- This account is also subject to exchange rate fluctuations since the foreign currency deposited into this account are converted into INR using the current exchange rate of the receiving bank;
- Interest income earned from the NRO account is not

tax-free.

ACCOUNT OPENED BY FOREIGN TOURISTS VISITING INDIA

• In case of a current / savings account opened by a foreign tourist visiting India with funds remitted from outside India in a specified manner or by sale of foreign exchange brought by him into India, the balance in the NRO account may be paid to the account holder at the time of his departure from India provided the account has been maintained for a period not exceeding six months and the account has not been credited with any local funds, other than interest accrued thereon.

FCNR ACCOUNT

- This is a term deposit account and not a savings account;
- Monies can be deposited in any currency permitted by RBI i.e., a foreign currency which is freely convertible;
- The deposits can range from a period of one to five years;
- The principal amount and interest earned from the deposits are fully repatriable;
- This account is not subject to exchange rate fluctuations since deposits and withdrawals are in foreign currency.
- Income earned from FCNR account is tax-free.

A tabulated comparison of the three accounts is provided below for your reference:

Particulars	NRE Account	FCNR (B) Account	NRO Account
Who can open an account	NRIs and PIOs (Individuals / entities of Pakistan and Bangladesh require prior RBI approval)		Any person resident outside India for putting through bonafide transactions in rupees. Individuals / entities of Pakistan nationality / origin and entities of Bangladesh origin require prior RBI approval.

2 A 'Non-resident Indian' (NRI) is a person resident outside India who is a citizen of India.

3 'Person of Indian Origin (PIO)' is 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: [PIO will include an OCI cardholder]

a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 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 clause (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 clause (a) or (b) or (c)

Particulars	NRE Account	FCNR (B) Account	NRO Account
			A Citizen of Bangladesh / Pakistan belonging to minority communities in those countries i.e., Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians residing in India and who has been granted LTV* or whose application for LTV is under consideration, can open only one NRO account with an AD bank. * Long Term Visa
Type of Account	Savings, Current, Recurring, Fixed Deposit	Term Deposit only	Savings, Current, Recurring, Fixed Deposit
Period for fixed deposits permitted	From one to three years. However, banks are allowed to accept NRE deposits for a longer period i.e., above three years from their Asset-Liability point of view.	For terms not less than 1 year and not more than 5 years.	As applicable to resident accounts.

Particulars	NRE Account	FCNR (B) Account	NRO Account
Permissible Credits	i. Inward remittance from outside India. ii. Proceeds of foreign currency/ bank notes tendered by account holder during his temporary visit to India. iii. Interest accruing on the account iv. Transfer from other NRE / FCNR(B) accounts. v. Maturity or sale proceeds of investments (if such investments were made from this account or through inward remittance). vi. Current income in India like rent, dividend, pension, interest, etc. is permissible subject to payment of taxes in India.		i. Inward remittances from outside India. ii. Legitimate dues in India. iii. Transfers from other NRO accounts. iv. Rupee gift / loan made by a resident to an NRI / PIO relative within the limits prescribed under LRS may be credited to the latter's NRO account.
	As a benchmark, credits to NRE / FCNR(B) account should be repatriable in nature.		
Permissible Debits	i. Local disbursements. ii. Remittance outside India. iii. Transfer to NRE / FCNR (B) accounts of the account holder or any other person eligible to maintain such account. iv. Permissible investments in India in shares / securities / commercial paper of an Indian company or for purchase of immovable property.		i. Local payments in rupees. ii. Transfers to other NRO accounts. iii. Remittance of current income abroad. iv. Settlement of charges on International Credit Cards. v. Repatriation under USD 1 million scheme is available only to NRIs and PIOs. vi. Funds can be transferred

