
Guide

For

Indian Residents

Wanting to Do Business Abroad

Indian Regulations

April 2020 Edition

Anil Chawla Law Associates LLP
Business Lawyers, Strategic Advisors and Insolvency Professionals

www.indialegalhelp.com

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Notes:

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Guide

For

Creating a Global Structure using

Holding Company

Based in

Switzerland / Liechtenstein / Singapore

Focus – Indian Entrepreneurs

March 2019

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1. For Whom Is This Guide Useful

This Guide is meant for Indian entrepreneurs, who want to step out. Indian dynamism, entrepreneurship and enthusiasm is seeking new horizons across the globe. We, Anil Chawla Law Associates LLP, salute the Indian entrepreneurs who have the ability to succeed in the most adverse circumstances and dedicate this Guide to them.

This Guide is for the entrepreneur who has a hands-on-approach to business. It is not for large corporate houses or banks or financial institutions that have a battery of lawyers to advise them. It is also not for businessmen who are looking to play foreign stock markets.

Typically, if you are planning an investment abroad in the range of less than Rs. Ten Crores, this Guide should be useful for you. This Guide is for Indian residents who are planning to set up businesses abroad using the automatic approval route of Reserve Bank of India.

The Guide takes an entrepreneur's view of every matter. It is practical and down-to-earth. It is not intended to be an academic treatise and is surely not a text book either. It is written by a law firm that is entrepreneur-driven and prides itself on taking a hardcore pragmatic perspective on every matter.

An entrepreneur is one who makes possible and profitable what seems impossible and unviable to everyone else. We, Anil Chawla Law Associates LLP, are committed to making your global dreams not just possible, but smooth, easy and profitable too. We seek to be your friend in your journey across the continents.

This Guide is the first step in our relationship with you on the path of your global dreams. It will help you get an overall view of the Indian regulations that one needs to comply with.

Of course, anyone stepping into a foreign land must take care of the laws, rules and regulations of the host country. Each country is different and keeping abreast of the laws of different countries can indeed be a challenge. Our best wishes to all the entrepreneurs who take up these challenges and take the Indian flag to every part of the world.

In all your endeavors across the globe, you may count on us as your friend and guide. However, please remember that good advice never comes cheap. We shall like to assure you that our services are always value-for-money since our motto is to add value to your business. So, kindly feel free to contact us for professional advice and support, but not for free answers to your queries.

2. Resident in India vs. Citizen of India

Reserve Bank of India controls and regulates investment in foreign entities by persons who are residents of India. A person may be a citizen of India and resident outside India. A citizen who is not resident of India will not be governed by Reserve Bank of India regulations.

An Indian resident is free to invest in foreign assets out of the income received when he/she was resident outside India. The following extract from section 6 of The Foreign Exchange Management Act, 1999(FEMA Act) is relevant

(4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

The definition of person is very wide and includes all types of legal entities as can be seen from this definition under section 2 of FEMA Act:

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

The conditions for a person to be resident of India are as follows under section 2(v) of the FEMA Act:

- (v)"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;

It is important to note that **under the FEMA Act, the intention to stay outside or inside India for an uncertain period is important.** This is different from the provisions under section 6 of Income Tax Act. To be a resident under Income Tax Act, an individual has to only stay in India for a specified number of days. So, an individual may be non-resident under Income Tax Act during a year and may be resident as per the FEMA Act, during the same year.

Relevant provisions of section 6 of Income Tax Act are reproduced here:

For the purposes of this Act, -

- (1) An individual is said to be resident in India in any previous year, if he -
 - (a) is in India in that year for a period or periods amounting in all to **one hundred and eighty-two days or more**; or
 - (b) [Omitted by the Finance Act, 1982, with effect from 1st April, 1983];
 - (c) having **within the four years** preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

Explanation 1: In the case of an individual, -

- (a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words “sixty days”, occurring therein, the words “one hundred and eighty-two days” had been substituted ;
- (b) being a **citizen of India, or a person of Indian origin** within the meaning of Explanation to clause (e) of section 115C, who, being outside India, **comes on a visit to India** in any previous

year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words “sixty days”, occurring therein, the words “**one hundred and twenty days**” had been substituted.

