

FEMA & PMLA

-Investment prospects for NRIs in India

PREVENTION OF MONEY LAUNDERING ACT

What is Money Laundering?

- The process of disguising the money earned through illegal activities as legitimate earnings.
- In the PMLA, 2002, money laundering has been defined as “any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property”.

Scope and scheme of the Act:

- To prevent money laundering
- Provide for confiscation of property derived from money laundering (earned through crime)

What is the offence of Money Laundering?

- Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering (Section 3).

Which agency administers the Prevention of Money Laundering Act, 2002?

- The Directorate of Enforcement in the Department of Revenue, Ministry of Finance.
- Financial Intelligence Unit - India (FIU-IND) under the Department of Revenue, Ministry of Finance is the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to enforcement agencies and foreign FIUs.

WHAT ARE THE POWERS AVAILABLE TO THE INVESTIGATING OFFICERS UNDER THE ACT?

- (a) to provisionally attach any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Section 5];
- (b) to conduct survey of a place [Section 16];
- (c) to conduct search of building, place, vessel, vehicle or aircraft & seize/freeze records & property [Section 17];
- (d) to conduct personal search [Section 18];
- (e) to arrest persons accused of committing the offence of Money Laundering [Section 19];
- (f) to summon and record the statements of persons concerned [Section 50].

WHAT ARE PROCEEDS OF CRIME?

- **“Proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [Section 2(1)(u)].**
- **There is no monetary threshold to initiate investigations under PMLA.**

WHAT IS A 'SCHEDULED OFFENCE'?

The offences listed in the Schedule to the Prevention of Money Laundering Act, 2002 are scheduled offences in terms of Section 2(1)(y) of the Act.

- Indian Penal Code
- NDPS Act
- Explosive Substances Act
- Unlawful Activities (Prevention) Act
- Arms Act
- Wild Life (Protection) Act
- Immoral Traffic (Prevention) Act
- Prevention Of Corruption Act
- Explosives Act
- Antiquities & Arts Treasures Act
- SEBI Act
- Customs Act
- Bonded Labour System (Abolition) Act
- Child Labour (Prohibition And Regulation) Act
- Transplantation Of Human Organs Act
- Juvenile Justice (Care And Protection Of Children) Act

WHAT IS A 'SCHEDULED OFFENCE'? (Contd...)

- The Immigration Act
- The Passports Act
- Foreigners Act
- Copyright Act
- Trade Marks Act
- Information Technology Act
- Biological Diversity Act
- Protection Of Plant Varieties And Farmers' Rights Act
- Environment Protection Act
- The Water (Prevention And Control Of Pollution) Act
- The Air (Prevention And Control Of Pollution) Act
- Suppression Of Unlawful Acts Against Safety Of Maritime Navigation And Fixed Platforms On Continental Shelf Act

Part 'C' Deals With Trans-border Crimes, And Is A Vital Step In Tackling Money Laundering Across International Boundaries.

WHAT ARE THE POSSIBLE ACTIONS WHICH CAN BE TAKEN AGAINST PERSONS / PROPERTIES INVOLVED IN MONEY LAUNDERING?

- (a) Attachment of property under Section 5, seizure/ freezing of property and records under Section 17 or Section 18. Property also includes property of any kind used in the commission of an offence under PMLA, 2002 or any of the scheduled offences.
- (b) Persons found guilty of an offence of Money Laundering are punishable with imprisonment for a term which shall not be less than three years but may extend up to seven years and shall also be liable to fine [Section 4].
- (c) When the scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.

Meaning of “Property”

“Property” means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located. Further, property includes, property of any kind used in the commission of an offence under this Act or any of the scheduled offences [Section 2(1)(v)].

What is “attachment”?

“Attachment” means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act [Section 2(1)(d)].

Procedure for attachment:

- FIR registered for commission of Scheduled Offence
- ECIR registered by the Enforcement Directorate
- Provisional attachment of “proceeds of crime” by Director/ Dy. Director
- Forwarding of complaint along with provisional attachment order to adjudicating authority
- Notice to owner of the property to show why the property should not be attached pending trial.
- Hearing-confirmation/setting aside of attachment
- If confirmed- appeal to appellate tribunal (45 days)
- Appeal to High Court (60 days)

Burden of Proof

- On the person charged with the offence.
- Until burden discharged presumption of money laundering against the accused

Attachment of property outside India

- Can be done in a “Contracting States”.

