

Where any loss or damage is caused to numerous persons, one or more of such persons may make an application to the Commission on behalf of and for the benefit of interested persons.

Question 65] Mention briefly powers of the Competition Commission of India under the Competition Act, 2002.
CS (Inter) – June 2008 (3 Marks)

Ans.: Powers of Commission to regulate its own procedure are as follows [Section 36]:

- (1) **Power of Civil Court:** The Commission shall have the same powers as are vested in a Civil Court, while trying a suit, in respect of the following matters:
 - Summoning and enforcing the attendance of any person and examining him on oath
 - Requiring the discovery and production of documents
 - Receiving evidence on affidavit
 - Issuing commissions for the examination of witnesses or documents
 - Requisitioning any public record or document or copy from any office.
- (2) **Proceeding before the Commission is judicial proceeding:** Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of the Indian Penal Code and the Commission shall be deemed to be a Civil Court.
- (3) **Power to take help of expert:** The Commission may call upon experts from the field of economics, commerce, accountancy, international trade etc. to assist in the conduct of inquiry.
- (4) **Power to call records:** The Commission may direct any person:
 - To produce before the Director General or the Secretary or authorized officer books or other documents the examination of which may be required for the purposes of this Act.
 - To furnish information to the Director General or the Secretary or authorized officer as may be required for the purposes of this Act.

Question 66] Who can appear before Competition Commission to present a case?

Ans.: Appearance before Commission [Section 35]: A complainant or defendant or the Director General may either appear in person or authorize one or more **Chartered Accountants** or **Company Secretaries** or **Cost Accountants** or **Legal Practitioners** or any of his or its officers to present the case before the Commission.

Question 67] In proceeding before the Competition Commission of India involving two pharmaceutical companies, the plaintiff requested the presiding officer to call upon the services of experts from the pharmaceutical sector to determine the truth of the allegations levelled by it against the respondent. The respondent opposed the request on the ground that such action cannot be taken by the Competition Commission. You are required to state with reference to the provisions of the Competition Act, 2002, whether the contention of the respondent is tenable?

CA (Final) – Nov 2005 (5 Marks), May 2008 (3 Marks)

CA (Final) – Nov 2010 (4 Marks)

Ans.: As per Section 36, the Commission may call upon experts from the field of economics, commerce, accountancy, international trade to assist in the conduct of inquiry before it. Thus the contention of the respondent that services of experts cannot be taken is not tenable.

Question 68] One mistake was detected after passing of orders by the Commission under Competition Act, 2002. Whether such mistake can be rectified? If so, by whom and how?

CWA (Inter) – Dec 2008 (2 Marks)

Ans.: Rectification of orders [Section 38]: The Commission may amend any order passed by it with a view to rectify any mistake apparent from the record on its own motion. The Commission may make an

amendment of an order for rectifying apparent from record, which has been brought to its notice by any party to the order.

However, while rectifying any mistake apparent from the record, the Commission shall not amend substantive part of the order passed by it.

DIRECTOR GENERAL

Question 69] Discuss the provisions relating to appointment of Director General under the Competition Act, 2002.

Ans.: Appointment of Director-General [Section 16]:

- (1) The Central Government by notification appoints a Director General and Additional, Joint, Deputy or Assistant Directors General or other advisers, consultants or officers for the purposes of assisting the Commission in conducting inquiry and for performing other functions provided by or under this Act.
- (2) Every Additional, Joint, Deputy and Assistant Directors General or such other advisers, consultants and officers shall exercise his powers and discharge his functions subject to the general control, supervision and direction of the Director General.
- (3) The salary, allowances and other terms and conditions of service shall be such as may be prescribed.
- (4) The Director General etc. shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

Question 70] State the duties of Director General under the Competition Act, 2002.

CS (Inter) – Dec 2004 (5 Marks)

CS (Executive) – Dec 2013 (3 Marks)

Ans.: Duties of Director General [Section 41]: The Director General shall assist the Commission in investigating into any contravention of the provisions, rules or regulations made under the Act.

The Director General shall have all the powers of available to Commission u/s 36(2).

The provisions of the Companies Act shall apply to an investigation made by the Director General as they apply to an inspector appointed under that Act.

COMPETITION ADVOCACY

Question 71] Write a short note on: Competition Advocacy

CS (Inter) – Dec 2006 (3 Marks)

CS (Executive) – June 2013 (3 Marks)

Ans.: Competition Advocacy is one of the main pillars of modern competition law which aims at creating, expanding and strengthening awareness of competition in the market. Section 49 of the Competition Act, 2002 mandates the CCI to undertake advocacy for promoting competition. **Competition Advocacy [Section 49]:** This Section makes the following provisions relating to Competition Advocacy-

- ◆ The Central may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter.
- ◆ On receipt of such a reference, the Commission shall, give its opinion **within 60 days** of making such a reference.
- ◆ The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central or State Government in formulating such a policy.

- ◆ The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.
- ◆ The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is sine-qua-non for accelerating economic growth.

Question 71A] Write a short note on: Competition Policy

CS (Inter) - Dec 2007 (3 Marks)

CS (Executive) - Dec 2008 (3 Marks)

Ans.: The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy.

Competition policy typically has two elements:

- (1) A set of policies that enhance competition in local and national markets.
- (2) Legislation designed to prevent anti-competitive business practices i.e., a competition law.

Competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete.

Question 72] How can the orders of Competition Commission imposing monetary penalty be executed under the Competition Act, 2002?

CS (Executive) - Dec 2014 (7 Marks)

Ans.: Execution of orders of Commission imposing monetary penalty [Section 39]:

- (1) If any person fails to pay any monetary penalty imposed under the Act, the Commission shall proceed to recover such penalty in specified manner as per the Regulations made under the Act.
- (2) If the Commission is of the opinion that it can recover the penalty as per the provisions of the Income-tax Act, 1961 then it may make a reference the concerned income-tax authority for recovery of the penalty.
- (3) In such cases the person upon whom the penalty has been imposed shall be deemed to be assessee in default under the Income Tax Act, 1961 and the provisions of the said Act shall apply for recovery of penalty.

PENALTIES

Question 73] What are the penalties attracted for Contravention of orders of Competition Commission under the Competition Act, 2002?

Ans.: **Contravention of orders of Commission [Section 42]:** If any person fails to comply with the orders or directions of the Commission, he shall be punishable with fine which may extend to ₹ 1 Lakh for each day during which such non-compliance subject to a maximum of ₹ 10 Crore.

If any person does not comply with the orders or directions or fails to pay the fine imposed, he shall be punishable with imprisonment for a term which may extend to 3 years or with fine up to ₹ 25 Crore or with both as the Chief Metropolitan Magistrate may deem fit.

However, the Chief Metropolitan Magistrate can take cognizance of any offence only on a complaint filed by the Commission or any of its officers.

Question 74] What are the penalties attracted for Contravention of orders of Director General under the Competition Act, 2002?

Ans.: **Penalty for failure to comply with directions of Commission & Director General [Section 43]:** If any person fails to comply with a direction given by the Commission or the Director General then such

person shall be punishable with fine which may extend to ₹ 1 Lakh for each day during which such failure continues subject to a maximum of ₹ 1 Crore.

Question 75] How much penalty can be imposed for failure to furnish information of Combination under the Competition Act, 2002?

Ans.: Power to impose penalty for non-furnishing of information on combinations [Section 43A]:

If any person or enterprise who fails to give notice to the Commission under Section 6(2) then the Commission shall impose a penalty which may extend to **1% of total turnover or assets** whichever is higher of such a combination.

COMPETITION APPELLATE TRIBUNAL

Question 76] Write a short note on: Competition Appellate Tribunal

Ans.: Establishment of Appellate Tribunal [Section 53A]: The Central Government has established Competition Appellate Tribunal:

- (a) To hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission
- (b) To adjudicate on claim for compensation that may arise from
- (c) To pass orders for the recovery of compensation

The Headquarter of the Appellate Tribunal is situated at New Delhi.

Question 77] Write a short note on: Appeal to Competition Appellate Tribunal

Ans.: Appeal to Appellate Tribunal [Section 53B]:

- (1) The Central or State Government or a local authority or enterprise or any person aggrieved by direction, decision or order made by Commission may prefer an appeal to the Competition Appellate Tribunal.
- (2) Every such appeal shall be filed within a period of **60 days** from the date receipt of copy of the direction, decision or order made by the Commission.
- (3) Such appeal has to be made in prescribed form along with prescribed fees.
- (4) The Appellate Tribunal may entertain an appeal after 60 days if it is satisfied that there was sufficient cause for not filing the same.
- (5) On receipt of an appeal, the Appellate Tribunal may pass appropriate order as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.
- (6) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.
- (7) The Appellate Tribunal shall endeavour to dispose of the appeal within 6 months from the date of receipt of the appeal.

TRANSFER OF PROPERTY ACT, 1882

INTRODUCTION : 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more living persons, or to himself and one or more other living persons. The property may be movable or immovable, present or future and the transfer can be made orally, unless transfer in writing is specifically required under any law. Any person competent to contract and entitled to transferable property, or authorized to dispose of transferable property on his own, can transfer such property whether in part or whole, absolutely or conditionally.

The Act outlines transfers of property by act of parties like sales of immovable property, mortgages and charges, leases of immovable property, exchanges, gifts and actionable claims.

The Transfer of Property Act, 1882 mainly deals with transfer of immovable property. It applies only to voluntary transfers. It does not apply to transfers by the operation of law. It came into force on the 1st July, 1882.

Before you start reading this chapter go through the following basic concepts.

ABSOLUTE INTEREST

When person owns property, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property.

Example: If Ram is the owner of land, he has an absolute interest in the land. If Ram sells his land to Balram, then Balram becomes the owner and he acquires an absolute interest in the land he has purchased from Ram. Likewise if Ram makes a gift of his property to Shyam, there again Shyam gets an absolute interest in the property which is gifted to him.

REVERSION & REMAINDER

Reversion means any future interest kept by a person who transfers property to another.

A reversion occurs when a property owner makes an effective transfer of property to another but retains some future right to the property. For example, if Ram transfers a piece of property to Shyam for life, Shyam has the use of the property for the rest of his life. Upon his death, the property reverts, or goes back to Ram, or if Ram has died, it goes to his heirs. Shyam's interest in the property is a life estate. Ram's ownership interest during Shyam's life, and his right or the right of his heirs to take back the property upon Shyam's death, are called reversionary interests.

A reversion differs from a remainder because a reversion arises through the operation of law rather than by act of the parties. A remainder is a future interest that is created in some person other than the grantor

or transferor, whereas a reversion creates a future interest in the grantor or his heirs. If Ram's transfer had been "to Shyam for life, then to Rahim," Rahim's interest would be a remainder.

VESTED & CONTINGENT INTEREST

Vested in possession: It is a right to present possession of property.

Vested in interest: It is a present right to future possession.

Example: If a land is given to Kalyani for life with a remainder to Piyusha, Kalyani's right is vested in possession, Piyusha's right is vested in interest.

In the above example, the interest of Piyusha is not subject to any uncertain condition. It will come into her possession after Kalyani's life comes to an end. Therefore, an interest is said to be vested when it is not subject to any condition, precedent, i.e., when it is to take effect on the happening of an event which is certain.

Contingent interest: A contingent interest is dependent upon the fulfilment of some conditions which may or may not happen.

Example: A gift to Aakash on the marriage of Mahesh creates a contingent interest, for Mahesh may never marry at all but that contingent interest becomes vested if and when Mahesh marries.

