



CA Vijay Gupta

# Definition of NRIs / PIOs / OCIs under various FEMA Regulations and Case laws under FEMA and Income Tax

## Part A: Under FEMA

### 1. Overview

1.1 The terms Non-Resident Indian ('NRI') / 'Person of Indian origin' ('PIO') / Overseas Citizen of India ('OCI') are specific to the statute to which it / these are to be applied/ referred to. This write-up discusses these terms as applied/ referred to under various Regulations/ Rules [i.e., notifications as to the Regulations issued by Reserve Bank of India ('RBI') under section 47 of Foreign Exchange Management Act, 1999 ('FEMA'), and notifications as to the Rules issued by the Central Government<sup>1</sup> under section 46 of FEMA]; and for limited purpose under the Income-tax Act, 1961.

1.2 These terms are not defined in FEMA; but have been specifically defined / referred to for its application in the relevant Regulation(s).

### 2.1 Definitions

2.1.1 Under FEMA, a "person resident outside India"<sup>2</sup> means a person who is not resident in India<sup>3</sup>. A "person resident outside India" is also referred to as 'Non-Resident' from FEMA perspective. Like under FEMA 20(R)<sup>4</sup>, NRI means an individual<sup>5</sup> resident outside India who is citizen of India<sup>6</sup>.

2.1.2 Under FEMA, a 'Person of Indian Origin' ('PIO') means a person resident outside India who is not a citizen of India, and satisfying other prescribed conditions mentioned in the relevant Regulation for being eligible as a PIO.

2.1.3 Under FEMA, an 'Overseas Citizen of India' ('OCI') means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.

1 As per the Allocation of Business Rules, the Department of Economic Affairs, Ministry of Finance administers FEMA, 1999

2 Section 2(w) of FEMA

3 Section 2(w) of FEMA

4 Section 2 (xxxv) of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017

5 Section 2 (u) of FEMA: The definition of "Person" includes an individual.

6 Under the Citizenship Act, 1955

2.1.4 PIO is no longer a separate category under certain FEMA Regulations viz., FEMA 20(R)<sup>7</sup> and FEMA 21(R)<sup>8</sup>] and has been subsumed to say so as OCI. However, PIO continues to be specifically defined and referred to in FEMA Regulations viz. FEMA 4<sup>9</sup>, FEMA 5(R)<sup>10</sup> ad FEMA 13(R)<sup>11</sup>].

## 2.2 Decoding of definitions

2.2.1 In all these three terms/categories (NRI, PIO & OCI), the important condition is that the individual is a 'person resident outside India'. Under FEMA, a "person resident outside India" means a person who is not resident in India<sup>12</sup>. A person resident in India is specifically defined under FEMA; which definition becomes of paramount importance as in all the three categories on non-residents, each of the specific one must fall outside the definition of 'person resident in India' to qualify as 'person resident outside India'.

2.2.2 Under FEMA, a "person resident in India"<sup>13+14</sup>, in the context of an individual, means: 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.

2.2.3 Under FEMA, to be treated as a person resident in India, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the preceding financial year – April to March) but has to also comply with the condition of the purpose/ intention of

7 FEMA (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 effective from 7th November, 2017

8 FEMA (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 effective from 26th March, 2018

9 FEMA (Borrowing and Lending in Rupees) Regulations, 2000 effective from 1st June, 2000

10 FEMA (Deposit) Regulations, 2016 effective from 1st April, 2016

11 FEMA (Remittance of Assets) Regulations, 2016 effective from 1st April, 2016

12 Section 2(w) of FEMA

13 Section 2(v) of FEMA

14 As observed by the Division Bench of Karnataka High Court in RBI vs. Jacqueline Chandani [1996] 86 Company Cases 231 that dictionary meaning of resident is not relevant for ascertaining the status under FERA.

stay<sup>15</sup>. Citizenship is not the criteria under FEMA to determine the status of a 'Person resident outside India' / 'Non-Resident'.

2.2.4 If one goes out of India or who stays outside India for circumstances/reasons mentioned in 'A' above, he becomes Non-Resident under FEMA immediately. The period of stay in India in current financial year or in the preceding financial year has no bearing on such a status. He would be outside the ambit of FEMA as far as overseas transactions are concerned.

2.2.5 On same principle, if an individual returns to India for circumstances/reasons mentioned in 'B' above, he becomes resident in India but subject to complying with the condition of period of stay being more than 182 days during the preceding financial year. After enactment of FEMA, the feature of duration of the physical stay of the person has become conducive criteria and intention is no longer remain the primary factor for determination of "person resident in India"<sup>16</sup>.