Punishment for vexatious search

- Officer who searches/arrests without recorded reasons is liable for imprisonment for 2 years or fine upto 50,000/- or both.

“Source of Funds” - NRI

- The general permission is subject to fulfillment of the following conditions:
- i. The amount invested by NRI should be of remittance from abroad through normal banking channels or by transfer of funds from the investor’s NRE/FCNR/NRO accounts with a bank in India.
- ii. The proprietary or partnership concern in India is not engaged in any agricultural/ plantation activity or real estate business, i.e., dealing in land and immovable property with a view to earning profit or earning income there from.

Whether the persons claiming or entitled to claim any interest in the enjoyment of immovable property can enjoy the property during the period of provisional attachment?

Yes. [Section 5(4)]

What is the remedy available to a aggrieved person, where the property is provisionally attached?

It has been provided in the Act that before recording the finding that all or any of the properties are involved in money laundering, the Adjudicating Authority has to issue a show cause notice of not less than thirty days to the aggrieved person. The aggrieved person at this stage can submit his reply and attend the hearing before the Adjudicating Authority to present his defence [Section 8(1)].

What will happen if the Adjudicating Authority records the finding that the all or any of the properties are involved in money laundering?

Where the Adjudicating Authority decides that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property. Such attachment shall— (a) continue during the pendency of the proceedings relating to any offences under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and (b) becomes final after an order of confiscation is passed [Section 8(3)].

What is “offence of cross border implication”?

(1) Any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A or Part C of the Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India; or

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

- Received the assent of the President on the 26th May, 2015
- Shall be effective from 1st April, 2016
- Applicable to the whole of India.
- Applicable to ordinary residents of India, Companies and AOPs

Key Features of the Act:

- Undisclosed Assets Located Outside India
- Undisclosed Foreign Income and Asset
- Value of an Undisclosed Asset

Rate of Tax

- 30% of the undisclosed income or fair market value of the asset.
- Penalty upto 100% of the Tax (under amnesty scheme)

Penalties

- For holding undisclosed foreign income and asset – three times the tax computed.
- For failure to furnish return of income – Rs. 10 Lacs.

Prosecution Provisions

- For wilful evasion of tax - rigorous imprisonment-3 to 10 years
- For wilful non filing of returns or non-declaration of foreign incomes or assets rigorous imprisonment for a period between 6 months and 7 years.
- Persons holding balances with maximum balances of Rs 5 lakhs (aggregate) have been exempted from penalties and prosecution under the Act.
- Under the Act, even Tax Advisors, Banks and Financial Institutions, who have been found to be aiding and abetting are liable for Punishments and jail terms.

Transition Period

- Can file declaration-30% tax along with penalty-no prosecution.
- No prosecution under IT Act, Wealth Tax Act, FEMA, Companies Act and Customs.
- This immunity not available to – people who have received notice under S. 142, 143(2), 148, 153A, 153C – search conducted under 132, survey under 133A – information received by the Gov. U/s 90 & 90A of the IT Act.

Let us see who according to FEMA is a “person”

- Section 2(u) of Foreign Exchange Management Act, 1999 defines a "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;

What is the reach of FEMA?

- FEMA extends to the whole of India. It also applies to the branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contraventions there under committed outside India by any person to whom the Act applies.

WHO IS A NRI?

- FEMA, 1999 classifies two types of NRIs
 - Non-Resident Indian holding Indian Passport (NRI)
 - Person of Indian Origin(PIO), i.e. Non-Resident Indians holding foreign passports.

From FEMA's point of view we have to see who is NRI and who is PIO.

- Certain sub-sections of Sec. 2 of FEMA have dealt with the definitions of 'person resident outside India' and 'person resident in India'.
 - **Person resident outside India**
 - Section 2 (w) of FEMA has defined "person resident outside India" means a person who is not resident in India.

