NRI Investment in India

Introduction A non-resident Indian (NRI) has a unique position under the Indian foreign investment law. This is natural considering the important role an NRI can play in the development of India through investments. The link that an NRI has with India has led to a number of investments in India by NRIs since liberalisation. The focus of Indian policy has been therefore to encourage NRI investment.

Certain checks have also been placed on such investment to ensure the fairness of all transactions with Indian assets. The Foreign Exchange Management Act, 1999 (FEMA), Regulations issued thereunder (the Regulations), the Foreign Direct Investment Policy of the Ministry of Commerce (the FDI Policy) and the Master Circular issued by Reserve Bank (the Master Circular) govern all forms of foreign investment in India. The FDI Policy is reissued every 6 months while the Master Circular is reissued annually.

An NRI: (i) is an individual; (ii) is a person resident outside India; (iii) has been or is an Indian citizen or a person of Indian origin (PIO). A person includes an individual. A person resident outside India is any person who is not resident in India. A person resident in India is any person residing in India for more than 182 days during the course of the preceding financial year but does not include a person who has gone out of India to pursue employment or do a business or for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period. A person of Indian origin is a citizen of any country other than Bangladesh or Pakistan who has held an Indian passport or any of whose parents or grandparents were citizens of India or is a spouse of any such person.

Accounts of an NRI in India An NRI is entitled to open various accounts with banks in India. An authorised dealer in India may accept deposits:
(a) under the Non-resident (External) Account Scheme (NRE) from an NRI subject to certain conditions;
(b) under the Foreign Currency (Non-resident) Account Banks Scheme (FCNR-B) from an NRI subject to certain conditions;
(c) under the Non-resident (Ordinary) Account Scheme (NRO) from any person resident outside India subject to certain conditions.

NRE account
- Can be opened and maintained with authorised dealers and with banks (including cooperative banks) authorised by Reserve Bank to maintain such accounts;
- Proceeds of remittances to India in any permitted currency can be deposited in the account;
- Permitted debits include: (a) local disbursements; (b) remittances outside India; (c) transfer to an NRE/FCNR account;
- Proceeds of remittances to India in any permitted currency can be deposited in the account.

NRO account
- Can be opened and maintained with funds remitted from outside India through normal banking channels or funds received in rupees by debit to the account of a non-resident bank maintained with an authorised dealer in India;
- Permissible debits are the same as for an NRE account.

FCNR-B account
- Can open these accounts with an authorised dealer;
- These accounts may be opened with funds remitted from outside India through normal banking channels or funds received in rupees by debit to the account of a non-resident bank maintained with an authorised dealer in India;
- Permissible debits are the same as for an NRE account.

On non-repatriation basis Other than in the prohibited sectors (discussed later), NRIs can purchase shares/convertible debentures issued by an Indian company on non repatriation basis without any limit. The consideration for such purchase shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR-B/NRO account maintained with the AD Category 1 bank. NRIs can also, without any limit, purchase on non-repatriation basis dated government securities, treasury bills, units of domestic mutual funds, units of money market mutual funds. The Government of India has notified that NRIs are not permitted to make investments in small savings schemes including PPF. In case of investment on non-repatriation basis, the sale proceeds shall be credited to NRO account. The amount invested under the scheme and the capital appreciation thereon will not be allowed to be repatriated abroad.

On repatriation basis An NRI can purchase on repatriation basis, without limit, government dated securities (other than...
bearer securities) or treasury bills or units of domestic mutual funds; bonds issued by a public sector undertaking (PSU) in India and shares in public sector enterprises being disinvested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

Foreign investment An NRI can also invest in securities of India through the FDI route or the Portfolio Investment Scheme.

FDI route Types of capital FDI is direct investment in capital instruments of Indian companies or a share in a partnership firm. The FDI Policy defines capital as:

(a) equity shares;
(b) compulsorily and mandatorily convertible preference shares; and
(c) compulsorily and mandatorily convertible debentures.

Convertible instruments are those that can be converted to equity shares. Warrants and partly-paid shares are not considered as capital. Such instruments can only be issued under the approval route of Reserve Bank (the approval route). Issue of other types of preference shares such as, non convertible, optionally convertible or partially convertible must conform to the rules and regulations applicable to external commercial borrowings (ECB). These include rules regarding eligible borrowers, recognised lenders, amount and maturity, end-use stipulations, etc.

Entities Indian companies including those which are micro and small enterprises can issue capital against FDI. An NRI or a person of Indian origin can invest in a partnership firm on a non-repatriation basis subject to certain conditions laid down in Para 3.3.2 of the FDI Policy. NRIs and PIOs that wish to invest on a repatriation basis and any entity other than an NRI or PIO can invest in partnership firms only under the approval route. The exceptions to such investment are concerns involved in any agricultural/plantation activity or real estate business (dealing in land to make profit) or print media.

Sectoral limitation The foreign investment regulations also specify certain prohibited sectors into which NRI investment is not possible.

Indirect foreign investment Also of note is the method to calculate indirect foreign investment. For the purposes of computing indirect foreign investment, “foreign investment” has been widely defined to include NRI investment under the FDI route and the PIS route.