2.2.6 Under Income-tax Act, presence/ stay in India is important for determination of residential status. It merely considers number of days of stay in India. Under FEMA, circumstances/reasons mentioned in 'A' / 'B' above are important.

2.2.7 Under Income-tax Act, one is either a resident or a non-resident for the entire

previous/financial year relevant to assessment year. One cannot be a resident for a part of the year, and non-resident for rest of the year. Under FEMA, status is determined on the date when one applies the provisions of FEMA. Residential status may be different under FEMA and under Income-tax Act for one or more financial year(s).

2.2.8 Under FEMA the threshold is *more than 182 days* during the course of the preceding financial year to determine status for a person residing in India. Whereas, under Income-tax Act, the threshold is *less than 182 days* in India for a citizen of India, who leaves India in any previous year for the purposes of employment outside India to be treated as resident in India – subject to satisfying other prescribed criteria. Accordingly, a person staying in India for exactly 182 days will be considered as a Resident under Income-tax Act; but will be considered as Non-Resident under FEMA.

2.2.9 If NRI returns to stay in India for an 'uncertain period' he will become a person resident in India. In order to ascertain intention, what is required to be seen is the conduct of the person and the surrounding circumstances<sup>17</sup>. The type of visa granted should clearly indicate the intention to stay in India for an uncertain period to determine his residential status under FEMA.

2.2.10 Students going abroad for studies are treated as NRIs and are eligible for all the facilities available to NRIs under FEMA<sup>18</sup>.

<sup>15</sup> Press Release of Government of India, Ministry of Finance dated February 1, 2009 - Government's advice on acquiring land by persons residing outside India – "A foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business / vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as he would be a 'person resident in India' as per section 2(v) of FEMA, 1999. To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him to clearly indicate the intention to stay in India for an uncertain period. In this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa".

<sup>16</sup> Kishore D. Shroff vs. Director, Enforcement Directorate - [2006] 70 SCL 290 (ATFFE - NEW DELHI)

<sup>17</sup> Basant Kumar Sharma vs. Government of India dated February 7, 2013

<sup>18</sup> A.P. (DIR Series) Circular No. 45 dated December 8, 2003

## 2.3 Case Laws

### 2.3.1 Uncertain period

*Major R. P. Verma vs. Union of India [1998] 17 SCL 35 (DELHI)*

The question whether a person has gone abroad to stay for an uncertain period would necessarily depend upon the facts and circumstances of each case. However, the broad proposition that if a person goes abroad but at that time he does not know for how long he is going to stay abroad, that would indicate his intention to stay outside India for an uncertain period, would not be acceptable. This fact by itself would not show intention to go outside India for an uncertain period. To illustrate, one may go abroad either on the business trip or as a tourist but for one or another reason he is uncertain about the period of stay abroad and consequently uncertain about the date of his return, but that by itself would not mean that such a person is a 'person resident outside India'. Likewise, a citizen of India may go abroad to look after his ailing friend or relation with the intention to return to India only after recovery of such ailing person and in fact returns, to India after three months when that person recovers, these persons are not entitled to the status of NRI. The period for which the visa may be issued by the country to be visited is also not relevant. A person may be granted visa for a period of 5 years and when he leaves he may be uncertain about the period of stay abroad but from that itself it is not possible to reach the conclusion that such a person is a 'person resident outside India'.

**Facts:** The appellant is a citizen of India. His mother was a permanent resident of U.K. She had acquired some assets including, shares in British companies. She died in U.K. on 13-5-1995. The appellant had gone to London to look-after his mother when she was ailing. The brother of the appellant has also died and the appellant is the sole inheritor of the assets left behind by his mother. The appellant had stayed in U.K. for about seven and half months before returning to India. For some period the appellant was

granted extension of time to hold assets abroad. The appellant has, however, not been granted permission by the RBI to permanently continue to maintain and hold the assets left behind by his mother in England and is required to sell the said assets and repatriate the sale proceeds to India through banking channel. According to respondents, to acquire the status of NRI one year continuous stay abroad is necessary. The appellant beside seeking declaration to be treated as NRI for the limited purpose of holding the assets acquired by him by way of inheritance in UK, has in the alternative, sought the waiver of the condition of one year stay abroad. The appellant has also challenged notification dated 17-7-1992 issued by respondents under section 14 of the Foreign Exchange Regulation Act, 1973 to the extent it imposes the condition of continuous stay abroad for a period of one year, to acquire the status of NRI.