A vested interest is transferable and heritable. If property is given to Anil for life and afterwards to Bobby, Bobby gets a vested interest and if Bobby transfers this interest to Chirag, Chirag will take when the life estate of Anil comes to an end. Bobby's interest, since it is vested, is also heritable. Therefore, if Bobby dies during the lifetime of Anil, Chirag will get the property after the death of Anil.

The contingent interest is not heritable although it is transferable. In a vested interest the transfer is complete, but when the interest is contingent the transfer depends upon a condition precedent.

Example: Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent.

Question 1] A property is given to Anil for life and afterwards to Bimal. Bimal transfers this interest to Chandan. Bimal dies during the life-time of Anil. Chandan claims the property. Decide.

CS (Inter) - June 2004 (6 Marks)

Ans.: A property is given to Anil for life. Here, Anil's interest is vested in possession. After Anil's death property will go to Bimal, hence Bimal's interest is vested interest. A vested interest is transferable and heritable. Thus, if Bimal dies during the life time of Anil, Bimal's vested interest will go his legal heir. Bimal can also transfer his vested interest to some other person. As per facts given in case, Bimal has transferred his vested interest to Chandan. As Bimal was to get the property after the lifetime of Anil, and so, Chandan gets the same rights. Hence, Chandan's claim is correct.

Question 2] Distinguish between: Vested & Contingent Interest

CS (Inter) - Dec 1992 (8 Marks)

CS (Executive) - June 2009 (4 Marks), Dec 2009 (4 Marks)

Ans.: The following are main points of distinction between a vested and contingent interest:

Points	Vested Interest	Contingent Interest
Meaning	It is a present right to future possession.	A contingent interest is dependent upon the fulfilment of some conditions which may or may not happen.
Takes effect	A vested interest takes effect from the date of transfer.	A contingent interest in order to become vested is conditioned by a contingency which may not occur.
Death of transferee	A vested interest cannot be defeated by the death of the transferee before he obtains possession.	A contingent interest may fail in case of death of transferee before the fulfilment of condition.

Example	If a land is given to Kalyani for life with a remainder to Piyusha, Kalyani's right is vested in possession, Piyusha's right is vested in interest.	A gift to Aakash on the marriage of Mahesh creates a contingent interest, for Mahesh may never marry at all.
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MOVABLE & IMMOVABLE PROPERTY

Question 3] What do you understand by movable and immovable property?

Ans.: Movable Property: The Transfer of Property Act does not define the term "movable property". Therefore, it is to be defined with the help of other statutes.

General Clauses Act, 1897	Property of every description except immovable property.
Registration Act, 1908	Property of every description excluding immovable property but including standing timber, growing crops and grass.

Immovable Property [Section 3]: The immovable property does not include standing timber, growing crops, or grass.

The term "immovable property" is also not defined under the Transfer of Property Act. It just says what cannot be treated as immovable property.

Let's have a look on how other statute defines the term "immovable property".

General Clauses Act, 1897	Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.
Registration Act, 1908	Immovable property includes the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

Question 4] Distinguish between: Movable & Immovable Property

CS (Executive) - June 2016 (5 Marks)

Ans.: Following are the main points of difference between movable & immovable property:

Points	Movable Property	Immovable Property
Meaning	Movable property means property of every description except immovable property.	Immovable property means land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.
Definition in TP Act, 1882	The expression 'movable property' is not defined by the TP Act, 1882.	Section 3 of TP Act defines negatively as, immovable property does not include standing timber, growing crops or grass.
Example	<p>The following have been held to be movable property.</p> <ul style="list-style-type: none"> ◆ Right to worship ◆ Government promissory notes ◆ Royalty ◆ Right to recover maintenance allowance ◆ Copyright ◆ Decree for sale on a mortgage-deed ◆ Decree for arrears of rent ◆ Machinery which is not permanently attached to earth ◆ Standing timber, growing crop and grass 	<p>The following have been recognized as immovable property.</p> <ul style="list-style-type: none"> ◆ Right to collect rents of immovable property ◆ Right to way ◆ Right to collect dues from fair on a piece of land ◆ Hereditary offices ◆ Equity of redemption ◆ Interest of mortgagee ◆ Right to collect lac from trees ◆ Right of ferry ◆ Right of fishery ◆ Right to receive future rents and profits of land ◆ Reversion in property leased a factory

Question 5] A orally grants to B for ₹ 7,00,000 the rights to catch and carry away fish from his lake. Is the grant valid?

Ans.: The Supreme Court in *Ananda Behra v. State of Orissa* (1956) SCJ p. 96, held that rights to catch and carry away fish from his lake is a benefit arising out of immovable property. So, under General Clauses Act it is immovable property. The sale requires a registered instrument for its validity. Therefore, the oral grant is **invalid** and cannot pass away any title in favour of B.

Question 6] Which of the following are movable or immovable properties under the Transfer of Property Act, 1882?

- (1) a right to way
- (2) a factory
- (3) a right to collect lac from trees
- (4) hereditary offices
- (5) growing crops
- (6) standing timber

CS (Inter) - Dec 2006 (6 Marks)

Ans.:

(1) a right to way	Immovable
(2) a factory	Immovable
(3) a right to collect lac from trees	Immovable
(4) hereditary offices	Immovable
(5) growing crops	Movable
(6) standing timber	Movable

RULES RELATING TO TRANSFER OF PROPERTY

Question 7] Enumerate the properties which cannot be transferred under the provisions of the Transfer of Property Act, 1882.

CS (Inter) - June 2003 (8 Marks), June 2008 (4 Marks)

CS (Executive) - June 2016 (5 Marks)

The concept of *spes succession* under the Transfer of Property Act, 1882.

CS (Inter) - June 2005 (5 Marks)

Ans.: What may be transferred [Section 6]: Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

Exceptions: Some exceptions to the general rule that property of any kind may be transferred. Thus, following properties cannot be transferred:

- (1) **Spes Successions:** The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman (*a man who is one of a person's blood relations*) or any other mere possibility of a like nature cannot be transferred.

Example: Suppose A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has only a hope expectancy that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

- (2) **Right of re-entry:** A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.

Example: A grants his land by way of lease to B, a limited liability company on condition that the land should revert to A from B if the company goes into liquidation. This is a mere right in favour of A and this right of A cannot transfer to anyone as this is a personal right which can be exercised by A only. But if A transfers the whole of his interest in the land including the right of re-entry to C, there the right to re-entry is a legal incident of property and can be validly transferred along with the property.

- (3) **Transfer of easement:** An easement cannot be transferred apart from the dominant heritage. (*An easement means a right to cross or otherwise use someone else's land for a specified purpose.*)

Example: The right of certain villagers to bath in another's tank cannot be transferred.

Example: If A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

- (4) **Restricted interest or personal interest:** An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. Examples of such restricted interest or property are the following:

- The right of pre-emption given under the Mohammedan Law.
- The office of a Shebait of a Temple or mohunt of a mutt or mutuwalli of a wakf.
- Emoluments attached to a priestly office.
- Service tenures.

- (5) **Right to future maintenance:** A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

- (6) **Mere right to sue:** A mere right to sue cannot be transferred.

Example: A commits an assault on B, B can file a suit to obtain damages; but B cannot assign the right to C and allow him to obtain damages. In contract also, the rule is the same. If A breaks a contract which he has entered into with B, B can bring action for damages, but B cannot transfer this right to C to recover damages.

- (7) **Transfer of public office & salaries, stipends, etc.:** A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.

- (8) **Stipends allowed to military, naval, air force and civil pensioners** of the Government and political pensions cannot be transferred. Since these allowances, pensions and stipends are given on personal basis, the law does not allow these types of property to be transferred.

Question 8] Amrish sells a property to Chaman for ₹ 25,000. In fact the property belonged to his father but he is named as the sole beneficiary in his father's will. What is the legal effect?

CS (Inter) - Dec 1991 (5 Marks)

Ans.: In the given problem, it is not clear whether Amrish sells the property during the life time of his father. If it is so, the transfer is not valid in view of the provisions Section 6(a).

"The property belonged to his father but he is named as the sole beneficiary in his father's will"-it may also be inferred that the sale takes place after the death of Amrish's father and that the sale is valid.

Question 9] A transfers to B for valuable consideration his reversionary interest in a house. When A succeeds to the house, B sues him for possession of the same. Advise B.

CS (Inter) – Dec 1993 (7 Marks)

Ajit transfer to Baljit for valuable consideration his reversionary interest in a property. When Ajit succeeds to the property, Baljit sues for possession of the same. Whether Bajit's suit for possession will succeed? Give reasons.

CS (Inter) – June 2001 (6 Marks)

CS (Executive) – Dec 2008 (5 Marks)

Ans.: Reversion means any future interest kept by a person who transfers property to another.

A reversion occurs when a property owner makes an effective transfer of property to another but retains some future right to the property.

As per **Section 6**, the reversionary interest is *spes succession* and is not transferable. Therefore, the transfer of reversionary interest of A to B is void, and hence, the suit of B for possession would fail.

Question 10] Discuss the validity of the following transfers:

(1) X, a Hindu widow, transfers her right to future maintenance.

(2) X, a Hindu widow, transfers her arrears of past maintenance.

(3) Transfer of right of easement apart from the dominant heritage.

CS (Inter) – June 2004 (3 × 2 Marks = 6 Marks)

Ans.: Validity of various transfer can be discussed as follows:

- (1) **Right to future maintenance:** A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred. Thus, transfer by X right to future maintenance is not valid.
- (2) **Right to past maintenance:** Arrears of past maintenance can be transferred since they are already accrued and due. Thus, transfer by X right to past maintenance is valid.
- (3) **Transfer of easement:** An easement cannot be transferred apart from the dominant heritage. Hence, transfer is invalid.

Question 11] Rohit, a Hindu who has his self-earned property, dies leaving his widow Priya and brother Bidur. Bidur's succession to the property is dependent upon two factors, viz.,

(1) his surviving the widow Priya and

(2) Priya leaving the property intact.

Bidur transfers his right of succession. Is it a valid transfer? Explain.

CS (Inter) – June 2004 (4 Marks)

Ans.: As per **Section 6**, the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman (*a man who is one of a person's blood relations*) or any other mere possibility of a like nature cannot be transferred.

As per facts given in case, Bidur has mere possibility of getting the property. This is *spes successions* and Bidur cannot transfer his right of succession. Thus, transfer by Bidur of his right of succession is not a valid transfer.

Question 11A] A makes a gift of a house to B with whom he had illicit relation in the past. Is this transfer valid? Will it make any difference if A's consideration for this transfer is adulterous relations of B with A? Give reason.

CS (Executive) – Dec 2014 (8 Marks)

Ans.: Section 6 of the Transfer of Property Act, 1882 deals with "what may be transferred". Section 6 provides that, property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force. Clauses (a) to (i) of Section 6 provides that which property cannot be transferred.

As per Section 6(h), no transfer can be made for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872.

Section 23 of the Indian Contract Act, 1872 declares that - the consideration or object of an agreement is if Court regards it as immoral or opposed to public policy.

In *Nagaratnam v. Ramayya* AIR 1968 SC 523, the Supreme Court held that past cohabitation was only motive and not a consideration for the gift and such transfer is not hit by Section 6(h) and gift of immovable property for past illicit cohabitation is valid.

However, adulterous relations are offence and hence it is immoral and opposed to public policy. It is unlawful consideration as per Section 23 of the Indian Contract Act, 1872 and hence transfer of immovable property is not valid as per Section 6(h) of the Transfer of Property Act, 1882

Question 12] Discuss the various formalities to be completed to effect valid transfer?

