Bombay Chartered Accountants' Society

7, Jolly Bhavan 2, Ground Floor, New Marine Lines,
Mumbai - 400020
Tel : 9122 - 61377600 **Fax :** 9122 – 61377666
Website : www.bcasonline.org **Email** : bca@bcasonline.org;

The Chamber of Tax Consultants

3, Rewa Chambers, Ground Floor, 31, New Marine Lines,
Mumbai - 400 020.
Tel : 9122 - 2200 1787 / 2209 0423; **Fax** : 9122 - 2200 2455
Website : www.ctconline.org **Email** : office@ctconline.org

Shri B. P. Kanungo,
Deputy Governor,
Reserve Bank of India,
Mumbai.

Dear Sir,

Sub: Representation on FEMA provisions

We submit herewith a representation for some provisions under FEMA which are causing difficulties and injustice for bonafide transactions.

We request for a personal meeting to explain the matter.

Thanking you,

Yours faithfully,

Bombay Chartered Accountants' Society

Chetan Shah

Chetan Shah
President

The Chamber of Tax Consultants

Hitesh Shah

Hitesh Shah
President

Cc: Smt. Malvika Sinha, Executive Director
Shri Shekhar Bhatnagar, Chief General Manager-in-charge
Shri Jyoti Kumar Pandey, Chief General Manager

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Representation under FEMA

Background for representation:

1. **FEMA objective and reintroducing prosecution** - FEMA and the regulations were enacted in the year 2000. The objective was to liberalise the law. The rules are provided and one has to interpret and follow the same. Prosecution provisions were removed. In 2005, Compounding rules were enacted "to provide comfort to the citizens and corporate community by minimizing transaction costs, while taking severe view of wilful, malafide and fraudulent transactions."

   However in 2015, prosecution has been brought back in FEMA. Under sections 13(1A) and 37A, if an Indian resident is found to have foreign assets in contravention of law, then based on mere suspicion, equivalent Indian assets can be seized. Further there is prosecution. Thus a civil law has become semi-criminal law. Under these provisions, even procedural violations come within the semi-criminal scope.

2. **Change in interpretation by RBI without change in law** - Another issue that we as practitioners face is interpretation changes that occur when officials change. This is often on account of the legal language used in the country. Over the years however this is causing hardship to the people who have undertaken bonafide transactions. And hardship is compounded when a view is changed all of a sudden without a clear statutory document. One possible solution to this problem is creating a library where interpretations of provisions are offered at any level within the RBI.

   We appreciate that changing circumstances can change policies and regulations. It is RBI's prerogative to change policies. However the change has to be prospective. We find that today's interpretations are being applied to past transactions. This is causing grave injustice to people.

   Further the change has to be spelt out clearly in the law – especially if it restricts any facility. It cannot be just a small phrase inserted somewhere in a regulation. The change in the policy has to be made abundantly clear. We have given more details and illustrations later.

3. **In our submission, if there is any ambiguity in the law, the interpretation has to be in favour of the investor. If at all RBI considers that compounding is required, then a token penalty should be levied.**

   Due to amendments in FEMA in 2015 wherein prosecution has been brought back, it is all the more necessary that a liberal interpretation is taken by RBI.

4. Another issue is absence of definition for certain terms and different interpretations adopted. By way of illustration, meaning of some of the common terms like "portfolio investment", "acquiring" etc, as interpreted by RBI are different from the meanings ascribed as per Company Law. The accepted market convention is that if a meaning is not specified, then normally the meaning under the law closest to the term (e.g. Company Law) will apply.

5. Our humble suggestion is that change in interpretation of law without declaring the change in law - should be minimised. This is of course a massive work. In the meantime, past innocent transactions should not be considered as violations.

If at all these are procedural lapses, only a token Compounding fee should be levied. Ideally a general amnesty should be declared for procedural breaches not involving black money.

For future transactions, abundant clarity should be provided.

6. We clarify that our representation is for bonafide transactions. In a society there will always be some people who will deliberately violate the law. We are not representing their matters. Let the law take its course. However we submit that if some people have violated the law, it cannot be a reason to have a blanket ban on everyone.