• Persons resident in India

- Section 2 (w) of FEMA has defined “person resident in India” means a person residing in India for more than one hundred and eighty-two days (182 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;

For Example:

- Mr. Arora came to India on 1 Sep’13 for taking up an employment in India.
- – For the Financial Year 2012-2013, he was not in India. As such, for the financial year 2013-2014 he is not resident of India.
- – For the Financial Year 2013-2014, he was in India for more than 182 days. As such, he is resident of India for the financial year 2014-2015.

DEFINITIONS OF PIO

- **Means a citizen of any country other than of a Prohibited Country, if**
- **a) He at any time held Indian Passport: or**
- **b) He or either of his parents or any of his grand- parents were a citizen of India by virtue of the Constitution of India or the Citizenship Act,1955 or**
- **c) The person is a spouse of an Indian citizen or a person referred to in sub-clause (a) or (b).**

Various notifications of FEMA for PIO

- I. **For the purpose of opening non-resident bank accounts in India**
- II. **For the purpose of investing in shares/debentures etc. in India**
- III. **For the purpose of acquiring immovable property in India**
- IV. **For the purpose of establishing a branch or office in India**
- V. **For the purpose of acquiring PIO Card.**

AUTHORITIES GOVERNING NRI INVESTMENTS IN INDIA

- NRI investments are governed under the Foreign Exchange Management Act, 1999 (FEMA)
- Regulations specified by the Securities and Exchange Board of India (SEBI)
- The Foreign Direct Investment policy of the ministry of commerce (the FDI Policy)
- The master circular issued by reserve bank (the master circular).
- The FDI Policy is reissued every 6 months while the master circular is reissued annually

Investment Routes/Permitted Sectors

- i. Investment in company shares and debentures
- ii. Investment in mutual funds
- iii. Investment in Immovable Property
- iv. Investment in Bonds / Government securities
- v. Investment in proprietary/partnership firms

Prohibited Countries

Indian Citizens who are now taken citizenship / carry passport of the following countries are not considered as PIOs i.e. they get the same treatment as Foreigners under FEMA.

Regulation	Prohibited Countries
i. Borrowing or Lending in Rupees	i. Bangladesh, Pakistan
i. Remittance of Assets	i. Bangladesh, Pakistan
i. Non Resident Accounts	i. Bangladesh, Pakistan
i. Investment in Shares	i. Bangladesh, Pakistan, Sri Lanka
i. Acquisition and Transfer of ii. Immoveable Property	i. Bangladesh, Pakistan, Sri Lanka, ii. Afghanistan, China, Iran, Nepal, iii. Bhutan

- **Immoveable Property – Eligibility & Definition of Person of Indian origin excludes citizens of: Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal.**

- **NRI:**

What can be Acquired	Any immoveable property other than Agricultural property, plantation or farm house
Payment Mode	Remittance from outside India or debit to non-resident account
Transfer of Agricultural Land, Plantation or Farm House	Only to person resident in India
Transfer of Any Other Property	Person Resident in India i.e. Indian Citizen, NRI, PIO, Foreigner

Type of Property	Mode of Acquisition	Status of Transferor
Any immoveable property other than Agricultural property, plantation or farm house	Any Mode other than Gift and Inheritance	Resident (Indian and Foreign Citizen) NRI & PIO
Any immoveable property other than Agricultural property, plantation or farm House	Gift	Resident (Only Indian Citizen) NRI & PIO
Any Property	Inheritance	Resident (Indian and Foreign Citizen) NRI & PIO
Any immoveable property other than Agricultural property, plantation or farm House	Sale	Person Resident in India ie. Resident. PIO Foreign Citizen Resident in India
Agricultural property, plantation or farm house	Gift, Sale	Indian Citizen Resident in India
Residential or Commercial Property	Gift	Resident NRI PIO resident outside India Foreign Citizen Resident in India

How can NRIs invest in real estate?

According to the regulations of FEMA and RBI, an NRI is permitted to make specific investment in real estate/property:

1. Any immovable property can be purchased by an NRI in India other than any agricultural land, farm house and plantation property.
2. He can get any immovable property as mentioned above by gift from Indian resident, Indian citizen residing outside India or person of Indian origin.
3. Obtain any property by inheritance.
4. He can transfer immovable property to any resident of India by sale.
5. He can transfer any agricultural land, farm house or plantation land to any resident of India by gift.
6. He can also transfer his residential or commercial property by means of gift to any person either residing in India or abroad or person of Indian origin.