Attestation is an important formality in connection with the execution of the transfer as per the Transfer of Property Act, 1882. Comment. CS (Inter) - June 2008 (4 Marks)

Ans.: Following are various formalities to be completed to effect valid transfer:

- (1) **Attestation:** Attestation, in relation to a document, signifies the fact of authentication of the signature of the executants of that document by the attestator by putting down his own signature on the document in testimony of the fact of its execution.
Attestation is valid and complete when two witnesses sign the instrument.
- (2) **Registration:** The advantage of registering a document is that any person who deals with the property would be bound by the rights that are created in earlier registered document. If a document of transfer relating to immovable property is required by the law to be and has been effected by registered instrument, the persons who deal with the property subsequently are deemed in the eye of law as having knowledge of the registered instrument from the date of its registration.
- (3) **Notice:** Notice, may be actual or constructive. If a person knows about a fact, he has an actual notice. If a person knows about a fact, he has an actual notice. But, in certain circumstances law treats a man who ought to have known a fact even though he did not in fact know it. This is called constructive notice.

Question 13] Who can transfer the immovable property?

Ans.: Persons competent to transfer [Section 7]: Every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property.

Hence, every person competent to contract and having ownership can transfer property. According to Indian Contract Act, 1872 a person is competent to contract when he is a major and of sound mind and is not disqualified from contracting by any law to which he is subject. But a minor can be a transferee. Thus, a mortgage can be validly executed in favour of a minor who has paid the consideration. [*Hari Mohan v. Mohini*, 22 C.W.C. 130, *Raghava v. Srinivasa*, (1917) 60 Mad. 308]

Although a minor is not competent to be a transferor yet a transfer to a minor is valid.

RESTRAINT ON TRANSFERS/RULES AGAINST INALIENABILITY

Question 14] What law against inalienability of property is given in the Transfer of Property Act, 1882? CS (Inter) - June 1994 (7 Marks)

Exceptions to the rule that absolute restraint on transfer of property is void. Comment.

CS (Executive) - Dec 2012 (4 Marks)

Ans.: Condition restraining alienation [Section 10]: Where property is transferred subject to a condition

absolutely restraining the transferee from parting with or disposing the property, the **transfer is valid** but **condition is void**.

Thus, one may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property.

Exception to the rule that absolute restraint on transfer of property is void:

- (1) In the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid.
- (2) The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

Examples of absolute restraint

- (1) Ram gives property to Shyam (his heirs) adding a condition that if the property is alienated it should revert to Ram. The transfer is valid and takes effect but the condition not to alienate the property is void. The transferee can ignore such condition.
- (2) Suresh gives to Nagesh property worth only ₹ 2,000 and adds a condition that Nagesh should sell property for ₹ 50,000 and not below that amount, this condition is invalid because no one will buy the property which is only worth ₹ 2,000 for ₹ 50,000. Thus, transfer of property of ₹ 2,000 by Suresh to Nagesh is valid but condition to sell it for ₹ 50,000 is void. Nagesh can sell the property at any amount as he able to sell by ignoring the condition.
- (3) Suresh gives to Nagesh property worth ₹ 50,000 and stipulates that if Nagesh wants to sell the property he should sell it to Parag only for ₹ 1,000. This will operate as an absolute restraint.
- (4) The testator gave his estate to his son and added a condition that if his son wanted to sell the property he should first give an option to the testator's wife who should be able to buy for 3,000 was void. [*Rosher v. Rosher*, (1884) 26, Ch. D. 801]
- (5) There was a partition between a Hindu father and his five sons. The deed of partition provided that if any one of the sons wanted to sell his share, he should not sell it to a stranger but to one of his brothers who should have the option to buy for a sum not exceeding ₹ 1,000. It was held by the Court that the condition absolutely prevented the son from selling the property to any one for good value. In this case the market value of the property of the son was far greater than ₹ 1,000. Hence, the condition was declared invalid. [*Trichinpoly Varthaga Sangum v. Shunmoga Sunderam*, (1939) Madras 954]

Partial restraint valid: Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid.

Restraint on enjoyment [Section 11]: Restraint on the enjoyment of the property is invalid. Where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.

Example: Aalia sells her house to Babita and adds a condition that only Babita should reside in that house. Here again transfer is valid but the condition is invalid. Aalia cannot put such condition on Babita regarding enjoyment of property. Babita can ignore such condition.

Restraint on enjoyment – when valid: If a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

Example: Raman has properties X & Y. He sells property Y to Mayank and puts a condition that Mayank should not construct on property Y more than one storey so that Raman's property X which he retains should have good light and free air. The condition which is imposed by Raman is for the benefit of another property which he retains. Such a condition is **valid**.

Condition making interest determinable on insolvency or attempted alienation [Section 12]: If a property is transferred to any person adding a condition that if such person becomes insolvent he ceases to hold that property. Such a condition is **void**.

However, if a landlord leases his property he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

Question 15] Sunil gives property worth ₹ 2,000 only to Anil and adds a condition that Anil should sell the property for ₹ 50,000 and not below this amount. Is this condition valid? Give reasons.

CS (Inter) – June 1990 (5 Marks)

Ans.: As per **Section 10**, where property is transferred subject to a condition absolutely restraining the transferee from parting with or disposing the property, the transfer is valid but condition is **void**.

Thus, one may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property.

As per facts given in case condition imposed by Sunil is void because no one will buy the property which is only worth ₹ 2,000 for ₹ 50,000. Thus, transfer of property of ₹ 2,000 by Sunil to Anil is valid but condition to sell it for ₹ 50,000 is void. Anil can sell the property at any amount as he able to sell by ignoring the condition.

Question 16] There was a partition between a Hindu father and his five sons. The deed provided that if any one of the sons wanted to sell his share, he shall sell it to one of his brothers only and not to any stranger. The consideration for that share shall be ₹ 1,000 only. Are these conditions valid? Give reasons.

CS (Executive) – Dec 2008 (5 Marks)

Ans.: As per **Section 10**, where property is transferred subject to a condition absolutely restraining the transferee from parting with or disposing the property, the transfer is valid but condition is **void**.

Thus, one may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property.

In given case the deed provided that if any one of the sons wanted to sell his share, he shall sell it to one of his brothers only and not to any stranger. The consideration for that share shall be ₹ 1,000 only. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

Question 17] Anil has two properties, Property-X and Property-Y. He sells his Property-Y to Jolly and puts a condition that Jolly should not construct more than one storey on Property-Y so that Property-X, which he retains, shall have good light and free air. Whether the condition imposed by Anil is 'valid' under the Transfer of Property Act, 1882? Give reasons.

CS (Inter) – Dec 1999 (5 Marks), June 2002 (5 Marks)

CS (Executive) – Dec 2009 (5 Marks), Dec 2016 (5 Marks)

Ans.: As per **Section 11**, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

Thus, it is clear that the condition which is imposed by Anil is for the benefit of another property which he retains. Such a condition is valid.

Question 17A] Distinguish between: Conditions restraining alienation and condition restraining enjoyment
CS (Executive) – Dec 2010 (4 Marks)

Ans.: Following are the main points of difference between conditions restraining alienation and condition restraining enjoyment:

Points	Conditions restraining alienation	Condition restraining enjoyment
Meaning	Conditions restraining alienation means transferor restrains transferee from parting with or disposing the property.	Condition restraining enjoyment means transferor restrains transferee from enjoyment of property.
Validity of transfer	Where property is transferred subject to a condition absolutely restraining the transferee from parting with or disposing the property, the transfer is valid but condition is void. Though absolute restraints are bad in law, partial restraints are valid if conditions imposed are reasonable.	Restraint on the enjoyment of the property is invalid. Where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.
Section	This dealt by Section 10 of the Transfer of Property Act, 1882.	This dealt by Section 11 of the Transfer of Property Act, 1882.
Example	Ram gives property to Shyam (his heirs) adding a condition that if the property is alienated it should revert to Ram. The transfer is valid and takes effect but the condition not to alienate the property is void. The transferee can ignore such condition.	Aalia sells her house to Babita and adds a condition that only Babita should reside in that house. Here again transfer is valid but the condition is invalid. Aalia cannot put such condition on Babita regarding enjoyment of property. Babita can ignore such condition.

TRANSFER FOR THE BENEFIT OF UNBORN PERSON

Question 18] Write a short note on: Transfer for the benefit of unborn person

CS (Inter) – Dec 2007 (4 Marks)

Describe the essential conditions required for transfer for benefit of unborn person.

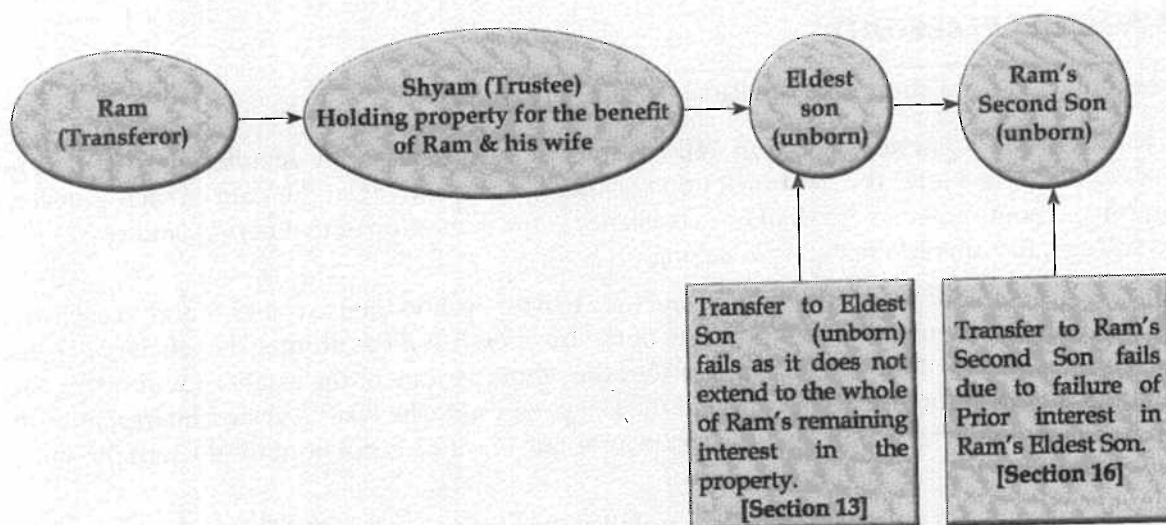
CS (Executive) – June 2010 (4 Marks), Dec 2016 (5 Marks)

Ans.: Transfer for benefit of unborn person [Section 13]: If there is transfer of property for the benefit of unborn person, subject to a prior interest created by the same transfer, interest created for the benefit of unborn person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

Thus, if a property is given to an unborn person, two conditions should be satisfied:

- (1) It should be preceded by a life estate in favour of a living person, and
- (2) It should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others.

Example: Ram transfers property of which he is the owner to Shyam in trust for Ram and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for Ram's second son. The interest so created to the benefit of the eldest son does not take effect, because it does not extend to the whole of Ram's remaining interest in the property. (*i.e. to say eldest son is getting only a life interest and not an absolute interest*)



Effect of a transfer on failure of prior interest [Section 16]: Further, where by reason of any rules contained in Section 13 interest created for the benefit of a person fails in regard to such person, any interest created in the same transaction and intended to take effect or upon failure of such prior interests also fail.