Particulars	NRE Account	FCNR (B) Account	NRO Account
			to NRE account within this USD 1 million facility.
Permitted Joint Holding	May be held jointly in the names of two or more NRIs / PIOs. NRIs / PIOs can hold jointly with a resident relative on 'former or survivor' basis. The resident relative can operate the account as a PoA holder during the lifetime of the NRI / PIO account holder.	May be held jointly in the names of two or more NRIs / PIOs. May be held jointly with residents on 'former or survivor' basis.	
Loans in India	AD can sanction loans in India to the account holder / third parties without any limit , subject to the usual margin requirements. The loan amount cannot be used for re-lending, carrying on agricultural / plantation activities or investment in real estate. In case of loan to account holder the loan can be used for personal purposes or for carrying on business activities or for making direct investments in India on non-repatriation or for acquiring a flat / house in India for his own residential use. In case of loan to third parties, loans can be given to resident individuals / firms / companies in India against the collateral	Loans against the deposits can be granted in India to the account holder or third party subject to usual norms and margin requirement. The loan amount cannot be used for relending, carrying on agricultural / plantation activities or investment in real estate. The term "loan" shall include all types of fund based / non-fund-based facilities.	

Particulars	NRE Account	FCNR (B) Account	NRO Account
	of fixed deposits held in NRE account. The loan should be utilised for personal purposes or for carrying out business activities. Also, there should be no direct or indirect foreign exchange consideration for the non-resident depositor agreeing to pledge his deposits to enable the resident individual / firm / company to obtain such facilities. These loans cannot be repatriated outside India and can be used in India only for the purposes specified in the regulations. The facility for premature withdrawal of deposits will not be available where loans against such deposits are availed of.		
Loans outside India	AD may allow their branches / correspondents outside India to grant loans to or in favour of non-resident depositor or to third parties at the request of depositor for bona fide purpose against the security of funds held in the NRE / FCNR (B) accounts in India. The term "loan" shall include all types of fund-based/ non-fund-based facilities.		Not permitted
Rate of Interest	There is no restriction on the rate of interest. It varies across banks and is generally based on the repo rate of RBI.		

Particulars	NRE Account	FCNR (B) Account	NRO Account
Operations by Power of Attorney in favour of a resident	Operations in the account in terms of PoA is restricted to withdrawals for permissible local payments or remittances to the account holder himself through normal banking channels. The PoA holder cannot repatriate outside India funds held in the account under any circumstances other than to the account holder himself, nor to make payment by way of gift to a resident on behalf of the account holder nor to transfer funds from the account to another NRE or FCNR(B) account.	Operations in the account in terms of PoA is restricted to withdrawals for permissible local payments in rupees, remittance of current income to the account holder outside India or remittance to the account holder himself through normal banking channels. While making remittances, the limits and conditions of repatriability will apply. The PoA holder cannot repatriate outside India funds held in the account under any circumstances other than to the account holder himself, nor to make payment by way of gift to a resident on behalf of the account holder nor to transfer funds from the account to another NRO account.	

IMPACT OF CHANGE IN RESIDENTIAL STATUS

• All non-resident accounts i.e., NRE / NRO (wherein, you are the primary account holder) need to be converted /

re-designated as resident accounts immediately upon the return of the account holder to India for taking up employment or return of the account holder to India for any purpose indicating his intention to stay in India for an uncertain period or upon change in the residential status. The account holder should provide appropriate documentation to the bank for conversion of NRE / NRO account into resident account.

- FCNR (B) deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by the account holder. Authorised Dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC accounts (if the depositor is eligible to open RFC account), at the option of the account holder.