Only NRIs are allowed to invest upto 100% in the following:

- Development of serviced plots and construction of residential premises
- Development of townships
- City & Regional level Infrastructure facilities including roads and bridges
- Manufacture of building materials

Income Sources:

Predetermined norms in home loans for non-residents who are looking forward to buying any property:

1. A maximum of 80 per cent amount is financed by the financial institution. The rest should be given by the NRI.
2. The remittance of the amount for down payment can be done from the place of residence by normal banking channels, i.e., NRO/NRE account in India.
3. The NRI has to repay his principal amount as well as interest part from that similar channel only.

Payment for acquisition of property:

- Funds received through normal banking channel by way of inward remittance.
- Funds held NRE/FCNR(B)/NRO A/c
- No payment outside India
- Refund against cancellation can be credited to the NRE A/c

Repatriation of sale proceeds:

- Original amount paid for the property can be repatriated immediately
- Capital Gains to be deposited in NRO A/c from where upto 1million USD can be repatriated every year

Renting out of property by NRI/PIO

- Yes, without approval of RBI
- Rent can be deposited in NRE/NRO A/c or remitted abroad.

Remittance of current income by NRI/PIO

- Rent
- Dividend
- Pension
- Interest

NRI: TYPE OF A/C THAT CAN BE HELD

- NRI can open, hold and maintain the different types of accounts with an Authorized Dealer (bank authorized to deal in foreign exchange) in India without the permission from the Reserve Bank. NRO Savings accounts can be maintained with the Post Offices in India.

The various types of Bank Accounts an NRI can open are:

- i. **Ordinary Non-Resident Rupee (NRO) Account:** NRIs can maintain NRO account for transactions in rupees without any approval from Reserve Bank of India.
- ii. **Non Resident (External) Rupee Accounts (NRE A/C):** NRE account is maintained for transactions in freely convertible foreign currency.
- iii. **Foreign Currency (Non Resident) Account (FCNR A/C):** FCNR A/C is maintained through term deposit. The account can be opened in Pound Sterling, U.S. dollar, Deutsche Mark and Japanese Yen. The deposit is acknowledged for a period not less than six months and not above three years.
- iv. **Non Resident (Non Repatriable) Rupee Deposit Scheme -NR-NR-RD Scheme:** NRIs can invest through this scheme in term deposit maintained out of the funds transferred in India in freely convertible foreign currency through proper banking channels.

NRI: Ability to Provide Loans Remitting Money to India

- **Q: Are there restrictions / limits on sending money to India?**
- **A: No. They can send money in any form without limit.**
- **Exception: Loans to relatives in India (Maximum Amount is USD 250,000)**
 - **Loans to Individuals**
 - **Loans to Relatives**
 - **Loans to Companies**
 - **Loans against Bank Accounts**

	NRE / FCNR (B)	NRO
To Account Holder / Third Parties in India	Allowed Against security of FD and for specified Purposes – Personal or Business purposes – Investment in firms and companies on non-repatriation basis – Purchase of residential house for own use	Allowed Against security of FD and for specified Purposes – Personal or Business purposes – Investment in firms and companies on non-repatriation basis – Purchase of residential house for own use
Foreign Currency Loan to Account Holder / Third Party outside India	Allowed (Against security of funds held in Account for any bonafide purpose)	Not Allowed

Regulating Authorities

- **The FEMA is administered by**
 - **a) The Central Government of India through “Rules” on Current Account Transactions & other matters such as compounding proceedings etc.**
 - **b) Reserve Bank of India through “Notifications” on Capital Account Transactions in general and**
 - **c) Directions [AP (Dir) Circulars]**
 - **d) FDI Policy DIPP**
 - **e) Discussion papers**

The Role of a Professional

- **CS/CA can act as Presenters before the Authorities (First and Appellate excluding the High Court) (S. 32)**
- **Certification as to end use of funds when ECB returns are filed with the RBI**
- **Valuation of shares of a company which attracts FDI**
- **Certification of the net-worth of the Indian entity investing outside India.**

The End

By

Jaiveer Shergill

Advocate, Supreme Court of India

Mob: +91 9910470757

Email: jaiveer@shergilloffice.com