Executive summary of the representations

A. **Liberalised Remittance Scheme (LRS):**

1. Investment in unlisted companies made prior to 5th August 2013 should not be considered as a violation. The investor should not be asked to unwind the investment and bring back the proceeds. At the most, a token penalty may be levied.

2. Holding funds in foreign bank accounts which are remitted under LRS, should not be considered as a violation.

3. Remittance made for any foreign asset like Gold and loan should not be considered as a violation.

4. There should be no restriction under Current Account transactions as stated in clause (ix) of Schedule III.

5. If a person has acquired any assets outside India under LRS / ODI, he should be permitted to gift the same to anyone.

B. **Principal(?) issues:**

6. To route all applications and compliances through the Authorised Dealer is not working out well. We suggest that one should be able to file all applications or reports online. The AD should provide his comments within a specified time limit. If AD does not respond, RBI should consider the case on merits. Or if the matter is just compliance, it should be accepted.

7. In case of violations, RBI should not insist on unwinding a transaction without considering other laws. Only if the transaction is fundamentally not permitted (e.g. foreign investment in agricultural activities), then unwinding may be directed.

8. RBI prefers to meet the investor but not the representatives. As a regulator, RBI should meet the bonafide representatives based on authorisation if so desired.

C. **Real Estate leasing:**

9. A clarification may be issued that investment in Real estate leasing business is permitted. The meaning of real estate business can be same for Foreign investment and overseas investment.

Detailed representation

A. **Liberalised Remittance Scheme:**

1. **LRS – brief history and background:**

1.1 LRS was first announced in February 2004 vide AP circular 64 dated 4.2.2004. As per the circular, foreign remittance was permitted for "any current or capital account transactions or a combination of both". A simple declaration had to be filed.

Thus from 2004, Indian rupee is convertible on capital account for individual residents upto the LRS limit. This position has been emphatically stated in international for a by Government of India at highest level.

There were very few restrictions. Remittance could not be made for transactions under Schedule I and II of Current Account regulations; and could not be made to a few countries.

Except for what was specifically prohibited, all transactions were permissible. Thus rupee was fully convertible up to the LRS limit except for prohibited transactions.

The basic scheme continues till today.

1.2 Foreign banks started soliciting deposits from Indian residents. Immediately RBI issued AP circular no. 80 dated 18.3.2004 stating that the banks that wish to market their products should take prior approval from RBI. Wherever RBI considered it appropriate, it immediately issued a circular prohibiting the transaction.

The circular however clarified in para 4 that "The above instructions do not restrict the freedom of resident individual from investing in permissible capital account transactions under the Scheme".

1.3 FAQs of 2004, Question 33 also stated "This facility is available for making remittance/s for any permissible current or capital account transaction or a combination of both."

FAQs of 2006 (Question 32) also stated the above.

1.4 Subsequent Master Circulars dated 1.7.2004, 1.7.2005, 1.7.2006 also stated that remittances can be made for "any current or capital account transactions or a combination of both".

1.5 AP circular no. 24 dated 20.12.2006 continued to state remittance can be used for "any current or capital account transactions or a combination of both". The limit was increased to US$ 50,000.

2. **Transactions "otherwise not permissible":**

2.1 AP circular no. 51 dated 8.5.2007 was issued increasing the limit under LRS from US$ 50,000 to US$ 1,00,000. In the circular it was stated as under:

"3. It is clarified that such remittances are allowed under the Scheme only in respect of permissible current or capital account transactions. All other transactions which are otherwise not permissible under FEMA and those in the nature of remittance for margins or margin calls to overseas exchanges / overseas counterparty are not allowed under the Scheme."

It was for the first time that RBI stated that transactions "otherwise not permissible", cannot be undertaken. We understand that under this circular, RBI has taken a stand that investment was possible in shares only as portfolio investment. It was not permitted in unlisted shares. (We may state that the word "portfolio investment" has not been used anywhere in the LRS circulars.)

Further, an individual was not considered as an "Indian party" under FEMA Notification no. 120. Hence investment by individual was considered as "otherwise not permissible".