### 2.3.2 Intention to stay

*Reserve Bank of India vs. Jacqueline Chandani – [1996] 86 COMP CASE 231 (Karnataka)*

If in a given case, a person who is not a citizen of India has come to stay with his or her spouse only for a day or two, it cannot be said that he or she is a person resident in India.

If the intention of the person to stay in India is for an uncertain period, though by the visa that is issued in his favour his stay is permitted only for a certain period, yet it would be a case which falls within the purview of the person who has come with the intention to stay in India for an uncertain period.

**Facts:** The petitioner was a U.S. citizen and her husband was an Indian citizen staying in India and the visa for the petitioner was being extended from time-to-time right from 1967. Prior to her marriage, all her savings from her earnings had been deposited from time-to-time in the bank account maintained in U.S.A., and she continued to operate the same even after her marriage. She continued to have her U.S.A. citizenship even after her marriage and she

registered herself as a foreigner in India under the Foreigner's Act and her visa was being extended from time-to-time. The total period of stay of the petitioner in India during 1967 to 1982 was about thirteen years, whereas her stay outside India was about 17½ months.

### 2.3.3 The term 'stay' – a short or casual stay

*K. Ramullan vs. Commissioner of Income-tax - [2000] 112 Taxman 57 (SC)*

The term 'stay' does not denote a short or casual stay; it has to be a stay for taking up employment or carrying on business or a vocation or with the intention of remaining in India for an uncertain period. A mere casual stay or stay for a short period, it would defeat the purpose of having Non-Resident (External) Account. This being the position, the appellant cannot be treated as a person resident in India during the relevant period. Consequently, he will be a person resident outside India within the meaning of section 2(q).

**Facts:** The assessee, though of Indian origin, had settled down in Malaysia in 1941 and acquired Malaysian citizenship. His wife and children resided in India and he owned some agricultural land, house property and investments in banks in India. For the assessment years 1983-84 and 1984-85, he claimed that the interest accrued on credit balance in his non-resident (external) account could not be included in computing his total income in view of the provisions of section 10(4A). During the period 13-6-1982 to 14-4-1985, he had stayed with his wife in India for undergoing medical treatment.

## 2.4 Overseas citizen of India cardholder

2.4.1 "Overseas citizen of India cardholder"<sup>19</sup> means a person registered as an Overseas Citizen of India Cardholder by the Central Government under section 7A of the Citizenship Act, 1955.

2.4.2 Section 7A provides for registration of Overseas Citizen of India Cardholder<sup>20</sup> by:

- (a) any person of full age and capacity, -
  - (i) who is a citizen of another country, but was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26-1-1950; or
  - (ii) who is a citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution Citizenship Act, 1955; or
  - (iii) who is a citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947; or
  - (iv) who is a child or a grandchild or a great grandchild of such a citizen; or
- (b) a person, who is a minor child of a person mentioned in clause (a); or
- (c) a person, who is a minor child, and whose both parents are citizens of India or one of the parents is a citizen of India; or
- (d) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section. For the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India.

2.4.3 No person, who or either of whose parents or grandparents or great grandparents is or had

<sup>19</sup> Section 2(ee) of the Citizenship Act, 1955

<sup>20</sup> Section 7A of the Citizenship Act, 1955. Became operational from 2-12-2005

been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this subsection.

2.4.4 The existing Persons of Indian Origin (PIO) Cardholders<sup>21</sup> are deemed to be Overseas Citizens of India (OCI) Cardholders. *Vide* Government of India's Gazette Notification No.25024/9/2014-F.I dated 9-1-2015; the PIO Scheme has been withdrawn. It is intimated that *vide* Gazette Notification No.26011/01/2014-IC.I dated 9-1-2015, all PIO Cards issued till 9-1-2015 are deemed to be OCI Card. Consequently, no PIO Card will be issued w.e.f. 9-1-2015.

2.4.5 OCI cannot be equated to Dual Citizenship<sup>22</sup>.

2.4.6 Notwithstanding anything contained in any other law for the time being in force, OCI Cardholder shall be entitled to the rights as the Central Government has by notification specified<sup>23</sup>:

- (a) grant of multiple entry lifelong visa for visiting India for any purpose;
- (b) exemption from registration with Foreign Regional Registration Officer or Foreign Registration Officer for any length of stay in India;
- (c) parity with NRIs in respect of all facilities available to them in economic, financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties;
- (d) shall be treated at par with NRIs in the matter of inter-country adoption of Indian children;

- (e) shall be treated at par with resident Indian nationals in the matter of tariffs in air fares in domestic sectors in India;
- (f) shall be charged the same entry fee as domestic Indian visitors to visit national parks and wildlife sanctuaries in India;
- (g) parity with NRI in respect of –
  - (i) entry fees to be charged for visiting the national monuments, historical sites, and museums in India;
  - (ii) Pursuing the following professions in India, in pursuance of the provisions contained in the relevant Acts, namely:- i) doctors, dentists, nurses and pharmacists; ii) advocates; iii) architects; iv) chartered accountants; and
- (h) to appear for the All India Pre-Medical test for such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.