With respect to the above, it would be relevant to refer to the compounding order **C.A. No. 4578 /2017 dated 30th January, 2018** in the matter of **Mr. Gaurav Bamania** for compounding of contravention of the provisions of the Foreign Exchange Management Act, 1999 (the FEMA) and the Regulations issued thereunder. The compounding was on account of violation on two grounds viz; payment of consideration towards investment in an Indian company by an NRI through a resident account and the applicant had not re-designated his existing account as a NRO account on becoming NRI. As per the RBI, there was a contravention of the provisions of Para 8(a) of Schedule 3 of FEMA 5 and Para 3 of Schedule 4 of FEMA 20, and applicant was required to apply for regularisation of the contraventions subject to compounding. The RBI has quoted Para 8(a) of Schedule 3 of FEMA 5 in the compounding order which states as under:

“When a person resident in India leaves India for a country (other than Nepal or Bhutan) for taking up employment, or for carrying on business or vocation outside India or for any other purpose indicating his intention to stay outside India for an uncertain period, his existing account should be designated as a Non-Resident (Ordinary) account.”

The matter was compounded in terms of the Foreign Exchange (Compounding Proceedings) Rules, 2000 and a sum of ₹26,530/- was levied as compounding fees by RBI as the amount of contravention involved was ₹56,850/-.

Further, it would also be useful to note the compounding

order **C.A. No. 85 /2019 dated 18th March, 2019** in the matter of **Mr. Thakorbbhai Dahyabbhai Patel** wherein the contravention sought to be compounded related to transfer of funds from NRE account to ordinary savings account thereby resulting in contravention of the provisions under Regulation 4(C) of Schedule 1 to Notification No. FEMA.5/2000-RB dated May 3, 2000, as amended from time to time. While the contravention was with respect to transfer of funds from NRE account to ordinary savings account, the same could have been mitigated if the applicant had converted / re-designated his ordinary savings account into NRE / NRO account after becoming a non-resident since the applicant, being a non-resident, is not eligible to open or maintain an ordinary savings account as per extant FEMA guidelines.

It would also be pertinent to note that the decision of the Hon'ble High Court of Delhi in the case of **Basant Kumar Sharma vs. Government of India [2013] 33 taxmann.com 282 (Delhi)**, which has been rendered in the context of Section 2(p)(ii)(c) of the Foreign Exchange Regulations Act, 1973 ('FERA'). In this case, the petitioner was an NRI who had returned to India for exploratory purposes and the petitioner had approached State Bank of India ('SBI') to convert his subsisting NRE account into NRO account and also to obtain necessary approval from RBI for sale of his investments. The SBI informed him that after becoming a resident, he was not allowed to keep a NRE account and his NRE account would have to be re-designated as a 'Resident Account' under Section 2(p)(ii)(c) read with Regulation A.15 of the Foreign Exchange Manual. The Petitioner did not agree with the stand adopted by SBI that he was a 'Resident' since he had come to India for exploring possibilities of resettlement but had also kept the doors open for overseas relocation in case, he would find a job outside India. The Petitioner wrote to various authorities, which included RBI, and requested their intercession in this matter and after a series of communications with various authorities, the Petitioner filed a writ petition with the Hon'ble Delhi High Court. The Hon'ble Delhi High Court affirmed the view adopted by SBI that the Petitioner had attained the status of a Resident in India within the meaning of Section 2(p)(ii)(c) of the FERA since his stay in India was for an uncertain period and thus his NRE account was required to be re-designated as a Resident Account due to change in residential status.

The provisions of residential status under FEMA and key differences vis a vis the Income-tax Act, 1961 (ITA) is covered in detail in earlier issue of this series titled

Residential Status of Individuals — Interplay With Tax Treaty published in January 2024.

A person can be Resident or Non-Resident under both ITA and FEMA or a person can be Resident under one Act and Non-Resident under the other Act. In such a scenario, it would be pertinent to analyse the impact of taxability of an individual under the ITA where his / her residential status is different under ITA and FEMA.

The interplay of residential status under ITA and FEMA comes into light at the time of claiming income tax exemption under Section 10(4)(ii) of the ITA for a person earning interest from his NRE account in India. As per Section 10(4)(ii) of the ITA, interest received on NRE account is exempt from tax in India, if the account holder is a Person Resident Outside India as defined under Section 2(w) of the FEMA or is a person who has been permitted by the Reserve Bank of India to maintain such account. Thus, the residential status under the ITA is not required to be looked into for claiming such exemption.