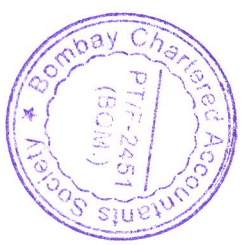
2.2 **In our humble submission, "otherwise not permissible" only reiterates that what is specifically prohibited – margin trading, etc. – cannot be undertaken. Atleast this is how the market interpreted the provision as a small phrase inserted in a circular does not change the fundamental meaning of LRS. If the intention was to specifically prohibit then it is our submission that, that should have been explicitly stated instead of leaving it open for interpretation.**

Consider the following transactions of an Indian resident:

i) Purchase of immovable property abroad.
ii) Giving a loan abroad.
iii) Portfolio investment abroad.
iv) Keeping Bank fixed deposits abroad.
v) Mutual Funds abroad.

All these transactions are "otherwise not permissible" even today.

This would mean that the LRS for capital account transactions is ineffective.



If purchase of immovable property abroad which is "otherwise not permissible" under Notification no. 7, is permitted under LRS; then how is purchase of shares of an unlisted company different?

We may also mention that subsequent Master Circulars, FAQs also state that investment is permitted in any shares (listed and unlisted). Details are given below.

In fact, under FEMA, sections 3, 4 and 8 together prohibit almost every foreign remittance and holding foreign assets by Indian Residents. LRS overrides all three sections and permits foreign remittance as well as investment. "Otherwise not permissible" phrase only adds confusion.

3. **Shares of unlisted company:**

3.1 Investment in shares has been permitted under the LRS. All circulars, FAQs, Master Circulars and Master Directions state that investment in shares is permitted.

There are several families and individuals who have invested in immovable property or portfolio investment abroad. Due to laws in foreign countries, consultants advised that one should invest through offshore companies.

Apart from this, it is not possible for family members to open many bank accounts and brokerage accounts to undertake portfolio investment. Hence they invest in an SPV to pool in family funds and then invest.

All these companies and investments are legitimate investments as permitted under the laws of those countries. Individually these were all bonafide transactions. Pooling was done either to achieve scale overseas or as necessitated by the laws of the foreign countries

We understand that according to RBI, portfolio investment is permitted. Portfolio investment can be even in private unlisted companies. We fail to appreciate how can investment in private unlisted companies be considered as portfolio investment. The normal meaning of portfolio investment means investment in stock market or mutual funds.

If RBI wants to give a specific meaning to any phrase which is different from normal meaning, then it should be specifically defined.

3.2 Right from the first circular (AP 64 of Feb. 2004), <u>all Master Circulars, FAQs, Master Directions</u> have stated that investment in shares is permitted.

Even the latest Master Directions dated 12.4.2017 states in para A.6(iii) that permissible transactions include "making investments abroad- acquisition and holding shares of both listed and unlisted overseas company"!

A reading by anyone will give a normal meaning that one can acquire shares of unlisted company. The phrase "transactions otherwise not permissible" simply does not bring out any restriction.

3.3 **Two facilities / schemes for share investment:**

We also wish to point out the following.

Vide AP circular no. 80 dated 13.1.2003, individuals were permitted to invest in listed shares of foreign companies without limit. (Some other simple eligibility criteria were prescribed.)

Vide AP circular 64 of Feb. 2004 (first LRS circular), investment in shares (listed and unlisted) was permitted.

Thus there were two facilities / schemes for investment in foreign shares – listed shares and LRS.

Vide AP circular 24 dated 20.12.2006, it was stated that "investment by resident individual in overseas companies would be subsumed under the Scheme of USD 50,000. The requirement of 10 percent reciprocal shareholding in the listed Indian companies by such overseas companies has been dispensed with".

Thus facility for investment in listed shares was subsumed with LRS. It was not the other way round. This actually brings out that LRS was for unlisted shares. It appears that as there was an overlap between the two facilities, the facility of listed shares was merged with LRS. Thus LRS was for both – listed and unlisted shares.