2.4.7 OCI Cardholder shall not be entitled to the rights conferred on a citizen of India<sup>24</sup> -

- (a) under article 16 of the Constitution with regard to equality of opportunity in matters of public employment;
- (b) under article 58 of the Constitution for election as President;
- (c) under article 66 of the Constitution for election as Vice-President;
- (d) under article 124 of the Constitution for appointment as a Judge of the Supreme Court;
- (e) under article 217 of the Constitution for appointment as a Judge of the High Court;

21 "Persons of Indian Origin Cardholders" means the persons registered as such under notification number 26011/4/98 F.I., dated the 19 August, 2002, issued by the Central Government in this regard.

22 G. Venkatesh vs. Bridge Federation of India [2015 SCC OnLine Mad 10335 / (2015) 4 LW 170 / (2015) 4 CTC 472]

23 Section 7B(1) of the Citizenship Act, 1955

24 Section 7B(2) of the Citizenship Act, 1955

- (f) under section 16 of the Representation of the People Act, 1950 in regard to registration as a voter;
- (g) under sections 3 and 4 of the Representation of the People Act, 1951 with regard to the eligibility for being a member of the House of the People or of the Council of States, as the case may be;
- (h) under sections 5, 5A and section 6 of the Representation of the People Act, 1951 with regard to the eligibility for being a member of the Legislative Assembly or the Legislative Council, as the case may be, of a State; and
- (i) for appointment to public services and posts in connection with affairs of the Union or of any State except for appointment in such services and posts as the Central Government may, by special order in that behalf, specify.

2.4.8 As per Hon'ble Supreme Court<sup>25</sup>, section 7A of the Citizenship Act, 1955 created as it were a new species called the OCI which appear to be a sub-species of PIOs although Section 7A itself does not use the word PIO. It calls for a greater generational proximity of the OCI with the country of origin than the PIO status does. While the statutory provision governing an OCI can be traced to Article 11 of the Constitution, there is no corresponding statutory status accorded to the PIO. While the above broad features distinguish an OCI from a PIO, the rights that go with either status are dependent on the policy of the Government of India. Thus the gaining of the status of an OCI or a PIO does not guarantee parity of treatment with Indian passport holders. The classification of PIOs and the sub-classification of OCIs is based on intelligible differentia justifying a different treatment *vis-a-vis* Indian passport holders. The very wording of Section 7B of the Act indicates that what is meant to be granted to OCIs is a limited right. Secondly, it is a statutory right and not a fundamental or Constitutional right.

### 3. Reference of NRI, PIO & OCI under specified FEMA Regulations

3.1 NRI, PIO & OCI have been referred to in the following FEMA Regulations:

Regulation	NRI	PIO	OCI
	Whether referred to?		
FEM (Deposit) Regulations, 2016 - <b>FEMA 5(R)</b> :			
- Regulation 2(vi)	Y	-	-
- Regulation 2(x)	-	Y	-
- Explanation to Regulation 2(x)	-	-	Y
FEM (Borrowing and Lending in Rupees) Regulations, 2000 - <b>FEMA 4</b> - Regulation 2(b)	Y	Y	-
- Same meaning as defined under FEMA 5(R)			
FEM (Remittance of Assets) Regulations, 2016 - <b>FEMA 13(R)</b> :			
- Regulation 2 (iii)	Y	-	-
- Regulation 2 (iv)	-	Y	-
- Same meanings as defined under FEMA 5(R)			

<sup>25</sup> Karm Kumar vs. Union of India and Ors. [(2010) SCC OnLine Del 2579/ (2010) 172 DLT 521]