Say, an individual having NRE account in India when he was a Person Resident Outside India as per FEMA and a Non-Resident as per the ITA comes to India for good during December 2023. It would be important to dwell into the change in residential status under each Act to determine eligibility for exemption u/s 10(4)(ii) of the ITA with respect to interest received from NRE account. The individual becomes a person resident in India as per FEMA from December 2023 onwards, however, he would be regarded as a Non-Resident under the ITA during Financial Year 2023-24 (assuming his stay in India was below the threshold as required under ITA). In order to claim exemption from tax u/s 10(4)(ii) of the ITA, a person has to be resident outside India under FEMA. Thus, even though the individual is a Non-Resident under the ITA, he would be entitled to claim exemption under Section 10(4)(ii) of the ITA only up to December 2023 (i.e till he was a Person Resident Outside India as per FEMA), as he would become resident of India under FEMA from the date of his return for good. Further, such individual shall be required to redesignate his NRE account to resident account on account of change in his residential status under FEMA.

On the contrary, interest earned on FCNR account by a Non-Resident or Resident but Not Ordinarily Resident ('RNOR') under the ITA is exempt from tax under Section 10(15)(iv)(fa) of the ITA. Thus, the exemption from tax in this case is determined by a person's residential

status under the ITA and not under FEMA. If a Non-Resident holding FCNR account in India returns to India on a permanent basis in a particular financial year, he would become a Person Resident in India under FEMA immediately upon his return, but may continue to be a Non-Resident or RNOR under ITA for that particular year. Accordingly, such person can continue to claim exemption of tax for interest earned from FCNR account since the residential status under FEMA shall not impact his eligibility to claim exemption. The exemption can continue to be claimed till the residential status is RNOR and the deposit has not matured.

With respect to the above, we would like to draw your attention to the decision of the Hon'ble Chennai Tribunal in case of **Baba Shankar Rajesh vs. ACIT 180 ITD 160 (Chennai ITAT) [2019]** wherein Assessee was denied exemption under Section 10(4)(ii) of the ITA by the Hon'ble Tribunal on the ground that the Assessee was a 'Person Resident in India' under Section 2(v) of the FEMA as he was a Non-Resident who had come to India for taking up employment in India.

Another important decision was rendered by the Hon'ble Supreme Court of India in the case of **K. Ramullan vs. CIT 245 ITR 417 (SC) [2000]** in the context of Section 2(p) & (q) of the Foreign Exchange Regulation Act, 1973 ('FERA') which was in favour of the Assessee. The Assessee was earlier denied exemption under Section 10(4A) of the ITA by the High Court with respect to interest earned from NRE account and the Supreme Court set aside the order of the Hon'ble High Court holding that under erstwhile clause (c) casual stay with spouse should not be included and hence unless the stay was for uncertain period or with some permanence the Assessee was a 'Person Resident Outside India' under Section 2(q) of the FERA and was thus entitled to claim exemption under Section 10(4A) [erstwhile section] of the ITA.

Of course, determination of residential status under FEMA depends upon facts and circumstances of each case.

Furthermore, the following two types of accounts are also permitted to be opened by persons resident outside India for specific purposes as explained:

i) Special Non-Resident Rupee Account (SNRR Account)

Any PROI having a business interest in India may

open, hold and maintain with an Authorised Dealer (AD Banks) in India, a SNRR account for the purpose of putting through bona fide transactions in rupees. SNRR accounts shall not earn any interest.

For the purpose of SNRR account, business interest, apart from generic business interest, shall include INR transactions relating to investments permitted under FEM (NDI Rules), 2019 and FEM (DI Regulations) 2019, import and export of goods and services, trade credit and ECB and business-related transactions outside International Financial Service Centre (IFSC) by IFSC units.

AD bank may maintain a separate SNRR account for each category of transactions or a single SNRR Account as per their discretion.