Several Master circulars and even the latest Master Directions dated 12.4.2017 state that investment in shares of both listed and unlisted is permitted.

3.4 In September 2010, FAQs were issued. In answer 3(v), it was stated that remittance cannot be made for "setting up a company abroad". There was however no circular etc. Master Circulars issued after this FAQs continued to state that investment can be made for shares.

Under Company Law, a person can incorporate a company as a promoter, subscribe to shares issued by a company, or acquire shares from another shareholder. All these are considered as investment in shares.

We understand that as per RBI "setting up a company" means a person cannot set up a JV / WOS. But investment without "setting up" is permitted. We fail to appreciate the difference. If "setting up" is not permitted, it is easily possible to overcome this restriction as follows. A person in another country could set up the company. The Indian investor could buy the shares from such a non-resident. In this case, the resident would not be setting up the company.

Again we do not wish to hair-split the words nor suggest any circumvention of the law. The issue is that language under FEMA is loose. It should be precise.

Under Company law; the company, shareholder, relationship between the company and shareholder are clearly defined. If FEMA wants to give a specific meaning, it should be spelt out clearly.

3.5 **Joint Ventures and Wholly Owned subsidiaries:**

In August 2013, vide Notification no. 263 dated 5.3.2013 (but published in the Gazette on 5.8.2013), investment in JV and WOS was permitted.

Investment in JV and WOS is largely permitted in companies. The definition of JV and WOS states that it is investment by an Indian party in the foreign entity.

Basically investment in following kinds of shares is permitted:

i) Listed shares.
ii) Unlisted shares.
iii) JV / WOS.

How does one distinguish between the above three kinds of share investment?

Today also, there are banks who do not know the difference between investment in JV/WOS and shares abroad. They advise that invest in unlisted shares under LRS.

The whole emphasis of stating the above is that the language of FEMA circulars and notifications gives rise to meanings which are contrary to the intent. Professionals and managers in RBI also get confused. How will investors understand the fine distinctions?

3.6 **Past representations:**

In the light of the above circulars, several people have invested abroad in shares of unlisted companies to hold investments or even to do business.

People have invested in immovable property abroad through companies. Several family members have invested in SPVs abroad and undertaken portfolio investment as it is difficult to invest small amounts in several names.

When RBI came to know that investment was being made in unlisted companies, it asked the investors to wind up the companies, bring back the proceeds and come for Compounding. Winding up the companies is a big exercise and costs money. It disturbs the whole set up.

Representations were made. RBI took a decision somewhere around December 2012, that in case of investments made before December 2012, people will not be asked to wind up the company. They will be asked to come for Compounding.

On discussions with RBI, it was understood that although there was no error by the investors, there should be no compounding. But because in the past, investors have been asked to go for Compounding, everyone will be asked by RBI to go for Compounding. Otherwise it will create difficulties for past matters of Compounding.

3.7 **Situation now:**

We have now been made to understand that even where investments were made prior to 2012, if the investment is not in a bonafide business (as permitted in FEMA notification no. 120), people will be asked to wind up and bring back the proceeds. Further Compounding will be as per the frame work.

We feel this is totally unfair. To allege that investor has contravened FEMA, and to levy a Compounding fee as per framework penalises the investor for no fault of his.

To unwind the investment is a huge exercise. Assets have to be sold in distress, tax may have to be paid, compliances abroad have to done, tax and other implications in India have to be undertaken. And for no fault of the investor.

3.8 **Portfolio investment** - Under the current law, investment is permitted in a JV/WOS abroad. However if the investment is in Financial services (Regulation 7), then there are additional conditions to be complied with (e.g. registration with regulator in India and abroad).

If individual family members have invested in a SPV abroad, and the SPV invests in portfolio of shares, will it be considered as financial services activity?

Further, portfolio investment is also specifically not permitted (Section 2(e)). This restriction is however meant to apply to companies and firms investing abroad. It is not meant for individuals.

Our submission is that one should consider the ultimate purpose. As individuals, portfolio investment is permitted. Hence portfolio investment undertaken through SPV should also be a permitted activity. It should not be considered as financial services or a restricted activity.