Explanation 2: For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

(1A) Notwithstanding anything contained in clause (1), an individual, being a citizen of India, shall be deemed to be resident in India in any previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

(6) A person is said to be “not ordinarily resident” in India in any previous year, if such person is—

- (a) an individual who has been a non-resident in India in seven out of the ten previous years preceding that year; or
- (b) a Hindu undivided family whose manager has been a non-resident in India in seven out of the ten previous years preceding that year.

The above extracts from Income Tax Act are to help Indian citizens and persons of Indian origin to plan whether to be resident in India or abroad.

3. Prohibited Sectors

Indian parties are prohibited from investing in a foreign entity engaged in real estate activities. It has to be noted that construction activities or development of townships are not prohibited. The foreign entity should not be engaged in buying and selling of real estate or instruments that relate to rights in real estate.

Investment in foreign banks can be done only with the prior approval of Reserve Bank of India.

In addition, activities that are illegal in host country are prohibited. Strangely, the law does not mention about prohibition of investing in an activity that is illegal in India but legal in host country.

The list of Transactions which are prohibited under Foreign Exchange Management (Current Account Transactions) Rules, 2000 is as follows:

SCHEDULE I

¹[Transactions which are Prohibited (see rule 3)]

1. Remittance out of lottery winnings.
2. Remittance of income from racing/riding, etc., or any other hobby.
3. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
4. Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
5. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
6. Payment of commission on exports under Rupee State Credit Route.
7. Payment related to "Call Back Services" of telephones.
8. Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

4. Investments under Automatic Approval Route

Investment by persons resident in India does not need any approval in any of the following cases:

- a) Under **Liberalized Scheme** by individuals up to USD 250,000 per annum
- b) Under **General Permission** for funds held in foreign currency accounts
- c) Under Automatic Approval Route – not exceeding 400 per cent of net worth (financial commitment to be below USD 1 billion)

Liberalized Scheme

Under this Scheme, Authorised Dealers (AD)(Banks dealing in foreign exchange) freely allow remittances by resident individuals up to USD 250,000 per financial year (April-March) for any permitted current or capital account transactions or a combination of both. The facility is available to all resident individuals including minors. In case of remitter being a minor, the relevant form must be signed by both, the minor and the minor's natural guardian.

Resident individuals are also permitted to acquire and hold immovable property using this scheme. In addition, the scheme may be used to purchase shares (of listed companies or otherwise) or debt instruments or any other asset outside India without prior approval of the Reserve Bank.

Limit under LRS has been revised from time to time as under:

(Amount in USD)

Date	Feb 4, 2004	Dec 20, 2006	May 8, 2007	Sep 26, 2007	Aug 14, 2013	Jun 3, 2014	May 26, 2015
LRS limit (USD)	25,000	50,000	1,00,000	2,00,000	75,000	1,25,000	2,50,000

The following points need to be noted about the LRS:

- a) Limit under LRS is per financial year per individual.
- b) Even a minor can take benefit of the scheme.
- c) Remittance can be consolidated in respect of family members subject to some conditions.
- d) An Indian resident cannot gift under LRS to another resident of India.
- e) Permissible capital account transactions under LRS are as follows:
 - Opening foreign currency account abroad with a bank;
 - Purchase property abroad;
 - Make investment abroad – acquire shares or debt instruments of both listed and unlisted overseas company; Acquire qualification shares of an overseas company for holding the post of Director or shares of a foreign company towards professional services rendered or in lieu of Director's remuneration; Invest in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
 - Set up wholly owned subsidiaries and joint ventures abroad subject to terms and conditions stipulated in RBI's Notification No. FEMA.263/RB-2013 dated 5 March 2013.
- f) The LRS limit includes capital account as well as permitted current account transactions. Examples of current account transactions are private visit, gift / donation, going abroad on employment, emigration, maintenance of relatives abroad, business trip, medical treatment abroad and studies abroad. LRS limit can also be used for giving Indian Rupee denominated gifts to relatives that are non-resident Indians or persons of Indian origin.