Regulation	NRI	PIO	OCI
FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017* <b>effective from 7-11-2017 - FEMA 20(R):</b> - Regulation 2 (xxxv) - Regulation 2 (xxxvi)  * Under Schedule 4 of FEMA 20(R) under Regulation 5(4) – relating to Purchase / sale of capital instruments or convertible notes or units or contribution to the capital of an LLP on non-repatriation basis, a Non-Resident Indian (NRI) or an Overseas Citizen of India (OCI), includes a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs.	Y –	– –	– Y
FEM (Investment in Firm or Proprietary Concern in India) Regulations, 2000 – <b>FEMA 24 - before it was superseded by FEMA 20(R) on 7-11-2017:</b> - Regulation 2(iv) - Regulation 2 (vi) <sup>26</sup>	Y –	– Y	– –
FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 - <b>FEMA 20 before 7-11-2017</b> but w.e.f. 15-2-2016: - Regulation 2(viia)	Y	–	Y
FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 <b>effective from 26-3-2018 - FEMA 21(R):</b> - Regulation 2(c) - Regulation 2(d)	Y –	– –	– Y
FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 - <b>FEMA 21 - before 26-3-2018:</b> - Regulation 2(c) <sup>27</sup>	–	Y	–
FEM (Permissible Capital Account Transactions) Regulations, 2000 – <b>FEMA 1 – Regulation 4: Explanation (ii)</b>	Y	–	–

26 'Person of Indian Origin' means a citizen of any country other than Bangladesh or Pakistan or Sri Lanka, if (a) he at any time held Indian passport; or (b) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or (c) the person is a spouse of an Indian citizen or a person referred to in sub-clause (a) or (b). This definition was valid before 7-11-2017 when FEMA 24 was superseded by FEMA 20(R) with effect from 7-11-2017.

27 'A person of Indian origin' means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan), who (i) at any time, held Indian passport or (ii) who or either of whose father or mother or whose grandfather or grandmother was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955). This definition was valid before 26-3-2018 when FEMA 21 was superseded by FEMA 21(R) with effect from 26-3-2018.



3.2 Categorisation of a 'Person resident outside India' / 'Non-Resident' from FEMA perspective as an NRI, PIO & OCI is necessary as different treatments/ exemptions/ restrictions/ investment facilities including in share & securities/ acquisition of immovable properties in India/ borrowings/ lending/ deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person/ loans/ remittance of assets etc., are mentioned in the definitions applicable for the subsisting FEMA Regulations - viz. (i) FEM (Borrowing and Lending in Rupees) Regulations, 2000 - FEMA 4; (ii) FEM (Deposit) Regulations, 2016 - FEMA 5(R); (iii) FEM (Remittance of Assets) Regulations, 2016 - FEMA 13(R); (iv) FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 - FEMA 20(R); and (v) FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 - FEMA 21(R).

3.3 Under FEMA 5(R) [same meanings assigned under FEMA 4 and FEMA 13(R)], 'Non-Resident Indian' ('NRI')<sup>28</sup> means a person resident outside India who is a citizen of India. 'Person of Indian Origin' ('PIO')<sup>29</sup> means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

- (a) Who was a citizen by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or

- (b) Who belonged to a territory that became part of India after the 15th day of August, 1947; or
- (c) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- (d) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

Explanation: For the purpose of this sub-regulation, the expression 'Person of Indian Origin' includes an 'Overseas Citizen of India' cardholder within the meaning of section 7(A) of the Citizenship Act, 1955 of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

3.4 Under FEMA 20(R), and FEMA 21(R), 'Non-Resident Indian' ('NRI')<sup>30, 31</sup> means an individual resident outside India who is citizen of India. 'Overseas Citizen of India' ('OCI')<sup>32, 33</sup>, means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955. The existing Persons of Indian Origin (PIO) Cardholders<sup>34</sup> are deemed to be Overseas Citizens of India (OCI) Cardholders till its expiry.

3.5 Under all the above referred five FEMA Regulations [viz., FEMA 4, FEMA 5(R), FEMA 13(R), FEMA 20(R), and FEMA 21(R)], the definition of NRI is similarly defined. The definition of PIO has been aligned to the

28 Regulation 2(vi) of FEMA 5(R)

29 Regulation 2(x) of FEMA 5(R)

30 Regulation 2 (xxxv) of FEMA 20(R). Under Schedule 4 of FEMA 20(R) under Regulation 5(4) – relating to Purchase/ sale of capital instruments or convertible notes or units or contribution to the capital of an LLP on non-repatriation basis, a Non-Resident Indian (NRI) or an Overseas Citizen of India (OCI), includes a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs.