Needless to say, if the activity involves obtaining funds from public at large, appropriate SEBI rules are there to regulate / prevent it.

3.9 **Our representation:**

We submit that under LRS, individuals should be allowed to remit funds abroad for any purpose keeping in line with the fact that rupee is convertible on capital account for individuals. (Exceptions such as no remittance to countries in FATF list, speculation etc. should continue.)

Alternatively, we submit that there should be no need to wind up the foreign company where investment has been made prior to 5th August 2013. At the most, a token Compounding fee may be levied.

Further, a specific circular should be issued to clearly state what is permitted and what is not.

4. **Bank accounts:**

Under LRS, a resident individual can open a foreign bank account and keep funds in the account. And there has never been any requirement to declare the purpose for which foreign bank account was opened. Indian resident could deposit funds in foreign bank account and then spend / invest from time to time. We now understand that RBI has taken a view that funds cannot be kept in bank account abroad!

4.1 We reproduce para 3.2 of AP circular 64 dated 4.2.2004 (first LRS circular).

"3.2 Under this facility, resident individuals will be free to acquire and hold immovable property or shares or any other asset outside India without prior approval of the Reserve Bank. Individuals will also be able to open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the scheme without prior approval of Reserve Bank. The foreign currency account may be used for putting through all transactions connected with or arising from remittances eligible under this scheme."

The circular clearly permits that a person can hold "any other asset outside India". Any other asset includes bank balances.

It further states that "Individuals will also be able to open, maintain and hold foreign currency accounts with a bank outside India for making remittances under the scheme without prior approval of Reserve Bank".

4.2 The latest Master Directions dated 12.4.2017 in fact state that LRS is permitted for opening foreign currency account abroad with a bank. (See Part A, para 6(i).) There is no further condition.

4.3 We understand that RBI is interpreting the circular that bank account can be opened for making remittances under the scheme. Thus if a person wants to buy an immovable property abroad, then for that purpose, bank account can be opened abroad. But it cannot be opened for keeping funds!

We clearly find this interpretation to be Hyper-technical and incorrect.

Even the revised A2 form issued in February 2016 contains a code for opening foreign bank account (S0023). This is specifically with reference to LRS.

So far all along, individuals have opened bank account abroad. And now the view is taken that funds cannot be kept in a foreign bank account. This will cause serious difficulties.

4.4 We submit that there should be a specific clarification issued that bank accounts can be opened abroad.

5. **Holding Gold abroad (and any other assets):**

As stated earlier, under LRS, a person can remit for any purpose (except those specifically prohibited).

We have been told that holding gold abroad is not permitted!

5.1 **Master Directions dated 1.1.2016:**

From 2004 till 2015, none of the circulars, FAQs and Master Circulars gave a list of transactions permitted. There was always a negative list – i.e. transactions which were not permitted. It meant that all other transactions were permitted.

Master Directions dated 1.1.2016 for the first time gave a list of transactions which can be undertaken. It specifies 5 items. Does it mean other transactions are not permitted?

5.2 FAQs of 2016 state transactions which are not permitted (negative list) - which means other transactions are permitted; Master Directions provide a positive list of transactions permitted. It means other transactions are prohibited. Normally it is good to provide clarification both ways. However here having both lists is causing confusion. In case of ambiguity, the benefit of doubt should be given to the investor concerned.

5.3 **Loan abroad:**

Due to the positive list, we understand that even loans are prohibited. When Debt instruments are permitted, we cannot see the reason for prohibition of loans. So far they were always permitted.

5.4 We submit that a specific negative list should be issued as to which transactions are not permitted. Transactions other than the above should be permitted. This will be in keeping with the original intent of LRS - Capital Account Convertibility for individuals upto LRS limit.

6. **Current Account Regulations:**

6.1 Under LRS, remittance can be made for any current account transaction. In fact the scheme is for remittance over and above the facilities under current account regulations.

Consider notification no. GSR 426(E) dated 26.5.2015. This is of course under Central Government's jurisdiction. However we have highlighted the difficulty below.