**Reserve Bank of India
Foreign Exchange Department
Central Office,
Mumbai-400 001**

Notification No. FEMA.263/RB-2013 dated March 05, 2013

**Foreign Exchange Management (Transfer or Issue of any
Foreign Security) (Amendment) Regulations, 2013**

- Extending loans to Non-resident Indians who are relatives as defined under Companies Act, 2013.

- g) Individuals can also open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the scheme without prior approval of Reserve Bank of India.
- h) Banks are not permitted to extend credit facilities for transactions under LRS.
- i) The scheme is **not available for capital account remittances to countries identified as non-cooperative countries** by Financial Action Task Force (FATF). The FATF puts together a list of non-cooperative countries which it categorizes as high risk and other monitored nations. This list changes from time to time on the basis of the nations' cooperation with the FATF. As on the date of preparing this Guide, only Iran and North Korea are on the high-risk list. Albania, Bahamas, Barbados, Botswana, Cambodia, Ghana, Iceland, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Pakistan, Panama, Syria, Uganda, Yemen, and Zimbabwe are on the monitored list of nations, on the date of this Guide. The lists are available at www.fatf-gafi.org. Bank branch making the remittance under LRS will be able to advise in this regard. Notably, the restriction is only on capital account transactions with the non-cooperative countries. There is no restriction on any revenue account transaction with these countries. So, if you have a relative in Iran and you want to send her money under LRS, you can do so.
- j) The scheme is not available for corporates, partnership firms, HUF and trusts.

For the purpose of LRS, **relative** is as defined under the Companies Act, 2013. As per section 2(77) of the said Act read with the relevant rules, relative means one of the following:

- a) Father including step-father
- b) Mother including step-mother
- c) Son including step-son
- d) Son's wife
- e) Daughter
- f) Daughter's husband
- g) Brother including step-brother
- h) Sister including step-sister

Notably, uncles and aunts as well as cousins are not included. For some reason that lesser mortals like us cannot understand, even step-daughter is not included. In the Indian legal schema, grandchildren are also not one's relatives.

Some operational points to be noted for making remittances under LRS are as follows:

- All remittances under LRS by an individual should be made through only one branch of a bank.
- It is mandatory to have PAN to make all remittances under LRS.
- Bank branch, which receives the request for making remittance under LRS may ask for such documents as it deems necessary.
- Bank branch may want to ensure that TDS requirements under Income Tax Act are duly complied with before making remittance.
- Bank branch will ensure that KYC (Know Your Consumer) norms have been duly complied in respect of the individual making the remittance.
- Bank branch will also ensure that Anti-Money Laundering Rules are duly complied with.
- Bank branch will generally do remittance under LRS if the individual has been banking with them for at least one year. If the account is new, the Bank may do due diligence including getting copies of Income Tax Assessment Order or Return.
- Bank branch will often like to see the source of funds being remitted under LRS and will not accept cash deposits in the account for remittance under LRS.
- Bank Branch will ask the individual wanting to remit funds under LRS to fill and sign Form A2, which is a very simple two page form. There are no other formalities connected with remittance under the LRS.

In case an individual who has invested by way of LRS for setting up a Joint Venture / Wholly Owned Subsidiary Abroad, wishes to disinvest the following rules apply:

1. A resident may disinvest (partially or fully) by way of transfer / sale or by liquidation or merger of the Joint Venture (JV) or Wholly Owned Subsidiary (WOS).
2. A resident individual shall be allowed to disinvest after a lock in period of one year from the date of first remittance for setting up JV or WOS.
3. The disinvestment proceeds are required to be repatriated to India within a maximum period of 90 days from the date of disinvestment and should be reported to the bank.
4. No write off shall be allowed in case of disinvestment by resident individual.