Question 19] On the occasion of birthday of Rajat, his father Govind gives a plot of land to him for life and after his death to his wife Sujata for life. He stipulates that after the death of both Rajat and Sujata, their eldest unborn son will get the property for life. After the death of eldest son, the land will be enjoyed by their younger son absolutely. Decide the validity of the transfer.

CS (Inter) - June 1995 (6 Marks)

CS (Inter) - Dec 2002 (5 Marks), Dec 2005 (5 Marks)

Ans.: As per **Section 13**, if there is transfer of property for the benefit of unborn person, subject to a prior interest created by the same transfer, interest created for the benefit of unborn person shall not take effect unless it extends to the whole of the remaining interest.

In the given problem, the interest created for the benefit of the eldest (unborn) son does not take effect, because the transfer does not extend to the whole of remaining interest in the property, since he is getting only a life interest and not an absolute interest. The alienation in favour of younger (unborn) son also fails as provided in **Section 16**. On failure of a prior interest, any interest intended to come into exercise after or upon failure of prior interest, also fails.

Question 20] Arjun transfers his property to Bhanu for life and after Bhanu's death to that of his unborn sons as shall first attain the age of 25 years and if no son of Bhanu shall attain that age, to Chandan who is living at the time of the transfer. Decide the validity of this transfer.

CS (Executive) - June 2009 (5 Marks)

Ans.: As per **Section 13**, if there is transfer of property for the benefit of unborn person, subject to a prior interest created by the same transfer, interest created for the benefit of unborn person shall not take effect unless it extends to the whole of the remaining interest.

In the given problem, the interest created for the benefit of the Bhanu's unborn son does not take effect, because the transfer does not extend to the whole of remaining interest in the property, since he is getting only a life interest and not an absolute interest. The transfer to in favour of Chandan also fails as provided in **Section 16**. On failure of a prior interest, any interest intended to come into exercise after or upon failure of prior interest, also fails.

RULE AGAINST PERPETUITY**Question 21] Write a short note on: Rule against perpetuity**

Ans.: Rule against perpetuity [Section 14]: No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Example: Transfer may be made to A for life and then to B for life and then to C for life and so on, provided that A, B & C are all living persons at the date of the transfer. But if the ultimate beneficiary is someone who is not in existence at the date of the transfer, the whole residue of the estate should be transferred to him. If he is born before the termination of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but if he is not born till the termination of the last prior estate, the transfer to him fails.

Further, the rule is not that vested interest is created at the birth of the beneficiary but that vested interest cannot be delayed in any case beyond his minority. Therefore, the rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

In India minority terminates at the end of 18 years.

Thus, the rule against perpetuity contains two propositions, i.e.:

- (1) No transfer is valid after the life-time of one or more persons living at the date of such transfer. Transfer can remain in effect only during the life time of an existing person.
- (2) Transfer can be extended to a person who is not in existence but if he is in existence at the time of termination of the period of last transfer. The moment the person is born he shall have contingent interest and after minority i.e. after the age of 18 years, he shall have vested interest. Barring these two conditions, a restriction on alienation of a property is void.

CONDITIONAL TRANSFER**Question 22] Write a short note on: Conditional Transfer**

Ans.: Conditional Transfer [Section 25]: An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition:

- is **impossible**,
- is **forbidden** by law,
- is of such a nature that, if permitted, it would **defeat** the provisions of any law,
- is **fraudulent**,
- involves or implies **injury** to the **person** or **property** of another, or
- Court regards it as **immoral** or **opposed to public policy**.

Illustration (as given in Transfer of Property Act, 1882)

- (a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.
- (b) A gives ₹ 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.
- (c) A transfers ₹ 500 to B on condition that she shall murder C. The transfer is void.
- (d) A transfers ₹ 500 to his niece C, if she will desert her husband. The transfer is void.

Fulfilment of Condition Precedent [Section 26]: Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustration (as given in Transfer of Property Act, 1882)

- (a) A transfers ₹ 5,000 to B on condition that he shall marry with the consent of C, D & E. E dies. B marries with the consent of C & D. B is deemed to have fulfilled the condition.
- (b) A transfers ₹ 5,000 to B on condition that he shall marry with the consent of C, D & E. B marries without the consent of C, D & E, but obtains their consent after the marriage. B has not fulfilled the condition.

Condition Subsequent: A transfer may also be made subject to a contingency which may or may not occur. Thus, an interest may be created with the condition super-added that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen. This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.

Example: A transfers a Farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect, B cuts down the wood. He loses his life interest in the farm.

Example: Similarly, if A transfers a farm to B provided that B shall not go to England within 3 years after the date of transfer, the interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Question 23] Anurag transfer ₹ 10,000 to his sister in law provided she deserts her husband. Is the transfer valid? CS (Inter) - June 2003 (5 Marks)

Ans.: As per **Section 25**, the condition should not be such as to cause injury to the person or property of another or should not be immoral or opposed to public policy. Condition imposed by Anurag to his sister is invalid and hence there is no valid transfer.

Question 24] Raman makes transfer of his house in favour of Sohan with the condition that Sohan will get the house only if he marries Shyama with the permission of her three brothers. Before the marriage is solemnized, one of the brothers dies. Sohan marries Shyama with the permission of the remaining two brothers. Can he claim the house.

CS (Inter) - June 1995 (5 Marks), June 1996 (6 Marks)

CS (Inter) - Dec 2000 (5 Marks)

Ans.: As per **Section 26**, a condition precedent shall be deemed to have been fulfilled if it has been substantially complied with.

In the given case, Sohan marries Shyama with the consent of two brothers i.e. the condition precedent is substantially fulfilled, more particularly when one brother has already died before the marriage is solemnized. Thus, Sohan will get the house.

DOCTRINE OF ELECTION

Question 25] The foundation of doctrine of election is that one may not approbate and reprobate at the same time. Comment. CS (Inter) - June 2001 (8 Marks)

A person cannot approbate and reprobate

CS (Inter) - Dec 2007 (4 Marks)

Write a short note on: Doctrine of election

CS (Executive) - Dec 2008 (4 Marks)

Ans.: 'Doctrine of Election' and the common law doctrine of prohibiting 'approbation' and 'reprobation' as enshrined in the Latin Maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is discussed as follows:

Election when necessary [Section 35]: Where a person –

- (i) Professes to transfer property which he has no right to transfer, and
 - (ii) As part of the same transaction, confers any benefit on the owner of the property,
- such owner must **elect either** to confirm the transfer or to dissent from it.

If he dissents from it, —

- (a) He must relinquish the benefit so conferred and
- (b) The benefit so relinquished reverts to the transferor or his representative as if it had not been disposed of.

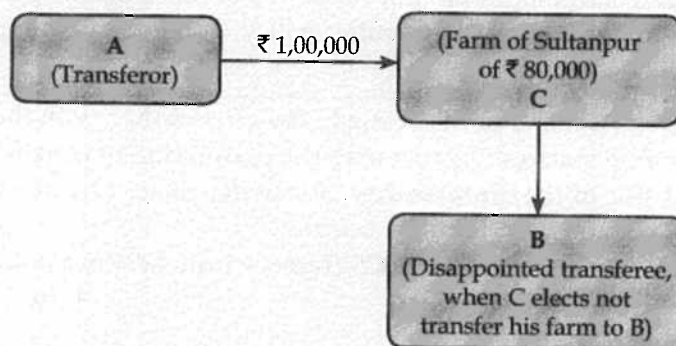
However, when such benefit reverts back to the transferor, it is subject to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred in two cases, namely —

- (i) Where the transfer is gratuitous, and the transferor has, before election, died or otherwise become incapable of making a fresh transfer and
- (ii) Where the transfer is for consideration.

Example: Let us suppose that one farm of Sultanpur is the property of C of ₹ 80,000. A professes to transfer that farm of Sultanpur to B and by same instrument ₹ 1,00,000 to C. C, the owner of the farm of Sultanpur, is to elect either to confirm the transfer or to dissent from it. If C elects to transfer his Farm of Sultanpur of ₹ 80,000 to B then only he can receive ₹ 1,00,000 from A.

However, if C elects to retain the farm then he will not receive the gift of ₹ 1,00,000.

In the same case, if A dies before the election is made by C. The representatives of A must, out of the ₹ 1,00,000 pay ₹ 80,000 to B to make good to the disappointed transferee the amount or value of the property attempted to be transferred.



Exception to the doctrine of election: Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Example: Let us suppose that X transfers to Y the property P1, in lieu of Y's property P2 which is given to Z. X also gives to Y the property P3. If Y elects to retain his own property he must relinquish claim over P1 but not P3.

Question 26] Kamal transfers his property worth ₹ 10,000 to Shyam and by the same instrument asked Shyam to transfer his property worth ₹ 5,000 to Manoj. Kamal dies before Shyam made his election. Can Manoj get compensation? If so, from whom and how much?

CS (Inter) - June 2006 (6 Marks), Dec 2006 (6 Marks)

CS (Executive) - June 2010 (4 Marks)

Ans.: As per Section 35, doctrine of election is applicable to given case.

In this case Kamal transfers his property worth ₹ 10,000 to Shyam and by the same document asks Shyam to transfer his property worth ₹ 5,000 to Manoj. Before Shyam can accept the property, Kamal dies. The representatives of Kamal must, out of the ₹ 10,000 pay ₹ 5,000 to Manoj to make good the amount or value of the property attempted to be transferred.

TRANSFER BY OSTENSIBLE OWNER/DOCTRINE OF HOLDING OUT**Question 27] Write a short note on: Doctrine of holding out****CS (Inter) - Dec 1998 (8 Marks), June 2006 (4 Marks)**

Ans.: General rule regarding the transfer of property is that no one can transfer a better title than what he himself possesses. However, Section 41 of the Transfer of Property Act, 1882 makes an exception to this rule. Thus, transfer made by the ostensible owner of the property is valid subject to condition specified in Section 41. This Section is a statutory application of the law of estoppels. An ostensible owner is one who has all the *indicia* of ownership without being the real owner.

Transfer by ostensible owner [Section 41]: Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

In simple words, if sale is made by ostensible owner for a consideration, then such sale is valid if transferee has taken reasonable care to see that transferor has power to make such sale.

Essential Conditions:

- (1) Transferor is the ostensible owner.
- (2) He is so by the consent, express or implied, of the real owner.
- (3) Transfer is for consideration, and
- (4) Transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

Examples:

- (a) A made a gift of property to B but continued in possession of the gifted property. He purported to exercise a power of revocation and then transferred the property to the defendant. The gift, however, was not revocable as it was an unconditional gift. B seeks to recover possession from the defendant. The defendant invoked protection under Section 41. In the given example, the donor is not an "ostensible owner" holding the property with the consent of the real owner. The defendant cannot, therefore, invoke the protection of Section 41.
- (b) The manager of a joint Hindu family consisting of some minor members alienated the ancestral house to P without any necessity and the alienee transferred it to the defendants. The minors challenged the alienation. The defendants sought protection under Section 41

Question 28] An illegitimate son of a deceased owner of a property gets possession of the property to which he is not legally entitled but his name is entered in the papers as owner. He mortgages the property. On the date of mortgage, the rightful owner's suit against him for recovery and possession was pending and it was decreed subsequently. When the rightful owner sought to avoid the mortgage, the mortgagee resisted the claim by pleading that mortgagor was the ostensible owner of the property when he mortgaged it. Decide.

CS (Inter) - Dec 2003 (6 Marks)

Ans.: General rule regarding the transfer of property is that no one can transfer a better title than what he himself possesses. However, **Section 41** of the Transfer of Property Act, 1882 makes an exception to this rule. Thus, transfer made by the ostensible owner of the property is valid subject to condition specified in Section 41.