31 Regulation 2(c) of FEMA 21(R)

32 Regulation 2 (xxxvi) of FEMA 20(R)

33 Regulation 2(d) of FEMA 21(R)

34 "Persons of Indian Origin Cardholders" means the persons registered as such under notification number 26011/4/98 F.I., dated the 19th August, 2002, issued by the Central Government in this regard.

definition similar to an OCI under the Citizenship Act, 1955. The citizens of Pakistan and Bangladesh are not eligible to get OCI registration. Earlier, before FEMA 21 was superseded by FEMA 21(R) effective from 26-3-2018, the citizens of Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan were not eligible category as PIO. Similarly, before FEMA 24 was superseded by FEMA 20(R) effective from 7-11-2017, the citizens of Sri Lanka were not eligible category as PIO. The subsisting FEMA 21(R), has provided for specified restrictions etc., for persons from Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) in relation to acquisition of Immovable Property for carrying on a permitted activity; acquisition by a Long-Term Visa holder; and prohibition on acquisition or transfer of immovable property in India by citizens of certain countries etc.

3.6 Under FEMA 20(R), and FEMA 21(R) Regulations, to avail exemptions / restrictions / investment facilities including in share & securities/ acquisition of immovable properties in India etc., the individual must have OCI Card; otherwise he/she will not be eligible for categorisation as OCI under these Regulations.

3.7 Under FEMA 5(R), FEMA 4 and FEMA 13(R) Regulations, to avail exemptions / borrowings / lending / deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person / loans / remittance of assets etc., the individual need not have OCI Card; as otherwise he/she will be eligible for categorisation as PIO under these Regulations. Of course, 'Person of Indian Origin' under these Regulations includes an 'Overseas Citizen of India' cardholder.

## Part B : Under Income-tax Act, 1961

### 1. Definition of NRI/PIO

1.1 Under the Income-tax Act, 1961 ('IT Act'), the term 'Non-Resident Indian' ('NRI') has been defined under Chapter XII-A (special provisions relating to certain incomes of non-residents), u/s 115C(e), as - "'Non-Resident Indian' means an individual, being a citizen of India or a person of Indian origin who is not a 'resident'"<sup>35</sup>.

*Explanation* – A person shall be deemed to be of Indian origin ('PIO') if he, or either of his parents or any of his grand-parents, was born in undivided India.

1.2 Under IT Act, three generations up to grand-parents are considered to determine status as PIO. Whereas, under FEMA, both for determining status of PIO & OCI, four generations up to great grand-parents are considered.

1.3 Wherever in the IT Act, any reference to NRI/PIO has been made, the definitions u/s. 115C(e) have been referred to e.g., in section 196A (Income in respect of units of non-residents); in Section 204 (Meaning of "person responsible for paying" under Chapter XVII – collection & recovery of tax).

### 2. Residential Status

2.1 Under section 6 (Residence in India) also, in the Explanation 1 – in the case of an individual, being a person of Indian origin, reference has been made to the meaning as per Explanation to section 115C(e).

2.2 Matrix for determining residential status of an individual under IT Act (which is different from the criteria mentioned in FEMA):

35 Resident as defined u/s. Sec 2(42) of the Income-tax Act, 1961

<b>Residential Status of an Individual<sup>36</sup> under Income-tax Act, 1961</b>	
<b>“RESIDENT IN INDIA”</b>	<b>“NON-RESIDENT IN INDIA”</b>
<b>Basic conditions</b>	
An individual is said to be <b>resident in India<sup>37</sup></b> in any previous year, if he satisfies <b>any one of A or B:</b>	An individual is said to be <b>non-resident<sup>38</sup> in India</b> in any previous year, if he satisfies <b>both of A and B:</b>
A. Is in India in that year for a period or periods amounting in all to 182 days or more <sup>39</sup> ,	A. Is in India in that year for a period or periods amounting in all to less than 182 days,
<b>or</b>	<b>and</b>
B. Having within the four years preceding that year been in India for a period or periods amounting in all to 365 days or more, is in India for a period or periods amounting in all to 60 days** or more in that year <sup>40</sup> .	B. Having within the four years preceding that year been in India for a period or periods amounting in all to less than 365 days, is in India for a period or periods amounting in all to less than 60 days*** in that year.
** Words "60 days" to read as "182 days" <sup>41</sup> - being a <b>citizen of India</b> , who leaves <b>India in any previous year for the purposes of employment</b> outside India, or as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 <sup>42</sup> .	
This relaxation is available only for a citizen of India and not for a <b>person of Indian origin</b> .	
*** Words "60 days" to read as "182 days" - being a <b>citizen of India, or a person of Indian origin</b> <sup>43</sup> 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 <sup>44</sup> .	
This relaxation is available both for a citizen of India and also for a person of Indian origin.	