For entrepreneurs who wish to invest up to approximately Rs. Ten Crores (Rs. 10,00,00,000-) (approximately USD 1.34 million) in ventures abroad, this is an easy and convenient route. The key points about this scheme are as follows:

- Available only to individuals (including minors)
- Limit of USD 250,000- per financial year (less any withdrawals for travel, etc.)
- Any bank branch dealing in foreign exchange can release funds without any approvals / permissions from Government of India or Reserve Bank of India.
- No reporting requirements / formalities

For making investment of say Rs. Ten Crores, an entrepreneur may choose from the following alternatives:

- a) Invest in the names of different family members with each investing about Rs. One Crore and Lakhs in one financial year.
- b) Invest in two or more financial years.

Let us take the case of an Indian resident named say Mr. Singh who has a wife and two kids aged three years and six months. Mr. Singh may invest more than Seven Crores in one financial year by investing about Rs. One Crore Eighty Lakhs in the name of each family member. In the next financial year, he may invest the balance sum of Rs. 3 Crores in the same manner.

RBI/FED/2017-18/3
FED Master Direction No. 7/2015-16

www.rbi.org.in

January 1, 2016
(Updated as on June 20, 2018)
(Updated as on August 02, 2017)
(Updated as on April 12, 2017)
(Updated as on February 11, 2016*)

To,
All Authorised Persons in Foreign Exchange

Madam / Sir,

Master Direction - Liberalised Remittance Scheme (LRS)

For details of the Liberalised Remittance Scheme, please refer to the following Master Direction of Reserve Bank of India

https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=10192

Though the Liberalised Scheme is very easy and convenient, it cannot be used by companies and firms. So, if your company wants to set up a Joint Venture / Subsidiary / New Company abroad, this scheme is not suitable for you.

General Permission

In case someone has earned any money when one was not resident of India, one may invest the said money even after becoming an Indian resident. This is the basis of General Permission. Relevant portion of the Master Direction is reproduced below.

General permission has been granted to persons residents in India for purchase / acquisition of securities in the following manner:

- (a) out of the funds held in RFC account;
- (b) as bonus shares on existing holding of foreign currency shares; and
- (c) when not permanently resident in India, out of their foreign currency resources outside India.

General permission is also available to sell the shares so purchased or acquired.

Automatic Approval Route

Under the Automatic Route, an Indian Party does not require any prior approval from the Reserve Bank for making overseas direct investments in a Joint Venture / Wholly Owned Subsidiary (JV / WOS) abroad. The Indian Party should approach an Authorized Dealer Category – I bank for effecting the remittances towards such investments.

Any Indian Party may make investments in a Joint Venture / Wholly Owned Subsidiary (JV / WOS) abroad under the Automatic Route. "Indian Party" includes any of the following:

- A company incorporated in India
- A body created under an Act of Parliament
- A partnership firm registered under the Indian Partnership Act, 1932
- A limited liability partnership incorporated under the Limited Liability Partnership Act, 2008

It should be noted that **individuals are not allowed to invest under the Automatic Route.**

The criteria for direct investment under the Automatic Route are as under:

- i. The Indian Party can invest **up to 400% of its net worth** (as per the last audited Balance Sheet) in JV / WOS for any bonafide activity permitted as per the law of the

host country. In case the financial commitment in any financial year is above USD 1 billion, prior approval of Reserve Bank will be required;

- ii. The Indian Party is not on the Reserve Bank's exporters' caution list / list of defaulters to the banking system published/ circulated by the Credit Information Bureau of India Ltd. (CIBIL) / RBI or any other credit information company as approved by the Reserve Bank or under investigation by the Directorate of Enforcement or any investigative agency or regulatory authority; and
- iii. The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorized dealer (bank) to be designated by the Indian Party.