6.2 Schedule III states that LRS can be used for specified transactions. For other transactions, RBI approval is required.

Item (ix) states "Any other current account transaction". Does it mean that for current account transaction, there is a limit of US$ 2,50,000?

If there is a restriction, it is against the provision and spirit of Section 5 of FEMA. Under section 5, drawal of foreign exchange is permitted for all Current Account transactions except as may be specifically prohibited. The purpose is to provide reasonable restrictions and restrict undesirable transactions like gambling etc.

Article VIII of IMF also does not permit blanket restrictions. India has accepted the commitment under Article VIII.

There are many individuals who do business worth several crores. Does it mean that now if an individual wants to import goods exceeding US$

2,50,000, he cannot undertake the same without approval from RBI? Some of the transactions where remittance can exceed US$ 2,50,000 are:

- Import of goods by a proprietor.
- Consultancy services payable by engineers, architects.

6.3 Our submission is that clause (ix) in Schedule III should be removed.

7. **Gift or bequest of assets acquired under LRS:**

Indian residents who have acquired assets abroad under LRS will one day bequeath or gift it to their heirs. Under Section 6(4), if an Indian resident inherits foreign assets from a returning Indian, he can retain the same abroad.

A similar facility is not available for gifts received from Indian residents.

The objective is that once the funds are remitted under LRS, the same can be retained abroad permanently.

It may be provided that if an Indian resident acquires foreign assets as gift or inheritance from another Indian resident, then the same can be kept abroad.

B. **Principal issues:**

8. **Dealing through Authorised Dealer:**

8.1 All applications / documents have to be routed through Authorised Dealer (AD). Unfortunately most of the professionals and businessmen do not have a happy experience with the ADs. This is because FEMA is not an expertise of the banks. However because RBI insists that all applications and compliance have to be undertaken through the bank, we have to go through them.

8.2 Now some of the ADs have started charging fees for just forwarding the papers to RBI. The fees have been upto Rs. 10 lakhs!

8.3 The most common issues with ADs are:

i) They have rendered incorrect advice.

ii) It is almost impossible to contact their legal manager who takes a view on FEMA regulations. The front line manager or relationship manager cannot explain the matter. This movement of matter between relationship manager and legal manager takes several months in many cases.

iii) It has happened that if the AD feels this transaction cannot be undertaken, it refuses to even forward the matter to RBI ! When the investors have filed the application for the same matter with another AD, it has been forwarded to RBI and the matter has been approved.

Different ADs have different views. **This has led to a situation as if there are several mini-regulators.** This is causing delays in many matters.

iv) Branches of ADs deal with a nodal office for reporting to RBI. People cannot contact nodal office. One does not know the status of the papers for several weeks or months.

If at all a person is able to contact the nodal office, he is referred back to the branch as the person is not a customer of the nodal office.

This again causes a lot of delay.

v) People have filed compliance reports with the AD. However the same have not been filed with RBI. When the investor has to undertake a transaction, he realises that past compliance is pending because of which his transaction cannot be undertaken.

When the AD starts the compliance, no documents are available. The client has to provide all past data.

vi) For some matters (e.g. FC-GPR forms) are sent by the bank in their godowns. If the AD has to retrieve the copies just after a few months of filing the form, it takes months to retrieve the forms.

8.4 We have been making representations that one should be able to file applications online. However even after so many years, only 3 forms can be filed online. Several others cannot be filed online.

8.5 **Our representation:**

We appreciate that RBI requires KYC from the banks as persons are bank's clients. RBI cannot know all the persons. However there has to be a time limit.

We suggest that one should be able to file all applications or reports online. The AD should provide his comments within a specified time limit. If AD does not respond, RBI should consider the case on merits. Or if the matter is just compliance, it should be accepted.

9. **Unwinding the transaction:**

9.1 In case of violations of FEMA regulations, the person is asked to unwind the transaction and then come for Compounding. We appreciate this issue and in principle agree with the same. However in many cases, unwinding is not possible only. Consider an illustration:

In case of FDI, the foreign investor has invested in share capital of an Indian company. The Indian company has allotted the shares. However the funds are sent through money changers instead of bank. (Ultimately the funds through money changers also come through banking channels.).