36 Sec 2(30) - "Person" includes (i) an individual

37 Sec 2(42)

38 Sec 2(30)

39 Sec 6(1)(a)

40 Sec 6(1)(c)

41 Memo explaining the provisions of Finance Bill 1994: The NRIs who have made investments in India, find it necessary to visit India frequently and stay here for the proper supervision and control of their investments. The Bill, therefore, seeks to amend clause (b) of the Explanation to section 6(1)(c) of the Income-tax Act, in order to extend the period of stay in India in the case of the aforesaid individuals from one hundred and fifty days to one hundred and eighty two days, for being treated as resident in India, in the previous year in which they visit India. Thus, such non-resident Indians would not lose their 'non-resident' status if their stay in India, during their visits, is up to one hundred and eighty one days in a previous year.

42 Explanation (a) to Sec 6(1)(c)

43 A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

44 Explanation (b) to Sec 6(1)(c)

<b>If RESIDENT IN INDIA, then find out whether:</b>
<b>Additional conditions (not relevant for Non-Resident)</b>
<b>"RESIDENT AND NOT ORDINARILY RESIDENT" IN INDIA<sup>45</sup> ('RNOR')</b>
Non-resident in India in 9 out of the 10 previous years preceding that year,  <b>or</b>  has during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to, 729 days or less.
<b>Alternatively</b>
<b>"RESIDENT AND ORDINARILY RESIDENT" IN INDIA<sup>46</sup> ('ROR')</b>
Resident in India in at least 2 out of the 10 previous years preceding that year,  <b>and</b>  has during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to, 730 days or more.
An individual becomes ROR if he satisfies at least one basic condition and both the additional conditions.

### 3. Specific provisions where FEMA referred

3.1 Section 10(4)(ii) of the IT Act provides that 'in the case of an individual, any income by way of interest on moneys standing to his credit in a Non-Resident (External) Account ('NRE account') in any bank in India in accordance with the Foreign Exchange Management Act, 1999<sup>47</sup>, and the rules made thereunder' shall be exempt from income-tax in India. As per Regulation 2(vii) of Foreign Exchange Management (Deposit) Regulations, 2016 - 'NRE account' means a Non-Resident External account referred to in clause (i) of sub-regulation (1)

of Regulation 5(1)(i) which provides that an authorised dealer in India may accept deposit under the Non-Resident (External) Account Scheme (NRE account), specified in Schedule 1, from a non-resident Indian. Non-resident Indians (NRIs) and Person of Indian Origin (PIOs) are eligible/permitted to open and maintain NRE accounts<sup>48</sup> with authorised dealers and with banks (including co-operative banks) authorised by the Reserve Bank to maintain such accounts.

3.2 Section 10(15)(iv)(fa) of the IT Act provides that interest payable by a scheduled bank to a non-resident or to a person who is not ordinarily resident within the meaning of section 6(6) on

<sup>45</sup> Sec 6(6)(a)

<sup>46</sup> Sec 6(1)

<sup>47</sup> Rachpal Singh vs. ITO, ITAT Amritsar (SMC) – [2005] 94 ITD 79 – For the purpose of examining whether the person is entitled to exemption u/s 10(4), one has to see the status under FERA (now FEMA) and not under the Income-tax Act.

<sup>48</sup> NRE accounts should be redesignated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts (if the account holder is eligible for maintaining RFC account) at the option of the account holder immediately upon the return of the account holder to India for taking up employment or for carrying on business or vocation or for any other purpose indicating intention to stay in India for an uncertain period. Where the account holder is only on a short visit to India, the account may continue to be treated as NRE account even during his stay in India.

deposits in foreign currency [FCNR(B)<sup>49</sup> and RFC account<sup>50</sup>] where the acceptance of such deposits by the bank is approved by the Reserve Bank of India shall be exempt from income-tax. As per Regulation 2(v) of Foreign Exchange Management (Deposit) Regulations, 2016 - 'FCNR(B) account' means a Foreign Currency Non-Resident (Bank) account referred to in clause (ii) of sub-regulation (1) of Regulation 5 - specified in Schedule 2. NRIs and PIOs are eligible to open and maintain these accounts with an authorised dealer.

## 4. Case Laws

### 4.1 Involuntary stay in India

*CIT vs. Suresh Nanda - [2015] 57 taxmann.com 448 (Delhi)*

Involuntary stay in India caused by unauthorised impounding of passport must be excluded for determining his residential status u/s. 6. Each case will have to be examined on its own merits in the light of facts & circumstances leading to 'involuntary' stay, if any, in India.