The total financial commitment of the Indian party, in all the Joint Ventures / Wholly Owned Subsidiaries put together, shall not exceed 400% of the net worth of the Indian Party as on the date of the last audited balance sheet. Financial commitment means the amount of direct investments outside India by an Indian Party and includes -

- i. by way of contribution to equity shares of the JV / WOS abroad;
- ii. as loans to its the JV / WOS abroad;
- iii. 100% of the amount of corporate guarantee issued on behalf of its overseas JV/WOS;
- iv. 100% of the amount of bank guarantees; and
- v. 50% of the amount of performance guarantee issued on behalf of its overseas JV/WOS.

The Indian Party / entity may extend **loan / guarantee only to an overseas JV/ WOS in which it has equity participation**. Proposals from the Indian Party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route.

Indian entities may offer any form of guarantee - corporate or personal (including the personal guarantee by the indirect resident individual promoters of the Indian Party) / primary or collateral / guarantee by the promoter company / guarantee by group company, sister concern or associate company in India provided that:

- a. All financial commitments including all forms of guarantees and creation of charge are within the overall ceiling prescribed for overseas investment by the Indian Party i.e. within 400 per cent of the net worth as on the date of the last audited balance sheet of the Indian party.

- b. No guarantee should be 'open ended' i.e. the amount and period of the guarantee should be specified upfront. In the case of performance guarantee, time specified for the completion of the contract shall be the validity period of the related performance guarantee.
- c. In cases where invocation of the performance guarantees breach the ceiling for the financial exposure of 400 per cent of the net worth of the Indian Party, the Indian Party shall seek the prior approval of the Reserve Bank before remitting funds from India, on account of such invocation.

In case of partial / full acquisition of an existing foreign company, where the investment is more than USD 5 million, valuation of the shares of the company shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker / Merchant Banker outside India registered with the appropriate regulatory authority in the host country.

In case of acquisition of an existing company where the investment is less than USD Five million, valuation of the shares will be done by a Chartered Accountant or a Certified Public Accountant.

In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country. Approval of the Foreign Investment Facilitation Portal (FIFP) will also be a prerequisite for investment by swap of shares.

Investments in Nepal are permitted only in Indian Rupees. Investments in Bhutan are permitted in Indian Rupees as well as in freely convertible currencies. All dues receivable on investments made in freely convertible currencies, as well as their sale / winding up proceeds are required to be repatriated to India in freely convertible currencies only. Investments in Pakistan by Indian Parties are permissible under the approval route.

Investment in unincorporated entities overseas is permitted only in the oil sector. Generally speaking, investment in unincorporated entities should be considered a no-go area.

Indian party is permitted to capitalize the payments due from the foreign entity towards exports, fees, royalties or any other dues from the foreign entity for supply of technical know-how, consultancy, managerial and other services within the ceilings applicable. Capitalization of export proceeds remaining unrealized beyond the prescribed period of realization will require prior approval of the Reserve Bank.

Indian software exporters are permitted to receive 25 per cent of the value of their exports to an overseas software start-up company in the form of shares without entering into Joint Venture Agreements, with prior approval of the Reserve Bank.

An Indian Party seeking to make investment in an **entity outside India, which is engaged in financial sector**, should fulfill the following additional conditions:

- i. be registered with the regulatory authority in India for conducting financial sector activities;
- ii. has earned net profit during the preceding three financial years from financial services activities;
- iii. has obtained approval from the regulatory authorities concerned both in India and abroad for venturing into such financial sector activity; and
- iv. has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

Portfolio Investments by listed Indian companies – Listed Indian companies are permitted to invest up to 50 per cent of their net worth as on the date of the last audited balance sheet in (i) shares and (ii) bonds / fixed income securities, rated not below investment grade by accredited / registered credit rating agencies, issued by listed overseas companies.

5. RBI Approval Route

Prior approval of the Reserve Bank is required in all other cases (except the ones covered in previous section) of direct investment abroad. For this purpose, application together with necessary documents has to be submitted in Form ODI through a bank dealing in foreign exchange.