The tenure of the SNRR account should be concurrent to the tenure of the contract / period of operation / the business of the account holder and in no case should exceed seven years in case of generic business transactions.

SNRR account is often used by foreign entities to obtain income tax refunds on account of earning passive income from India or foreign entities undertaking turnkey projects in India. Earlier foreign entities were required to establish project offices (as regulated by RBI) in India to execute turnkey projects awarded to joint ventures between Indian entity and foreign entity also known as unincorporated joint venture. Now, with the introduction of the SNRR account, foreign companies can execute projects without establishing a project office in India.

ii) Escrow Account

Resident or non-resident acquirers may open, hold and maintain Escrow Account with ADs in India as permitted under Notification No. FEMA 5(R)/2016-RB. The account can be opened for acquisition/transfer of capital instruments / convertible notes in accordance with Foreign Exchange Management (Non-Debt Instrument) Rules, 2019.

The accounts shall be non-interest bearing. No fund / non-fund-based facility would be permitted against the balances in the account.

PPF AND SSV ACCOUNT FOR NRIS

The Ministry of Finance has issued updated guidelines for Public Provident Fund (PPF), Sukanya Samridhi

Yojana (SSY), and other small savings schemes, effective from 1st October, 2024. One of the key changes under the new guidelines in relation to PPF accounts of NRIs are as under:

- For NRIs, PPF accounts which were opened under the Public Provident Fund Account Scheme, 1968 where Form H did not require the residency details of the account holder and the account holder became an NRI during the account's tenure, the Post Office Savings Account ('POSA') interest rate shall be granted to the account holder until 30th September, 2024. However, after this date, the interest on these accounts will drop to 0 per cent.

Further, it is pertinent to note that an NRI cannot open a new PPF account. If an account was opened by an individual while he / she was a resident who subsequently became an NRI, the account can continue until maturity. This rule has been there from quite some time, however, there have been cases where NRIs have even continued holding PPF accounts for another 5 years after completion of 15 years. In such cases, banks have denied interest in such accounts.

PPF interest is tax-free in India under Section 10(11) of the ITA for both residents and non-residents. However, the said PPF interest might be taxed in the residence country of the NRIs if it taxes its citizens / residents on their worldwide income.

Further, NRIs are not eligible to open and operate a Sukanya Samriddhi Yojana Account under the erstwhile Guidelines. There has been no change in this respect under the updated guidelines as well.

REMITTANCE FACILITIES UNDER FEMA

We have further discussed below the options available for persons resident outside in India to remit funds outside India under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 [Notification No. FEMA 13(R)/2016-RB dated 1st April, 2016]. As explained, current income in NRE and FCNR(B) account is freely repatriable outside India. For other balances and accounts pertaining to capital account transactions which are not repatriable in nature, the RBI has provided the following options:

i) Remittances by NRIs / PIOs:

Popularly known as USD 1 Million scheme / facility which covers only capital account transactions. ADs may allow **NRIs / PIOs** to remit up to USD one million per financial year:

- out of balances in their NRO accounts / sale proceeds of assets / assets acquired in India by way of inheritance / legacy;
- in respect of assets acquired under a deed of settlement made by either of his / her parents or a relative as defined in the Companies Act, 2013. The settlement should take effect on the death of the settler;
- in case settlement is done without retaining any life interest in the property i.e., during the lifetime of the owner / parent, it would be as remittance of balance in the NRO account;

The NRI or PIO should make such remittances out of balances held in the account arising from his / her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account.

Further, gift by a resident individual to an NRI / PIO after turning non-resident in a particular year may not be permitted under the Liberalised Remittance Scheme ('LRS') since such remittances under LRS are only permissible for resident individuals. However, such remittance can be made under the 1 million Dollar scheme by the residential individual after turning non-resident.