As per facts mentioned in case, illegitimate son of a deceased owner of a property is not ostensible owner of the property and hence he cannot transfer or mortgage the property to another. Hence, rightful owner of the property will succeed in avoiding the mortgage.

DOCTRINE OF FEEDING THE GRANT BY ESTOPPLE

Question 29] Discuss the law embodied in the doctrine of feeding the grant by estoppels under Transfer of Property Act, 1882. CS (Inter) – Dec 2005 (6 Marks)

Write a short note on: Doctrine of feeding the grant by estoppels

CS (Executive) – June 2009 (4 Marks)

Ans.: Transfer by unauthorized person who subsequently acquires [Section 43]: Where, a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

In simple words, if a transferor transfer the property of other which he is not entitled, then subsequently when he acquires the property, he will have to transfer the property to the transferee.

Example: A, a Hindu who has separated from his father B, sells to C three fields, X, Y & Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Question 30] Ajay, a Hindu, who was separated from his father, sells to Chander three fields A, B & C representing that he is authorized to transfer the same. Of these fields, Field-C does not belong to Ajay, as it was retained by his father at the time of partition, but after his father's death Ajay being the heir obtained Field-C. Chander did not rescind the contract of sale and asked Ajay to deliver Field-C to him. Whether Chander will succeed? Decide. CS (Inter) – June 1988 (5 Marks), Dec 2000 (6 Marks)
CS (Executive) – June 2009 (6 Marks), Dec 2009 (5 Marks)

Ans.: According to Section 43, if a transferor transfer the property of other which he is not entitled, then subsequently when he acquires the property, he will have to transfer the property to the transferee. As per the facts given in case, Ajay has no authority to sale Field-C and Chander has yet not rescinded the contract, hence by applying provisions of Section 43 Chander can require Ajay to deliver Field-C acquired by him on the death of his father.

DOCTRINE OF FRAUDULENT TRANSFER

Question 31] Discuss the doctrine of fraudulent transfer.

"Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed, for which he may move to the Court." Comment. CS (Executive) – June 2016 (5 Marks)

Ans.: Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his relative or a friend. The law does not allow this. Section 53 embodies the principle.

Fraudulent Transfer [Section 53]: Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Thus, where an owner of the property contracts a debt and then transfers his property to someone so that the creditor cannot proceed against the property to realize his debt, such a transfer is voidable at the option of the creditor. The transfer is valid so long as the creditor does not challenge it in a Court of law and gets a declaration that the transfer is invalid.

A suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of all the creditors. Once the creditor sues the debtor and says that the debtor has the intention to deceive him, the transfer can be declared invalid by the Court. The creditor has to satisfy the Court that there was an intention on the part of the debtor to defeat his rights.

Example: Suppose a man takes a loan from the creditor. He does not pay the loan. The creditor sues him in a Court to get back his debt. On seeing this, the debtor transfers his property to his friend or some other person who simply holds the property on behalf of the transferor. Again, the debtor may make a gift of his property to his wife or sell it to a friend who will afterwards retransfer the same to the transferor. Under these circumstances, we can easily say that the debtor's intention was to prevent the creditor from taking the property by a suit in the Court and to realize his debt.

But suppose the debtor has several creditors and he transfers his property to one of his creditors in satisfaction of his whole debt to him. This is not a fraudulent transfer. A mere preference of one creditor over the others is not fraudulent, even if the whole property is so transferred and nothing is left for the other creditors. But the other creditors may file a petition in the Court within **three months** of the transfer praying that the debtor be declared insolvent. If the debtor is adjudicated an insolvent, their interest will be protected and the transfer will be declared as **fraudulent preference**. The transfer will be set aside and the property will be distributed among all the creditors.

However, the rights of a transferee in good-faith and for consideration are protected. It says nothing shall affect or impair the rights of a transferee in good-faith and for consideration.

DOCTRINE OF PART PERFORMANCE

Question 32] Discuss the doctrine of part performance

CS (Inter) - June 1998 (8 Marks), Dec 2003 (5 Marks)

CS (Inter) - Dec 2007 (4 Marks)

CS (Executive) - Dec 2008 (4 Marks), Dec 2009 (6 Marks)

Ans.: Doctrine of part-performance is embodied in **Section 53A** of the Transfer of Property Act.

A Contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligation. As registration has not been effected A, the transferor, seeks to evict B from the land. Can he do so?

No, B will not be allowed to suffer simply because the formality of registration has not been through. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

Essential Conditions:

- (1) There must be a contract to transfer immovable property.
- (2) It must be for consideration.
- (3) The contract should be in writing and signed by the transferor.
- (4) The terms must be ascertainable with reasonable certainty.
- (5) The transferee should have taken the possession of the property. In case he is already in possession, he must have continued in possession.
- (6) The transferee must have fulfilled or ready to fulfil his part of the obligation.

If all the above mentioned conditions are satisfied, the transferor and the persons claiming under him are debarred from exercising any right in relation to the property other than the right expressly provided by the terms of the contract notwithstanding the fact that the instrument of transfer has not been registered or complete in the manner prescribed by the law for time being in force.

Question 33] Ajoy transfers his house under a written contract of sale to Bijoy for ₹ 10,00,000. Bijoy pays ₹ 3,00,000 to Ajoy and takes possession of one of the four rooms of the house. No registration of documents of the contract of sale is made. After six months of the said contract, Ajoy sells the same house to Chander for ₹ 20,00,000. Chander has no knowledge of the previous transaction between Ajoy and Bijoy. When Chander claims the house, Bijoy takes protection of part-performance of the contract. Will Bijoy succeed?

CS (Inter) – Dec 2001 (6 Marks)

CS (Inter) – June 2005 (5 Marks)

Ans.: The doctrine of part-performance will not affect the right of a subsequent transferee for consideration without notice of the earlier contract and of its being partly performed.

Hence, Chandan as bona fide purchaser has full right of possession of property.

ACCUMULATION OF INCOME

Question 34] Write a short note on: Accumulation of income

Ans.: Direction for accumulation [Section 17]: Accumulation of income from the land for an unlimited period without the income-being enjoyed by owner of the property is not allowed. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is:

- ◆ Life of the transferor, or
- ◆ 18 years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is void.

Exceptions: In following cases any direction for accumulation of income beyond the period prescribed above is allowed:

- (1) For the payment of the debts of the transferor or any other person taking any interest under the transferor.
- (2) For provision of portions for children or any other person taking any interest in the property under the transfer, and
- (3) For the preservation and maintenance of the property transferred.

DOCTRINE OF LIS PENDENS

Question 35] Explain the rule of lis pendens as provided in the Transfer of Property Act, 1882.

CS (Inter) – Dec 1993 (5 Marks), Dec 2002 (8 Marks)

CS (Executive) – June 2009 (4 Marks), June 2010 (4 Marks)

Ans.: Lis means dispute, 'pendens' means pending, Lis pendens means a pending suit, action, petition or the like.

Transfer of property pending suit relating thereto [Section 52]: During the pendency of a suit in a court of law, property which is subject to litigation cannot be transferred i.e. property may be transferred but this transfer is subject to the rights that are created by a court's decree.

The provision is based on maxim—"us lite pendente nihil innovetur"—During litigation nothing new should be introduced.

A suit in foreign Court cannot operate as lis pendens. The doctrine of *lis pendens* does not apply to movables. It is the essence of the rule that a right to immovable property is directly and specifically in question in the suit. The doctrine is **not applicable** in favour of a **third-party**.

Question 36] While a suit relating to Property-X is pending between Rajan and Sajan, Mohan transferred this property in favour of Rameshwar. Court passes a decree in favour of Rajan and against Sajan. Rajan starts proceedings for enforcement of the decree against Rameshwar. Advise Rameshwar.

CS (Inter) - June 1994 (5 Marks), June 1997 (5 Marks)

CS (Inter) - Dec 1998 (6 Marks)

While a suit relating to a bungalow is pending between Ram and Shyam, Gita transferred the bungalow in favour of Sita. The court passes a decree in favour of Ram. Ram starts proceedings for execution of the decree against Sita. Will Ram succeed?

CS (Inter) - Dec 2004 (5 Marks)

Ans.: According to **Section 52**, during the pendency of a suit in a court of law, property which is subject to litigation cannot be transferred i.e. property may be transferred but this transfer is subject to the rights that are created by a court's decree. The doctrine is **not applicable** in favour of a **third-party**.

In the given case, during the pendency of the suit, the disputed property is transferred by Mohan, who is not party to the suit. The decree passed in the suit is not binding on transferee Rameshwar.

The doctrine of *lis pendens*, as incorporated in **Section 52** can be invoked, *inter alia*, when the property in dispute is transferred or otherwise dealt with by any of the parties to the suit.

SALE, EXCHANGE, GIFT, LEASE

Question 37] Write a short note on: Sale of immovable property

Ans.: Sale [**Section 54**]: "Sale" has been defined as a transfer of ownership in exchange for a price paid or promised or partly paid and partly promised.

Essentials:

- (a) The seller must be a person competent to transfer. The buyer must be any person who is not disqualified to be the transferee.
- (b) The subject matter is transferable property.
- (c) There is a transfer of ownership.
- (d) It must be an exchange for a price paid or promised or partly paid and partly promised.
- (e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

Mode of transfer by sale: Sale of an immovable property can be effected.

- (a) Where such property is tangible
 - ◆ by a registered instrument if it is of the value of ₹ 100 and upwards, and
 - ◆ by a registered instrument or by delivery of property when it is less than ₹ 100 in value, and
- (b) Where the property is tangible or a reversion, only by a registered instrument.

Question 38] Write a short note on: Exchanges

Ans.: When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".

Essentials:

- (1) The person making the exchange must be competent to contract.
- (2) There must be mutual consent.
- (3) There is a mutual transfer of ownership though things and interests may not be identical.
- (4) Neither party must have paid money only.

This Section applies to both movable and immovable property.

Mode of exchange: A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.

Question 38A] Distinguish between: Sale and Exchange

CS (Executive) – Dec 2011 (4 Marks)

Ans.: Following are the main points of difference between movable & immovable property:

Points	Sale	Exchange
Meaning	"Sale" has been defined as a transfer of ownership in exchange for a price paid or promised or partly paid and partly promised.	When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".
Money consideration	In sale whole or part consideration should be money.	Money consideration is not involved in exchange.
Section	Section 54 of the Transfer of Property Act, 1882 deals with the 'sale'.	Sections 118 to 121 of the Transfer of Property Act, 1882 deals with the 'exchange'.

Question 38B] Distinguish between: Sale and Contract for sale

CS (Executive) – Dec 2010 (4 Marks)

Ans.: "Sale" has been defined as a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

"Contract for sale" includes both a present sale and a contract to sell at a future time.

A contract for the sale of immovable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown.

Question 39] Write a short note on: Gift

Ans.: "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Essentials:

- (1) There must be a transfer of ownership.
- (2) The subject matter of gift must be a certain existing movable or immovable property.
- (3) The transfer must be made voluntarily.
- (4) It must be done without consideration.
- (5) There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

The essence of a gift is that it is a gratuitous transfer.

According to **Section 123**, a gift of immovable property must be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift of movable property may be made by a registered instrument or by delivery of property.