Reserve Bank will, inter alia, take into account the following factors while considering such applications:

- a) Prima facie viability of the JV / WOS outside India;
- b) Contribution to external trade and other benefits which will accrue to India through such investment;
- c) Financial position and business track record of the Indian Party and the foreign entity; and
- d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

With a view to enabling recognized star exporters with a proven track record and a consistently high export performance to reap the benefits of globalization and liberalization, proprietorship concerns and unregistered partnership firms are allowed to set up JVs / WOS outside India with the prior approval of the Reserve Bank subject to satisfying certain eligibility criteria. An application in form ODI may be made to the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Overseas Investment Division, Central Office, Amar Building, 5th Floor, Fort, Mumbai 400 001, through their bank.

Investments by established proprietorship or unregistered partnership exporter firms will be subject to the following conditions:

- i. The Partnership / Proprietorship firm is classified as a "Status Holder" in terms of Foreign Trade Policy.
- ii. The bank is satisfied that the exporter is KYC (Know Your Customer) compliant and is engaged in the proposed business and meets the requirement as indicated at (i) above.
- iii. Exporter has proven track record i.e. overdue exports do not exceed 10 per cent of the average export realization of previous three financial years.

- iv. The exporter has not come under adverse notice of any Government agency like Directorate of Enforcement, Central Bureau of Investigation, Income Tax, etc. and does not appear in the exporters' caution list of the Reserve Bank or in the list of defaulters to the banking system in India.
- v. The amount of investment outside India does not exceed 10 per cent of the average export realization of the preceding three financial years or 200 per cent of the net owned funds of the firm, whichever is lower.

Registered Trusts and Societies engaged in manufacturing / educational / hospital sector are allowed to make investment in the same sector(s) in a JV/WOS outside India, with the prior approval of the Reserve Bank.

6. Obligations of Indian Party Making Overseas Investment

An Indian Party which has made direct investment abroad (whether under LRS or automatic route or approval route) is under obligation to

- (a) Receive share certificate or any other document as an evidence of investment within six months. The share certificate or any other document as evidence of investment has to be submitted to and retained by the bank, who is required to monitor the receipt of such documents and satisfy themselves about the bonafides of the documents.
- (b) Repatriate to India the dues receivable from foreign entity within 60 days of its falling due.
- (c) Submit Annual Performance Report in Part II of Form ODI to the Reserve Bank through the Bank handling the transfer of funds every year on or before 31st December.

Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian Party based on the un-audited annual accounts of the JV / WOS provided:

- a) Statutory Auditors of the Indian Party certify that law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS and the figures in the APR are as per the un-audited accounts of the overseas JV / WOS and
- b) That the un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian party.

For individuals making overseas investment through LRS, the reporting requirements can be summed up as follows:

- a) Submit Part I of Form ODI to the bank within 30 days of making the remittance.
- b) The Bank shall report the particulars of remittance to Reserve Bank of India in Part I and II of Form ODI within 30 days of making the remittance.
- c) The obligations as stated at the start of this Chapter also have to be complied with.
- d) The particulars of disinvestment (if any) shall also be reported to the Bank in Part III of the Form ODI within 30 days of the receipt of the disinvestment proceeds.

7. Disinvestment / Transfer of Shares in Overseas Entity

As and when the Indian Party (which has invested abroad) wants to disinvest from the overseas entity, the case will be considered on the basis whether any loss is being made on the original investment. If there is some loss being made, it amounts to what is called as “write-off of investment”. There are two sets of conditions prescribed by Reserve Bank of India – (1) Where there is NO write-off of investment and (2) Where there is some write-off of investment.

NO Write-Off Of Investment

An Indian Party without prior approval of the Reserve Bank may transfer by way of sale to another Indian or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to the following conditions:

- i. the sale does not result in any write off of the investment made.
- ii. the sale is effected through a stock exchange where the shares of the overseas JV/ WOS are listed;
- iii. if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV / WOS;
- iv. the Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy, commission or other entitlements and / or export proceeds from the JV or WOS;
- v. the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
- vi. the Indian Party is not under investigation by CBI / DoE/ SEBI / IRDA or any other regulatory authority in India.