**Facts:** Assessee ad come to India on 28-9-2006. During the visit to India beginning 28-9-2006 that his passport was impounded by CBI. Further, the passport was released pursuant to Court orders, only on 21-9-2011. Thus, the assessee was in India continuously and uninterruptedly from 28-9-2006 to 21-9-2011. This would mean that he was on Indian soil for 185 days during the financial year 2006-07 (corresponding to assessment year 2007-08) and throughout

during financial year 2007-08 (corresponding to assessment year 2008-09). By above account, a strict interpretation and enforcement of the rule contained in section 6(1)(a) would render the assessee a resident. The plea raised, however, is that this would not be just or fair nor in consonance with the intention of the legislature.

**The Court observed** that the Income-tax Act leaves the choice to the citizen to be in India and be treated as a resident for purposes of taxation or be not in India so as to avail the status of a non-resident. The simple test the muster of which is to be passed is the minimum prescribed period of presence in India in a particular financial year. It naturally follows that the option to be in India, or the period for which an Indian citizen desired to be here is a matter of this discretion. Conversely put, presence in India against the will or without the consent of the citizen, should not ordinarily be counted adverse to his chosen course or interest, particularly if it is brought about under compulsion or, to put it simply, involuntarily.

### 4.2 Going abroad for the purpose of employment

*[2011] 198 Taxman 1 (Ker.) - O. Abdul Razak*

The court held that in our view, going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore means

<sup>49</sup> When an account holder becomes a person resident in India, deposits may be allowed to continue till maturity at the contracted rate of interest, if so desired by him. However, except the provisions relating to rate of interest and reserve requirements as applicable to FCNR(B) deposits, for all other purposes such deposits shall be treated as resident deposits from the date of return of the account holder to India. Authorised dealers should convert the FCNR(B) deposits on maturity into resident rupee deposit accounts or RFC account (if the depositor is eligible to open RFC account), at the option of the account holder and interest on the new deposit (rupee account or RFC account) shall be payable at the relevant rates applicable for such deposits.

<sup>50</sup> Regulation 4(B) of FEM (Foreign Currency Accounts by a person resident in India) Regulations, 2015 – FEMA 10(R): A person resident in India is permitted to open a RFC account with an AD bank in India out of foreign exchange received or acquired by him by converting assets which were acquired by him when he was a non-resident.

going abroad to take up employment or any a vocation as referred to in the Circular No. 346, dated 30-6-1982, which takes in self employment like business or profession taken up by the assessee abroad.

#### 4.3 'Visit to India'

Return to India after resigning job abroad is not 'visit to India' under *Explanation* (b) to sec. 6(1)(c). If a person returns to India after a long period of absence there is all the more reason he or she will like to go to visit relatives and friends in different places. Those activities are not necessarily indicators of a visit. When the applicant resigns from her employment in China, the reason for return to India does not seem to be only for a visit. In such circumstances it cannot be held that the applicant came to India only for a visit. – [2014] 362 ITR 38 (AAR New Delhi) - *Mrs. Smita Anand, China*.

#### 4.4 'Visit to India' / 'Visitor' / Work permit visa

[2003] 131 *Taxman* 477 (CAL.) - *Vijay Mallya vs. ACIT*

The court observed that relevant part of notice dated 30-11-1995 u/s. 142(1) read as: the 'visitor' as understood in a common parlance is a person who goes or comes to see (person or place) as act of friendship or on ceremony of for curiosity. Having accepted this definition of visitor it is very difficult to treat you as visitor to India and to apply *Explanation* (b) to section 6(1)(c) in your

case. You came to India for the purpose of your business for looking after your companies to attend meeting of Board of Directors to pursue or hobby of horse racing and breeding and other serious and profit motivated occupations. In view of this, you cannot be treated as a visitor.... Your indirect contention of having work permit visa and having an appointment offer in financial year 1989-90 is not going to alter the situation. Primarily because the job undertaken is an arrangement in the nature of disguise and is to hoodwink the provisions of Income-tax Act.

#### Part C : Conclusion

In conclusion, it is hoped that this write-up will provide an insight on terms NRI / PIO / OCI as defined under FEMA for different treatments/ exemptions / restrictions / investment facilities including in share & securities/ acquisition of immovable properties in India / borrowings / lending / deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person / loans / remittance of assets etc. mentioned in the definitions applicable for the FEMA Regulations.

With liberalisation of Foreign Exchange regulations (substantially amended / substituted / relaxed / simplified) specified investment opportunities / structuring options are now available to foreign investors defined as NRI / OCI.

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It is culture that withstands shocks, not a simple mass of knowledge. You can put a mass of knowledge into the world, but that will not do it much good. There must come culture into the blood.

— Swami Vivekananda