Revocation of gift: A revocable gift is one which may be revoked by the donor at any time. It is to be noted that, a gift cannot be revoked at the will and pleasure of the grantor. If the revocation of gift depends upon the mere will or pleasure of the donor, then such a gift is void. But on the other hand, if the condition is one which does not depend on the will or pleasure of the donor, the gift can be revoked on the happening of such condition.

Illustrations:

- (a) A gives a field to B, reserving to himself, with B's assent, the rights to take back the field in case B and his descendents die before A, B dies without descendents during A's lifetime. A may take back the field.
- (b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at leisure ₹ 10,000 out of one lakh. The gift holds goods as to ₹ 90,000 but is void as to ₹ 10,000 which continues to belong to A.

It was held by the Privy Council, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective and if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with. [*Kalyan Sundaram Pillai vs. Karuppa Moppanar* AIR 1927 PC 42]

Delay in registration of a gift does not postpone its operation. Section 123, Transfer of Property Act, 1882 merely requires that donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration. [*Kalyan Sundaram Pillai vs. Karuppa Moppanar* AIR 1927 PC 42]; [*Venkata Rama Reddy v. Pillai Rama Reddy* AIR 1923 Mad. 282]

Question 40] Ajoy voluntarily makes a gift of his immovable property to Bijoy. Bijoy accepts the gift. The possession of the property was given to Bijoy but the gift deed which required registration under section 123 of the Transfer of Property Act, 1882 was not registered. Whether Ajoy, the donor can revoke the gift? Decide.

CS (Executive) - Dec 2010 (6 Marks)

If the gift of an immovable property is accepted but not registered, does it amount to a valid gift? Give reasons.

CS (Executive) - June 2016 (5 Marks)

Ans.: It was held by privy council in *Kalyan Sundaram Pillai vs. Karuppa Moppanar* AIR 1927 PC 42 that, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective and if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with.

Thus, as per the facts given in case gift is complete as it was accepted by the donee. However, to be a valid gift, it must be registered as provided in the Transfer of Property Act, 1882.

Question 41] What is meant by 'onerous gift'?

CS (Executive) - June 2016 (5 Marks)

Ans.: **Onerous gifts [Section 127]:** Sometimes several things are transferred as a gift by single transaction. In such case some of them are really beneficial while the other conveys burdensome obligations. Such gift is known as onerous gift and the donee takes nothing by the gift unless he accepts it fully.

Where the gift is in the form of two or more independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the other.

Illustrations (as given in Transfer of Property Act, 1882)

- (a) A shares in X, prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.
- (b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

Question 42] Write a short note on: Leases

Ans.: According to **Section 105**, a "lease" of immovable property is a transfer of a right to enjoy property. Since it is a transfer to enjoy and use the property, possession is always given to the transferee. The lease of immovable property must be made for a certain period.

The transferor is called the lessor, the transferee is called the lessee, the price is called premium and the money, share service or any other thing of value to be so rendered is called the rent.

The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively.

Question 43] Distinguish between: Lease & License

CS (Inter) - June 2000 (4 Marks)

CS (Executive) - Dec 2009 (4 Marks)

Ans.: Following are the main points of difference between lease and license:

Points	Lease	License
Meaning	Lease of immovable property is a transfer of a right to enjoy property.	A licence is a right to do or continue to do in or upon the immovable property of the grantor, something which would, in the absence of such a right, be unlawful.
Possession	A lease involves a transfer of interest followed by possession of the property for a specified period.	In case of license, the legal possession continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose.
Enjoyment of property	In the case of a lease, there is a transfer of a right to enjoy the property.	In the case of a license there is something less than a right to enjoy the property in the licensee.
Transfer of property	Lease would amount to transfer of property.	A mere license does not create interest in the property to which it relates.
Transfer	The lease is both transferable and heritable.	License is personal to the grantee. It is neither transferable nor heritable.
Termination	Lease comes to an end only in accordance with the terms and conditions stipulated in the contract.	License can be withdrawn at any time at the pleasure of the grantor.

Question 43A] Amrit (lessor) grants his immovable property (premises) on lease for 4 years to Sukant (lessee) commencing from 1st June, 2001. The lessor gives a notice to the lessee on 1st February, 2008 for vacating the premises on 1st March, 2008:

(i) Is this notice a valid notice?

(ii) If the lease is continued after 4 years, will the tenancy be on monthly basis or yearly basis? Decide.

CS (Executive) - Dec 2012 (6 Marks)

Ans.: As **Section 106** of the Transfer of Property Act, 1882, in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. However, landlord and tenant can mutually agree and make the lease of immovable property for agricultural or manufacturing purposes on month to month basis. (If they have not agreed then only a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year).

Lease of immovable property for any purpose other than agricultural or manufacturing purposes shall be deemed to be a lease from month to month.

Notice: In case of a tenancy for a period more than a year the landlord wants to terminate or end the lease, he has to give a 6 months notice to the lessee to quit. In case of a tenancy from month to month, 15 days notice to quit is necessary.

The monthly tenancy may be created either by contract or may be presumed from the nature of the tenancy to be one, from month to month.

Effect of holding over [Section 116]: If a lessee of property remains in possession after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

As per facts given in case Amrit has granted his immovable property on lease for 4 years to Sukant. The problem does not specifically specify that the lease of immovable property is for agricultural or manufacturing purposes; hence it is deemed to be lease for month to month basis. The lease is granted for 4 years on 1st June, 2001 which end on 31st May, 2005. Sukant remains in possession after the determination of the lease; hence applying effect of holding over it will be lease of month to month after 31st May 2005.

Since it is lease of month to month notice of 15 days will be necessary. Amrit has given notice Sukant on 1st February, 2008 for vacating the premises on 1st March, 2008. Notice period is of 1 month which is more than statutory period of 15 days. Thus, notice given by Amrit is valid.

ACTIONABLE CLAIMS

Question 44] Write a short note on: Actionable claim

CS (Inter) - June 1995 (4 Marks), Dec 2005 (3 Marks)

Ans.: As per **Section 3**, actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Important points relating to actionable claim:

- (1) Actionable claim is a claim to an **unsecured debt**, which the Civil Court recognizes as affording grounds for relief of the person who claims it.
- (2) It is not in ready possession of a person and that person can claim such a debt by bringing action in a court of law.
- (3) It includes a **beneficial interest** in the **movable property**.

Examples of Actionable Claim: The following claims are "actionable claims" -

- ◆ Claim for arrear rent.
- ◆ Claim for rent to fall due in future.
- ◆ An option offered to repurchase the property once sold.
- ◆ Benefit of a contract giving option to purchase the land.
- ◆ When a contract for purchase of goods is endorsed by the purchaser, by writing on the back of the contract under his signature that he has sold all his rights and interest in the goods purchased under the said contract to a certain person who is named and properly identified in such endorsement.
- ◆ Provident Fund that is standing to the credit of a member of the Provident Fund.
- ◆ Money due under the Insurance Policy.
- ◆ A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in movable property not in possession.

Not Actionable Claims:

- A claim which is decreed.
- Relinquishment of interest of a member retiring from joint Hindu Family business in favour of the members who continue to be coparceners of the same.
- "Right to Sue", though it is a right but not an actionable claim.
- A claim for main profits.

- Debentures are secured debts and therefore not regarded as actionable claims.
- Copyright though a beneficial interest in immovable property is not an actionable claim since the owner has actual or constructive possession of the same.

Actionable claim does not include:

- ◆ Benefit of contract for purchase of goods,
- ◆ Arrears of rent due,
- ◆ Money due under insurance policy,
- ◆ Partner's right to sue for accounts of dissolved partnership etc.
- ◆ Negotiable instruments

Illustration:

- ◆ Aman agrees on 1.2.2016 to deliver 1,000 gunny bags to Balu on 1.3.2016. On 1.2.2016 Balu assigns interest in the contract to Chirag. Aman fails to deliver the bags on 1.3.2016. Chirag can sue Aman because a beneficial interest in a subsisting contract which relates to movable property is an actionable claim which can be validly transferred.
- ◆ Suppose in the above illustration Balu has assigned the right to Chirag to claim damages after the contract was broken. That is Balu transfers his right to sue Aman on, say, 1.4.2016, (i.e. one month after the contract was broken). In this case what B has assigned to Chirag is a mere right to sue Aman and get damages. Balu cannot transfer this right. After the breach of the contract, Balu has a mere right to sue Aman which he cannot assign or transfer.

MORTGAGES & CHARGES

Question 45] "Mortgage implies transfer of limited interest in an immovable property." Explain how the limited interest is transferred under different kinds of mortgages enumerated in Section 58 of the Transfer of Property Act, 1882.

CS (Inter) - June 1991 (8 Marks)

Ans.: According to Section 58, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan, an existing or future debt or performance of an engagement which may give rise to pecuniary liability.

In simple words, when some immovable property is offered as security for repayment of loan, the transaction is called as mortgage. Mortgages are **advance against immovable property**.

There are three essentials in a mortgage:

- (1) There is a **transfer of an interest** in the specific immovable property
- (2) **Property** should be an **immovable** one and
- (3) Transaction is for the purpose of **securing the payment of a loan or of the performance of an obligation** which may give rise to a pecuniary liability.

Question 46] Define 'Mortgage.' Explain briefly the various kinds of mortgages.

CS (Inter) - Dec 1994 (8 Marks)

Write a shot note on: Usufructuary Mortgage

CS (Executive) - Dec 2013 (5 Marks)

Ans.: There are six kinds of mortgages namely.

- (1) **Simple Mortgage:** A simple mortgage is a transaction whereby without delivering possession (ownership or occupancy) of the mortgaged property, the mortgagor binds himself personally to pay the debt. Mortgagor also agrees that in the event of his failure to pay the mortgage money, the mortgagee shall have the right to sale of property by a decree (an order of law) of the court.

If the mortgaged property is not sufficient to discharge the debt, the mortgagee can bring a personal action against the mortgagor for the recovery of money.

- (2) **Mortgage by conditional sale:** In this type of mortgage, the property is mortgaged with a condition super added that in the event of failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded as a sale. In case the loan is repaid within the stipulated time, the sale shall be invalid, or on condition that on such payment being made, the buyer shall transfer the property to the seller.
- (3) **Usufructuary Mortgage:** In this type of mortgage, the mortgagor has to deliver possession of the property to the mortgagee. The mortgagor expressly, or by implication binds himself to deliver possession of the mortgaged property to the mortgagee; and authorizes him to retain such position until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of those and to appropriate the same in *lieu* of interest or partly in payment of mortgage money. This is also known as mortgage with possession.
- (4) **English Mortgage:** Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the money as agreed, the transaction is called an "English Mortgage".
- (5) **Mortgage by deposit of title deeds:** This type of mortgage is called equitable mortgage. In this transaction, a person delivers the property with an intention to create a security, and obtains a loan. The requisites of such a mortgage are:
- ◆ a debt
 - ◆ deposit of title deeds and
 - ◆ an intention that deeds shall be security for the debt.

It should be noted that this type of mortgage can be created only in certain towns and not everywhere in India. The facility to create a valid mortgage is available in the following towns in India:

Calcutta, Madras, Bombay, Adoni, Ajmer, Allahabad, Alwar, Bangalore, Bellary, Cochin, Coimbatore, Delhi, Jaipur, Jodhpur, Kanpur, Rajahmundry, Udaipur, Vellore, Ellora, Pali, Bhilwara, Bikaner, Kakinada, Narayanganj, Mysore and Madurai.

- (6) **Anomalous Mortgage:** A mortgage which is not a simple mortgage, a mortgage by conditional sale, usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds, is called an anomalous mortgage.