Computation? 
(a) Direct investment—All direct investment by a non-resident entity in an Indian company would form part of foreign investment. A non resident entity is a “person resident outside India” as defined in FEMA.
(b) Indirect investment—Indirect investment involves two tiers. The non-resident entity invests in the investing company (investing company) which then makes a downstream investment in the investee company (investee company). The issue is whether such investments in the investee company would be indirect foreign investment taking into consideration the foreign investment at the investing company level and upwards. To make this determination, the meaning of ownership and control in the FDI policy is important. “Owned” refers to the beneficial ownership of more than 50% of the equity interest of the company. “Control” refers to the power to appoint majority of the Directors of the company. There are two scenarios:

Entities (i) The investing company is Indian owned and controlled. The investing company is Indian owned and controlled if the investing company is owned and controlled by resident Indian citizens and/or Indian companies which are owned and controlled ultimately by resident Indian citizens. A resident Indian citizen is a “person resident in India” under FEMA read with the Indian Citizenship Act;
(ii) Any investing company not falling under (i) above.

Computation For (i) above, the investment by the investing company in the investee company would not be indirect foreign investment for the investee company.
For (ii) above, the entire investment by the investing company in the investee company would be indirect foreign investment for the investee company except where the investee is a wholly owned subsidiary of the investing company. In such a case, the same proportion of foreign investment as exists at the investing company level would be the indirect foreign investment at investee company level.
Thus, downstream investment by an Indian company owned or controlled by NRIs would be foreign investment and must follow the foreign investment regulations.
NRI investment is also subject to pricing and reporting requirements.

Pricing The price of shares issued to non-residents must not be less than:
(a) the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed;
(b) the fair value of shares done by a SEBI registered Category I Merchant Banker or Chartered Accountant as per the
discounted free cash flow method (DCF) for unlisted companies;
(c) the price as applicable to transfer of shares from resident to non resident as per the pricing guidelines laid down by
RBI from time to time, where the issue of shares is on preferential allotment.
For convertible instruments, a conversion formula is permitted provided the pricing guidelines outlined above are met as
the minimum floor price at the time of issue of such instruments.

Reporting NRI investment must be reported to Reserve Bank in Form FC-GPR by the Indian investee company.

Transfer of shares
Sale From To Regulatory position NRI Person resident in India Pricing and reporting NRI Person resident outside India Reserve Bank approval NRI NRI General permission Person resident in India NRI Pricing and reporting Person resident outside India NRI General permission Pricing guidelines Transfer from resident to non-resident must conform to the following guidelines:
(a) for listed companies, the price must be in accordance with the SEBI guidelines for preferential allotment;
(b) for unlisted companies, the price must not be less than the fair value to be determined by a SEBI registered Category I Merchant Banker or a Chartered Account as per the DCF method.
Transfer from non-resident to resident must be at a price which is not more than the price above.

Portfolio Investment Scheme (PIS)
- NRIs can purchase/sell shares/convertible debentures of listed Indian companies on recognised stock exchanges
under the Portfolio Investment Scheme (PIS). For this purpose, the NRI has to apply to a designated branch of a bank,
which deals in portfolio investment. All sale/purchase transactions are to be routed through the designated branch in
India.
- NRIs can invest through designated authorised dealers, on repatriation and non-repatriation basis under PIS route up
to 5% of the paid-up capital/paid-up value of each series of debentures of listed Indian companies. The aggregate paid-
up value of shares/convertible debentures purchased by all NRIs cannot exceed 10% of the paid-up capital of the
corporation/paid-up value of each series of debentures of the company. This ceiling can however be enhanced up to
24% if the company passes a special resolution in general meeting.
- NRIs are not permitted to short sell.
- Payment for purchase of shares and/or debentures on repatriation basis has to be made by way of inward remittances
of foreign exchange through normal banking channels or out of funds held in NRE/FCNR-B account maintained in India.
If the shares are purchased on non-repatriation basis, the NRIs can also utilise their funds in the NRO account in addition
to the other permitted account uses.
- Shares purchased by NRIs on the stock exchange under PIS cannot be transferred by way of sale under private
arrangement or by way of gift (except by NRIs to their relatives as defined in the Companies Act, 1956 or to a charitable
trust duly registered under the laws in India) to a person resident in India without prior approval of Reserve Bank.
- NRIs are allowed to invest in exchange traded derivative contracts approved by the Securities Exchange Board of India
(SEBI) from time to time out of rupee funds held in India on non-repatriation basis, subject to limits prescribed by SEBI.
Conclusion NRIs have a special status under Indian foreign investment laws. If they invest on a non-repatriation basis
there are very few checks on such investment. If they invest on a repatriation basis they must follow the norms laid down
for FDI and PIS. Ambiguities remain in cases where an NRI wishes to transfer shares to a non-resident and for certain
gifts of shares. For reasons outlined in the preceding sections of this article, it may be best to seek Reserve Bank
approval for such transactions to avoid any issues arising from the fact that these transactions are on the capital account.

- The conditions are:
(a) The investment must be by inward remittance or out of NRE/FCNR(B)/NRO account maintained with authorised
dealers/authorised banks.
(b) The firm of proprietary concern is not engaged in any agricultural/plantation or real estate business or print media.
- Retail trading (except single brand product); atomic energy; or lottery business; or gambling and betting; or agriculture
(excluding floriculture, horticulture, development of seeds, animal husbandry, pisciculture and cultivation of vegetables,
mushrooms, etc. under controlled conditions and services related to agro and allied sectors) and plantations (other than
tea plantations); or business of chit fund; or nidhi company; or trading in transferable development rights (TDR); or
activities/sectors not opened to private sector investment (including atomic energy and railway transport (other than mass rapid transport system); or manufacture of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.