The prescribed limit of USD 1 million is not allowed to be exceeded. In case a higher amount is required to be remitted, approval shall be required from RBI. In our experience such approvals are given in very few / rare cases based on facts.

ii) Remittances by individuals not being NRIs/ PIOs:

ADs may allow remittance of assets by a **foreign national** where:

- the person has retired from employment in India (upto USD 1 million per financial year);
- the person has inherited from a person referred to in section 6(5) of the Act⁴ (up to USD 1 million per financial year);

- the person is a non-resident widow / widower and has inherited assets from her / his deceased spouse, who was an Indian national resident in India (up to USD 1 million per financial year);

- the remittance is in respect of balances held in a bank account by a foreign student who has completed his / her studies (balance represents proceeds of remittances received from abroad through normal banking channels or out of stipend / scholarship received from the Government or any organisation in India).

- Salary income earned in India by individuals who do not permanently reside in India⁵.

However, these facilities are not available for citizens of Nepal or Bhutan or a PIO.

iii) Repatriation of sale proceeds of immovable property:

A PIO/ NRI / OCI, in the event of sale of immovable property other than agricultural land / farmhouse / plantation property in India, may be allowed repatriation of the sale proceeds outside India provided:

- 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;

- the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in FCNR(B) account or

NRE account.

In the case of residential property, the repatriation of sale proceeds is restricted to a maximum of two such properties in the lifetime of the NRI / PIO. The non-resident seller shall be liable to TDS @ 20 per cent under Section 195 of the ITA on the sale consideration of the property. In such cases, non-resident sellers may apply for a Lower Deduction or Nil Deduction Certificate from the tax authorities under Section 197 of the ITA in order to minimise their tax liability and retain a higher portion of the sale proceeds. If the non-resident seller does not obtain a lower / nil deduction certificate, he / she can claim a refund by filing a return of income, in case the actual tax liability works out to be lower than the tax withheld by the buyer.

Further, the seller repatriating sale proceeds outside India may be required to obtain Form 15CB from the Chartered Account for repatriation of sale proceeds outside India.

Foreign Remittance by NRIs / OCIs — Compliances under ITA

The relevant provisions governing taxability of foreign remittances and the compliance requirements with respect to the same are provided under Section 195 of the ITA and Rule 37BB of the Income-tax Rules, 1962.

Section 195 of the ITA states that any person responsible for paying to a resident, not being a company or foreign company, any interest (excluding certain kinds of specified interest) or any other sum chargeable under the provisions of the ITA (not being the income under salaries) shall at the time of credit of such income to the payee in any specified mode, deduct income-tax thereon at the rates in force. **The provisions of Section 195 of the ITA are applicable only if the payment to non-residents is chargeable to tax in India.**

Further, Section 195(6) of the ITA requires reporting of any payment to a non-resident in Form 15CA / 15CB irrespective of whether such payments are chargeable to tax in India. Rule 37BB defines the manner to furnish information in Form 15CB and making declaration in Form 15CA. In terms of Rule 37BB, the information for payment to a non-resident is required to be provided in Form 15CA in four parts as under:

- Part A - For payment or aggregate of payments during

4 "person resident in India" means

(i) 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—

(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;

5 "As per Explanation to Regulation 5 of the Remittance of Asset Regulations, 2016, '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.

the FY not exceeding ₹5,00,000.

- Part B - When a certificate from Assessing Officer is obtained u/s 197, or an order from an Assessing Officer is obtained u/s 195(2) or 195(3) of the ITA.

- Part C - For other payments chargeable under the provisions of the ITA - To be filed after obtaining a certificate in Form 15CB from a practicing Chartered Accountant.

- Part D - For payment of any sum which is not chargeable under the provisions of the ITA.

Form 15CA is a declaration by the remitter that contains all the information in respect of payments made to non-residents and Form 15CB is a Tax Determination Certificate in which the Chartered Accountant ('CA') examines a remittance with regard to chargeability provisions. These forms can be submitted both online and offline (bulk mode) through the e-filing portal. A CA who is registered on the e-filing portal and one who has been assigned Form 15CA, Part-C by the person responsible for making the payment is entitled to certify details in Form 15CB. The CA should also possess a Digital Signature Certificate (DSC) registered with the e-filing portal for e-verification of the submitted form.