The Indian entity is required to submit details of such disinvestment through its designated bank within 30 days from the date of disinvestment.

Write-Off Of Investment

Indian Parties may disinvest, without prior approval of the Reserve Bank, in any of the under noted cases where the amount repatriated after disinvestment is less than the original amount invested:

- (a) in case where the JV / WOS is listed in the overseas stock exchange;
- (b) in cases where the Indian Party is listed on a stock exchange in India and has a net worth of not less than Rs.100 crores;
- (c) where the Indian Party is an unlisted company and the investment in the overseas venture does not exceed USD 10 million. and
- (d) where the Indian Party is a listed company with net worth of less than Rs.100 crores but investment in an overseas JV/WOS does not exceed USD 10 million.

In case of disinvestment as mentioned above, all conditions as prescribed for No Write-Off of Investments given above will also apply.

An Indian Party, which does not satisfy the conditions laid down above for undertaking any disinvestment in its JV/WOS abroad, shall have to apply to the Reserve Bank for prior permission.

Rules applicable for disinvestment of investments made under LRS are given in the section related to LRS.

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8. Offices, Representatives and Accounts Abroad

Many Indian companies wish to open a bank account abroad. This is often felt necessary for the purpose of collecting payments from customers either through bank transfers or through online transactions. Unfortunately, this is not as simple as it sounds. Many Indian companies have opened subsidiaries abroad when all that they required was a collection bank account. Reserve Bank of India, strangely, is positively inclined towards Indians opening companies abroad but does not seem inclined to encourage Indians to open collection accounts in foreign banks.

Permissible bank accounts by Indian residents in foreign banks can be classified into three categories:

- a) Account by a company/ firm in the name of its office/ branch/ representative outside India
- b) Exporter's bank account
- c) Bank account for Overseas Direct Investment

A quick brief glance at the three is as follows:

Branch office account

A firm or a company registered or incorporated in India may open, hold and maintain in the name of its office or its branch set up outside India or its representative posted outside India, a foreign currency account with a bank outside India by making remittances from India for the purpose of normal business operations of the branch or representative;

Provided that –

- (a) the overseas branch/ office has been set up or representative is posted overseas for conducting normal business activities of the Indian entity;
- (b) the total remittances made by the Indian entity to all such accounts in an accounting year shall not exceed
 - i. 15 per cent of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth,

whichever is higher, where the remittances are made to meet initial expenses of the branch or office or representative; and

- ii. 10 per cent of such average annual sales/ income or turnover during the last financial year where the remittances are made to meet recurring expenses of the branch or office or representative;

(This is not applicable in case when remittances are from an EEFC account and when the Indian entity is a 100% Export Oriented Unit (EOU) or a unit in Export Processing Zone (EPZ) or in a Hardware Technology Park or in a Software Technology Park, within two years of establishment of the Unit)

- (c) the overseas branch/ office/ representative shall not enter in any contract or agreement in contravention of Indian laws related to foreign exchange;
- (d) the account so opened, held or maintained shall be closed,
 - i. if the overseas branch/ office is not set up within six months of opening the account, or
 - ii. within one month of closure of the overseas branch/ office, or
 - iii. where no representative is posted for six months,

and the balance held in the account shall be repatriated to India;

Branch / office / representative may buy office equipment and other assets required for normal business operations. Funds required for this may be remitted by the Indian entity from India as a current account transaction.

However, transfer or acquisition of immovable property outside India, other than by way of lease not exceeding five years, by the overseas branch/ office/ representative will be subject to RBI regulations.

Notably, the above facility cannot be used by e-commerce companies who are, for example, in the business of providing an e-commerce platform to foreign sellers and buyers and wish to establish a collection account in a foreign country without establishing a branch office or representative in that country.