Question 47] Distinguish between: English mortgage and mortgage by conditional sale

CS (Executive) - Dec 2016 (3 Marks)

Ans.: Following are the main points of difference between English mortgage and mortgage by conditional sale:

Points	English Mortgage	Mortgage by Conditional Sale
Meaning	Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the money as agreed, the transaction is called an "English Mortgage".	In this type of mortgage, the property is mortgaged with a condition super added that in the event of failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded as a sale. In case the loan is repaid within the stipulated time, the sale shall be invalid, or on condition that on such payment being made, the buyer shall transfer the property to the seller.
Sale of property	In English mortgage the property is absolutely sold to the mortgagee.	In mortgage by conditional sale, the mortgaged property is conditionally sold.
Personal liability	The mortgagor has personal liability to pay the debt.	The mortgagor has no personal liability to pay the debt.

Right of foreclosure	The mortgagee has no right of foreclosure.	The mortgagee has right of foreclosure.
Mesne profits	The ownership is transferred to mortgagee and the mortgagee enjoys the <i>mesne profits</i> .	If mortgagor commits defaults, title of property can be transferred to mortgagee.
Possession	The mortgagor has right to possession.	The mortgagor has no such right.

Foreclosure is a legal process in which a lender attempts to recover the balance of a loan from a borrower who has stopped making payments to the lender by forcing the sale of the asset used as the collateral for the loan.

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property.

Question 48] Distinguish between: Sub-Mortgage & Puisne Mortgage

CS (Inter) - Dec 2007 (4 Marks)

Ans.: Following are the main points of distinction between sub-mortgage & puisne mortgage:

Points	Sub-mortgage	Puisne mortgage
Meaning	Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage.	Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a <i>puisne mortgage</i> .
Example	Where A mortgages his house to B for ₹10,000 and B mortgage his mortgagee right to C for ₹8,000. B creates a sub-mortgage.	Where A mortgages his house worth ₹ One lakh to B for ₹ 40,000 and mortgages the same house to C for a further sum of ₹ 30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of ₹ 40,000 plus interest.

Question 49] Explain the doctrine of 'clog on equity of redemption' under the Transfer of Property Act, 1882.

CS (Inter) - Dec 1991 (5 Marks)

CS (Executive) - Dec 2014 (5 Marks)

Ans.: A mortgagor has a right of redemption. Any clause or provision inserted in the mortgage deed to prevent, evade, or hamper redemption is void. "Once a mortgage always a mortgage" rule is based on the principle of equity. The court will not allow or permit any condition which will impede the redemption of mortgage or the repayment of loan for which the security of property was given.

A mortgage deed, providing that if the amount is not paid within a stipulated time, the mortgages would become the absolute owner of the property, was held to be a clog on equity of redemption. [*Murari Lal v. Dev Karani*]

However, when conditions are reasonable and do not prevent the mortgagor to redeem the property, they will be recognize as valid and binding.

Conditions like "no redemption during cultivating season of a land, for a certain period", were held valid and enforceable. But where "no redemption on a particular day", barred the mortgagor from redeeming for a further long period, it was held to be a clog on redemption, hence not valid.

Question 50] Write a short note on: Doctrine of Marshalling

CS (Inter) - June 1990 (4 Marks)

CS (Executive) - Dec 2009 (4 Marks)

Ans.: **Marshalling [Section 81]:** If the owner of two or more properties mortgages them to one person and then mortgages one or more of those properties to another person, the subsequent mortgagee is-in the absence of a contract to the contrary - entitled to have the prior mortgage debt satisfied out of the

properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or any person who has for consideration acquired an interest in any of the properties.

Example: Ram has three properties P_1 , P_2 & P_3 . He mortgages all the three properties to Shyam. He again mortgages property P_1 & P_2 to Mohan. Since properties P_1 & P_2 are common to both Shyam and Mohan, Mohan can invoke doctrine of marshalling and can compel Shyam to have the prior mortgage debt satisfied out of the property P_3 which was not mortgaged to Mohan.

Question 51] A mortgages his fields X, Y and Z to B. Thereafter he mortgaged fields X and Y to C. Can C compel B to first relieves his money from field Z?

CS (Inter) - Dec 1995 (6 Marks), Dec 1999 (6 Marks)

Ans.: According to doctrine of marshalling as provided in **Section 81**, the subsequent mortgagee in the absence of a contract to the contrary, is entitled to have the prior mortgage debt satisfied out of the properties not mortgaged to him

In given case, C can invoke the doctrine of marshalling and can compel B to first relieves his mortgage money from field Z.

Question 52] Distinguish between: Mortgage & Charge

CS (Executive) - Dec 2008 (4 Marks), Dec 2009 (4 Marks)

CS (Executive) - Dec 2010 (4 Marks), Dec 2012 (4 Marks)

CS (Executive) - Dec 2013 (4 Marks)

Ans.: Following are main points of distinction between mortgage & charge:

Points	Mortgage	Charge
Meaning	A mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced.	Although in a charge, the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage.
Transfer of interest	In mortgage there is transfer of interest in the property.	In charge there is no transfer of any interest in the property.
Created	A mortgage can only be created by act of parties.	A charge may be created by act of parties or by operation of law.
Registration	A mortgage deed must be registered and attested by two witnesses.	A charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
Foreclosure	In certain types of mortgage the mortgagee can foreclose the mortgaged property.	The charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
Personal liability	In a mortgage, there can be security as well as personal liability.	In a charge the remedy of the charge-holder is against the property only.

Question 53] What do you understand by 'crystallisation of floating charge' under the Transfer of Property Act, 1882?

CS (Executive) - June 2016 (5 Marks)

Ans.: A floating charge attaches to the company's property generally and remains dormant till it crystallizes or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right.

In certain cases like default, liquidation etc. the lender can take physical possession of the assets and realize his dues by selling the current assets, without the intervention of the Court. This is termed as 'crystallization of charge'.

A floating charge crystallizes and the security becomes fixed in the following cases:

- (1) When the company goes into liquidation
- (2) When the company ceases to carry on the business

- (3) When the creditors or the debenture holders take steps to enforce their security e.g. by appointing receiver to take possession of the property charged.
- (4) On the happening of the event specified in the deed.

In the aforesaid circumstances, the floating charge is said to become fixed or to have crystallized. Until the charge crystallizes or attaches or becomes fixed the company can deal with the property so charged in any manner it likes.

Effect of crystallization of a floating charge: On crystallization, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors. But preferential creditors who have priority for payment over secured creditors in the winding-up get priority over the claims of the debenture holders having floating charge.

FOREIGN CONTRIBUTION (REGULATION) ACT, 2010

INTRODUCTION : *The object of the Foreign Contribution (Regulation) Act, 2010 is to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.*

The Foreign Contribution (Regulation) Act, 2010 was enacted to regulate the acceptance and utilization of foreign contribution or hospitality with a view to ensuring that the Parliamentary institutions, political associations, academic and other voluntary organizations as well as individuals working in important areas of national life may function in a manner consistent with the values of sovereign democratic republic. The Act was amended in 1984 to extend its provisions to cover second and subsequent recipients of foreign contribution and to the members of higher judiciary, besides introducing the system of grant of registration to the association receiving foreign contribution.

The Act extends to the whole of India. It came into force on 1.5.2011.

OBJECT, SCOPE, APPLICABILITY & DEFINITIONS

Question 1] Discuss the object, scope & applicability of Foreign Contribution (Regulation) Act, 2010
CS (Inter) – June 2005 (3 Marks)

Ans.: The object of the Act is:

- ◆ To regulate the acceptance and utilization of foreign contribution or foreign hospitality and
- ◆ To ensure that parliamentary institutions, political associations, academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic.

The Act extends to the **whole of India** and also applies

- To citizens of India outside India and
- Associates, branches or subsidiaries outside India of companies or bodies corporate registered or incorporated in India.

The provisions of the Act are not applicable to any transaction between the Government of India and the Government of any foreign country or territory.

Application of other laws not barred [Section 52]: The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force

Question 2] Define 'foreign contribution' under the Foreign Contribution (Regulation) Act, 2010**CS (Executive) – June 2015 (5 Marks)**

Ans.: Foreign Contribution [Section 2(h)]: Foreign Contribution means the donation, delivery or transfer made by any **foreign source**, of any -

- (i) **Article** not being an article given as a gift for his personal use, if the market value of such article is not more than specified sum [*Currently ₹ 25,000 as per Rule 6A*];
- (ii) **Currency**, whether Indian or foreign;
- (iii) **Security** and includes any foreign security

Explanation 1: A donation, delivery or transfer of any article, currency or foreign security by any person who has received it from any **foreign source**, either directly or through one or more persons, shall also be deemed to be foreign contribution.

Explanation 2: The interest and other income derived from foreign contribution deposited in any bank shall also be deemed to be foreign contribution.

Explanation 3: Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution.

Question 3] Define: Foreign Hospitality

Ans.: Foreign Hospitality [Section 2(i)]: Foreign hospitality means any offer made by a foreign source for providing a person with the costs of travel to any foreign country or with free board, lodging, transport or medical treatment.

Question 4] Define: Foreign Source

Ans.: Foreign Source [Section 2(j)]: Foreign source includes:

- (i) Government of any foreign country or territory and any agency of such Government
- (ii) Any international agency, not being the UN or any of its specialized agencies, the World Bank, IMF or such other agency notified by the Central Government
- (iii) A foreign company
- (iv) A corporation incorporated in a foreign country or territory
- (v) A multi-national corporation
- (vi) A company within the meaning of the Companies Act, 2013, and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely-
 - (a) The Government of a foreign country or territory
 - (b) The citizens of a foreign country or territory
 - (c) Corporations incorporated in a foreign country or territory
 - (d) Trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory
 - (e) Foreign company
- (vii) A foreign trade union
- (viii) A foreign trust or a foreign foundation

- (ix) A society, club or other association of individuals formed or registered outside India
- (x) A citizen of a foreign country

REGULATION OF FOREIGN CONTRIBUTION & HOSPITALITY

Question 5] Which organizations/individuals are specifically prohibited from receiving foreign contributions under the Foreign Contribution (Regulation) Act, 2010?

CS (Executive) – Dec 2015 (3 Marks), June 2016 (5 Marks)

Ans.: Prohibition to accept foreign contribution [Section 3]: Following person or organization cannot accept foreign contribution:

- (a) Candidate for election
- (b) Correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper
- (c) Judge, Government servant or employee of any corporation or government company or any other body controlled or owned by the Government
- (d) Member of any Legislature (*i.e.* MP & MLA)
- (e) Political party or its office-bearer
- (f) Organization of a political nature
- (g) Association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form
- (h) Correspondent or columnist, cartoonist, editor, owner of the association or company covered in clause (g).

Person resident in India, and citizen of India resident outside India, shall not accept any foreign contribution or acquire or agree to acquire any currency from a foreign source, on behalf of any political party or any person referred to Section 3(1).

Person resident in India shall not deliver any currency which has been accepted from foreign source to any person if he knows or has reasonable cause to believe that such other person intends or is likely to deliver such currency to any political party or any person referred to in Section 3(1).

Citizen of India resident outside India shall not deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to-

- (i) Any political party or any person referred to in Section 3(1) or
- (ii) Any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in Section 3(1).

Person receiving any currency from a foreign source on behalf of any person or class of persons, referred to in Section 9, *shall not* deliver such currency-

- (a) To any person other than a person for which it was received, or
- (b) To any other person, if he knows or has reasonable cause to believe that such other person intends or is likely to deliver such currency to a person other than the person for which such currency was received.