Form 15CB has six sections to be filled before submitting the form which are as under:

- 1) Certificate
- 2) Remittee (Recipient) Details
- 3) Remittance (Fund Transfer) Details
- 4) Taxability under the Income-tax Act (without DTAA)
- 5) Taxability under the Income-tax act (with DTAA relief)
- 6) Accountant Details (CA's details)

The foreign remittances by NRI / OCI would generally comprise of payments to NRIs / foreign companies / OCIs / PIOs towards royalty, consultancy fees, business payments, etc., where the payment contains an income element or transfer from one's NRO bank account to NRE / foreign bank account i.e., transfer to own account. Sub-rule (3) of Rule 37BB of the Income-tax Rules, 1962 provides a specific exclusion for certain remittances under Current Account Transaction Rules, 2000 or remittances falling under the Specified List provided thereunder⁶.

⁶ <https://incometaxindia.gov.in/pages/rules/income-tax-rules-1962.aspx>

The transfer from NRO to NRE / foreign bank account may fall within one of the purposes under the category of remittances which may not contain an income element and thus would not be chargeable to tax in India. Thus, there should not be any requirement of obtaining Form 15CB and reporting would only be required in Part D of Form 15CA. However, certain Authorised Dealer banks insist on furnishing Form 15CA along with Form 15CB for source of funds from which remittance is sought to be made in order to process the remittance. In such case, reporting would be required in Part C of Form 15 CA and the CA would be required to report the taxability of such remittance under Section 4 (which deals with taxability under ITA without DTAA) or Part D, Point No. 11 under Section 5 (which deals with taxability under the ITA with DTAA relief).

It may be noted that furnishing of inaccurate information or non-furnishing of Form 15CA can trigger penalty of sum of Rupees 1 lakh under section 271-I of the ITA. Thus, in order to avoid any future litigation and to be compliant from an income-tax perspective, it would be advisable to comply with the reporting obligation under Part C of Form 15CA and obtain Form 15CB from a CA at the time of making remittance from NRO account to NRE / foreign bank account.

When dealing with certification on taxability of funds from which remittance is sourced, a CA may need to bifurcate into separate certificates and also travel back several years. A CA must analyse the following aspects before issuing certificate for remittances from one's own NRO bank account to NRE account:

- Find out the source of funds lying in the NRO account by tracing them back to the incomes comprised therein which may trace back to several years;
- Income-tax returns filed by the NRI in India for the period concerned;
- Relevant year's Form 26AS and TDS certificates;
- Documents and issues pertaining to each type of income.

Third parties transferring money to NRE / NRO accounts of NRIs (for e.g., payment of rent or a sale consideration of an immovable property), may ask for certain documents from NRI before making transfers, such as a certificate under section 197 of the ITA from the Assessing Office

(AO) of NRI, undertaking/ bond from NRI, certificate from the CA in case of certain controversial issues. Further, such third-party payers shall be required to obtain Form 15CA / Form 15CB at the time of remittance to the NRI. NRIs should pre-empt such documentation requirements of tax authorities at the time of receiving remittances from third parties in their NRI / NRO account and thus obtain such documents in advance and keep them on their records, in case required to be furnished before tax authorities at the time of remittances / transfers by NRI's between their own accounts i.e., NRO to NRE.

Such documentation may also be helpful to CA issuing Form 15CA / CB to the NRI in future for remittance between own accounts.

It is not possible nor intended to cover all aspects of the important topic of Bank Accounts in India by non residents and Repatriation of Funds. In view of the dynamic nature of FEMA and other laws, readers are well advised to get an updated information at the time of advising their clients and / or undertaking transactions relating to bank accounts or repatriation of funds outside India. ■