In such cases, there is no FIRC. The Authorised dealer does not proceed in absence of FIRC. The authorised dealer says he has asked RBI and he has been told that the Indian company should unwind the transaction.

Under company law, once the shares are allotted, these cannot be cancelled. There is no way to return the capital. The transaction cannot be unwound.

9.2 Our submission is that in such cases, RBI should consider other laws. Just because of procedural issues, a harsh step of unwinding should not be insisted. **If the ultimate result is that the transaction is permitted, procedural lapses should be compounded and unwinding avoided.**

We appreciate that if the foreigner has invested in an activity like agriculture, then the company may have to be wound up. But if in substance, there is no violation, the matter should be considered liberally.

10. **Meeting representatives of investors:**

10.1 Generally RBI does not prefer to meet representatives of the investors. RBI insists that either the person should come or the AD. There are several times when the client is not able to come. And he would prefer to come with his representative.

In any democracy, if there is a regulator who deals with public, principles of natural justice demand that they should meet people and their representatives. Everything cannot be explained in writing. We have seen the difficulties due to written rules.

Even courts in India provide an opportunity to the parties for a hearing. Legal representatives are clearly permitted.

10.2 For Central Banking functions, the Central Bank may not meet people. However for regulatory functions, representatives should be permitted.

We appreciate that one should not be able to walk in RBI. However if the client has authorised his representative, the representative should be permitted to meet RBI managers personally.

C. **Real Estate Leasing:**

11. **Foreign Direct Investment:**

11.1 **Current provision:**

The Consolidated FDI Policy of 2016 clarifies in Paragraph 5.2.10 and Sl. No. 11 of Annex. B to Schedule 1 of FEMA 20/2000-RB lays down the conditions for FDI in Construction Development: Townships, Housing, Built-up Infrastructure. The meaning of "Real estate business" is provided as under:

"Real estate business" means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business."

Hence, the activity of renting of property will not be treated as real estate business. Accordingly, FDI is permissible in this activity.

11.2 **Issue on hand:**

While the above provision is a major relaxation, the full intent of the relaxation is not met since it is not expressly provided in the above Note that a fully completed property can be acquired by an entity with FDI funds and then leased / rented out. This provision is essential for entities which would like to earn rent / income from lease of fully developed and completed properties.

11.3 **Submissions:**

a) We humbly submit that the RBI amend the Notification / issue a Circular clarifying that the above provision includes the acquisition of fully completed real estate properties by an entity with FDI funds for earning of rent/ income on lease of the property, not amounting to transfer, and this will not amount to real estate business.

b) The intent of the Government in liberalising leasing in the real estate sector can be seen by the fact that it first permitted (by way of DIPP's Clarification dated 15th September 2015) facility sharing arrangements by leasing / sub-leasing within group companies and the same was not treated as real estate business. This minor relaxation was followed up by a total relaxation by way of the DIPP's Press Note 12/2015 which reviewed the FDI Policy in various sectors, including Construction Development. Subsequently, the RBI has also amended the FEMA Regulations (20/2000-RB) accordingly.

While the intent definitely seems to be to allow foreign investments in completed assets provided that the intent is to earn rental income, we only request that the language be a bit clearer.

12. **Overseas Investment:**

12.1 Overseas investment has been permitted for almost all activities except portfolio investment, banking business and real estate business.

12.2 Section 2(p) defines Real Estate business as under:

"Real estate business" means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges".

This definition is different from the definition in other regulations.

It states that Real estate business only means buying and selling (i.e. trading) of real estate. Then it states that development and construction is "not included as real estate business" – i.e. it is permitted.

Real estate leasing is not restricted. It would mean that it is permitted. However RBI has been considering the activity of buying and leasing as not a permitted activity.

12.3 Apart from the above technical interpretation, we submit that leasing of Real estate business may be considered as a permitted activity.

The meaning of Real Estate business can be aligned across FEMA regulations. Otherwise, different rules have different meanings.