Exporters

An Indian exporter who has undertaken a construction contract or a turnkey project outside India or who is exporting services or engineering goods from India on deferred payment terms may open, hold and maintain a Foreign Currency Account with a bank outside India, provided that -

- a. approval as required under the Foreign Exchange Management (Export of goods and services) Regulations, 2015 has been obtained for undertaking the contract/ project/ export of goods or services, and
- b. the terms and conditions stipulated in the letter of approval have been duly complied with.

For making Overseas Direct Investment

An Indian Party may open, hold and maintain Foreign Currency Account abroad for the purpose of making overseas direct investments subject to the following terms and conditions:

- a. The Indian Party is eligible for making overseas direct investment.
- b. The host country regulations stipulate that the investment into the country is required to be routed through a designated account.
- c. The account shall be opened, held and maintained as per the regulation of the host country.
- d. The remittances sent to the account by the Indian Party should be utilized only for making overseas direct investment into the Joint Venture/ Wholly Owned Subsidiary (JV/ WOS) abroad.
- e. Any amount received in the account by way of dividend and/ or other entitlements from the subsidiary shall be repatriated to India within 30 days from the date of credit.
- f. The Indian Party should submit the details of debits and credits in the account on yearly basis to the designated Authorized Dealer (bank) with a certificate from the Statutory Auditors of the Indian Party certifying that the account was maintained as per the host country laws and the extant FEMA regulations / provisions as applicable.
- g. The account so opened shall be closed immediately or within 30 days from the date of disinvestment from JV/ WOS or cessation thereof.

Other Cases

Some other relevant cases where Indian residents are allowed to maintain bank accounts abroad are as follows:

1. Funds raised by External Commercial Borrowings (ECB) or through American Depository Receipts (ADRs) or Global Depository Receipts (GDRs)

2. Resident individuals may open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the Liberalised Remittance Scheme. The account may be used for putting through all transactions connected with or arising from remittances eligible under LRS.
3. A person resident in India who has gone out of India to participate in an exhibition/ trade fair outside India may open, hold and maintain a Foreign Currency Account with a bank outside India for crediting the sale proceeds of goods on display in the exhibition/ trade fair. Provided that the balance in the account is repatriated to India through normal banking channels within a period of one month from the date of closure of the exhibition/ trade fair.
4. A person resident in India who is on a visit to a foreign country may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India, provided that on his return to India, the balance in the account is repatriated to India.

9. Master Directions of Reserve Bank of India

For further details, please refer to the following two Master Directions of Reserve Bank of India: <https://www.rbi.org.in/scripts/NotificationUser.aspx?id=10637&fn=5&Mode=0>



भारतीय रिज़र्व बैंक
RESERVE BANK OF INDIA
www.rbi.org.in

RBI/FED/2015-16/10

FED Master Direction No. 15/2015-16

January 1, 2016

(Updated as on September 18, 2019)

(Updated as on January 04, 2018@)

(Updated as on January 25, 2017)

(Updated as on October 06, 2016*)

To,

All Authorised Dealer Category – I banks and Authorised banks

Madam / Dear Sir,

**Master Direction – Direct Investment by Residents in
Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad**



भारतीय रिज़र्व बैंक
RESERVE BANK OF INDIA
www.rbi.org.in

RBI/FED/2015-16/9

FED Master Direction No.14/2015-16

January 1, 2016

(Updated as on January 9, 2020*)

To,

All Authorised Dealer Category – I banks and Authorised banks

Madam / Sir,

Master Direction - Deposits and Accounts

<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/09MDD593B2F2D48648C8AB3D37625C9F245D.PDF>

Details of Master Direction related to LRS are given at the following link:

<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/03MD945692290C104C5595AEDAC89AE78788.PDF>

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Anil Chawla Law Associates LLP

MF-104, Ajay Tower, E5/1 (Commercial), Arera Colony, Bhopal – 462 016 (MP) INDIA

Website – www.indialegalhelp.com

E-mail – info@indialegalhelp.com

Cell: (+91 / 0) 94250 09280 (Anil Chawla)

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