Question 6] Mention the provisions of the Foreign Contribution (Regulation) Act, 2010 in respect of exemptions from accepting foreign contributions.

CS (Executive) – Dec 2008 (5 Marks), Dec 2010 (5 Marks)

Ans.: Persons to whom section 3 shall not apply [Section 4]: Following transactions does not come within the purview of Section 3 if foreign contribution is accepted subject to the provisions of Section 10:

- (i) Salary, wages or other remuneration received from any foreign source by way of payment in the ordinary course of business or
- (ii) Payment in the course of international trade or commerce, or in the ordinary course of business transacted outside India or
- (iii) Transaction made by foreign source with the Central Government or State Government
- (iv) Gift or presentation made to a member of any Indian delegation (*however such gift or present must be accepted in accordance with the rules made by the Central Government*) or
- (v) Foreign contribution received from relative or
- (vi) Remittance received, in the ordinary course of business through any official channel, post office, or any authorized person in foreign exchange under the FEMA
- (vii) Scholarship, stipend or any payment of like nature

Intimation of receiving foreign contribution from relatives [Rule 6 of Foreign Contribution (Regulation) Rules, 2011]: Any person receiving foreign contribution in excess of ₹ 1 lakh in a financial year from any of his relatives shall inform the Central Government in Form FC-1 within 30 days from the date of receipt of such contribution.

Question 7] Gabbar is a local level leader of a regional party in Haryana. He received a sum of US \$ 5,000 as an agent of foreign source in relation to transaction made by the foreign source with the Government of Haryana. Did he contravene the provisions of the Foreign Contribution (Regulation) Act, 2010?

CS (Inter) - June 2004 (3 Marks)

Ans.: Acceptance of foreign contributions as an agent of a foreign source in relation to any transaction made by such foreign source with government is exempt u/s 4.

Therefore, Gabbar has not contravened the provisions of the Foreign Contribution (Regulation) Act, 2010.

Question 8] Modern Educational Institute, New Delhi is a non-profit organization engaged in building students careers. Four of its brilliant students are in receipt of scholarships directly from a US based educational foundation. Discuss whether there has been any violation of the provisions of the Foreign Contribution (Regulation) Act, 2010.

CS (Inter) - Dec 2004 (4 Marks)

Ans.: As per Section 4, certain transactions mentioned in section itself prohibition of Section 3 regarding receipt of foreign contribution does not apply. Receipt of foreign contribution in form of "scholarship, stipend or any payment of like nature" is covered in Section 4 and hence students of Modern Educational Institute can receive the scholarships directly from a US based educational foundation. It will not amount to violation of the provisions of the Foreign Contribution (Regulation) Act, 2010.

Question 9] Do the following transactions amount to contravention of the Foreign Contribution (Regulation) Act, 2010? Give reasons in support of your answer and refer to relevant provisions:

- (i) Abhay, general secretary, Loktantrik Sangathan, Moradabad (UP) receives a sum of US \$ 1,000 by way of payment in the ordinary course of business transacted by him outside India.
- (ii) Avtar, a government servant, is in receipt of contribution by way of gift as a member of Indian delegation.
- (iii) Vidur, a District and Sessions Judge, accepts a diamond studded watch from his relative residing in UK.
- (iv) Sanjay, a private school teacher, is given a gift by his student living in USA for his personal use and the market value of the article is ₹ 2,200 only.

CS (Inter) - Dec 2006 (1 × 4 = 4 Marks)

Ans.: Validity of given transaction under the Foreign Contribution (Regulation) Act, 2010 can be discussed as follows:

- (1) Payment received in the ordinary course of business is exempt u/s 4, hence there is no contravention by Mr. Abhay.
- (2) Gift or presentation as a member of any Indian delegation is exempt u/s 4, provided that it was accepted in accordance with the regulations made by the Central Government.
- (3) As per **Section 4**, foreign contribution received from relative is exempt.

As per **Rule 6** of the **Foreign Contribution (Regulation) Rules, 2011**, any person receiving foreign contribution in excess of ₹ 1 lakh in a financial year from any of his relatives shall inform the Central Government in **Form FC-1** within **30 days** from the date of receipt of such contribution.

As per **Rule 6A** of the **Foreign Contribution (Regulation) Rules, 2011**, any article gifted to a person for his personal use whose market value in India on the date of such gift does not exceed ₹ 25,000 shall not be a foreign contribution.

Considering the above provision if a diamond studded watch is received from relative residing in UK will not amount to foreign contribution if its value is less than ₹ 25,000.

However, if its value is above ₹ 1,00,000 then Vidur is required to inform the Central Government in **Form FC-1** within **30 days** from the date of receipt of gift.

- (4) As per **Rule 6A** of the **Foreign Contribution (Regulation) Rules, 2011**, any article gifted to a person for his personal use whose market value in India on the date of such gift does not exceed ₹ 25,000 shall not be a foreign contribution. Thus, Sanjay a private school teacher can accept a gift by his student living in USA for his personal use as the market value of the article is ₹ 2,200. (i.e. below ₹ 25,000)

Question 10] What are the restrictions on acceptance of foreign hospitality under the Foreign Contribution (Regulation) Act, 2010?

CS (Inter) – June 2003 (3 Marks), June 2004 (3 Marks)

CS (Inter) – Dec 2006 (3 Marks)

Ans.: Foreign Hospitality [Section 2(i)]: Foreign hospitality means any offer made by a foreign source for providing a person with the costs of travel to any foreign country or with free board, lodging, transport or medical treatment.

Restrictions on acceptance of foreign hospitality [Section 6]: Following person cannot receive foreign hospitality visiting any country without prior permission of the Central Government:

- ◆ Member of a Legislature or office-bearer of a political party or
- ◆ Judge or
- ◆ Government servant or
- ◆ Employee of any corporation or any other body owned or controlled by the Government

It shall not be necessary to obtain such permission for an **emergent medical aid** needed on account of **sudden illness** contracted during a visit outside India. However, where such foreign hospitality has been received, the person receiving such hospitality shall give, within **1 month** from the date of receipt of such hospitality sent intimation with prescribed details to the Central Government.

Receiving foreign hospitality by specified categories of persons [Rule 7]:

- (1) Any person belonging to any of the categories specified in Section 6 who wishes to avail of foreign hospitality shall apply to the Central Government in **Form FC-2** for prior permission to accept such foreign hospitality.
- (2) Every application for acceptance of foreign hospitality shall be accompanied by an invitation letter from the host or the host country, and administrative clearance of the Ministry or department concerned in case of visits sponsored by a Ministry or department of the Government.
- (3) The application for grant of permission to accept foreign hospitality must reach the appropriate authority ordinarily two weeks before the proposed date of onward journey.

- (4) In case of emergent medical aid needed on account of sudden illness during a visit abroad, the acceptance of foreign hospitality shall be required to be intimated to the Central Government within **60 days** of such receipt giving full details including the source, approximate value in Indian Rupees, and the purpose for which and the manner in which it was utilized.

However, no such intimation is required if the value of such hospitality in emergent medical aid is up to **₹ 1 lakh or equivalent** thereto.

Question 11] Aditya, a director of Amex Ltd., visited Germany thrice in 2015 on invitations and free air-tickets, board and lodging extended to Amex Ltd. by the Chamber of Commerce and Industry, Germany. Has Aditya or the company contravened the provisions of the Foreign Contribution (Regulation) Act, 2010? Mention relevant provisions.

CS (Inter) – June 2006 (5 Marks)

CS (Executive) – June 2013 (5 Marks)

Ans.: As per **Section 6**, following person cannot receive foreign hospitality visiting any country without prior permission of the Central Government:

- ◆ Member of a Legislature or office-bearer of a political party or
- ◆ Judge or
- ◆ Government servant or
- ◆ Employee of any corporation or any other body owned or controlled by the Government

Since directors of public company are not covered u/s 6, Aditya can accept foreign hospitality and as such he or the company has not contravened the provisions of the Foreign Contribution (Regulation) Act, 2010.

Question 12] Distinguish between: Foreign Contribution & Foreign Hospitality

CS (Inter) – June 2007 (3 Marks), June 2008 (4 Marks)

Ans.: Following are the main points of distinction between foreign contribution & foreign hospitality:

Points	Foreign Contribution	Foreign Hospitality
Meaning	Foreign Contribution means the donation, delivery or transfer made by any foreign source, of any - (i) Article not being an article given as a gift for his personal use, if the market value of such article is not more than specified sum (ii) Currency , whether Indian or foreign; (iii) Security and includes any foreign security	Foreign hospitality means any offer made by a foreign source for providing a person with the costs of travel to any foreign country or with free board, lodging, transport or medical treatment.
Prohibition	Foreign contribution cannot be accepted by political parties and other person and organization mention u/s 3.	Following person cannot receive foreign hospitality visiting any country or territory outside India without prior permission of the Central Government: ◆ Member of a Legislature or office-bearer of a political party or ◆ Judge or ◆ Government servant or ◆ Employee of any corporation or any other body owned or controlled by the Government

Question 13] What are the prohibitions under the Foreign Contribution (Regulation) Act, 2010 regarding the transfer of foreign contributions to other person?

Ans.: **Prohibition to transfer foreign contribution to other person [Section 7]:** If a registered person or person granted a certificate or person obtained prior permission has received foreign contribution can transfer such foreign contribution to any other person registered person or person granted a certificate or person obtained prior permission only.

However, such person may transfer a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under this Act only by taking prior approval of the Central Government.

Question 14] What are the restriction to utilize foreign contribution for administrative purpose under the Foreign Contribution (Regulation) Act, 2010?

Ans.: Restriction to utilize foreign contribution for administrative purpose [Section 8]: Every person, who is registered and granted a certificate or given prior permission to receive foreign contribution, shall utilize such contribution for the purposes for which the contribution has been received.

Any foreign contribution or any income arising out of it shall not be used for **speculative business**.

Every person receiving any foreign contribution shall not defray sum exceeding 50% of foreign contribution received in a financial year to meet administrative expenses without prior approval of the Central Government.

Question 15] What are the powers of Central Government regarding receipt of foreign contributions under the Foreign Contribution (Regulation) Act, 2010?

CS (Inter) – June 2007 (5 Marks), June 2008 (4 Marks)

Ans.: Power of Central Government to prohibit receipt of foreign contribution in certain cases [Section 9]: The Central Government may-

- (a) Prohibit any person or organization from accepting any foreign contribution
- (b) Require any person to obtain prior permission of the Central Government before accepting any foreign hospitality
- (c) Require any person to furnish intimation within prescribed time and in prescribed manner of the source, purpose, manner of utilization of any foreign contribution received
- (d) Require specified person to obtain prior permission of the Central Government before accepting any foreign contribution
- (e) Require any person to furnish intimation, within prescribed time and in prescribed manner as to the source, manner of utilization receipt of any foreign hospitality

However above prohibition shall be made by the Central Government only if it is satisfied that the acceptance of foreign contribution or foreign hospitality by such person, is likely to affect prejudicially-

- (i) Sovereignty and integrity of India or
- (ii) Public interest or
- (iii) Freedom or fairness of election to any Legislature or
- (iv) Friendly relations with any foreign State or
- (v) Harmony between religious, racial, social, linguistic or regional groups, castes or communities.

Judicial View:

A show-cause notice and an opportunity of being heard must be given to the concerned person. The final order must disclose that the satisfaction is founded on objective material and must furnish proper reasons for non acceptance of the explanation of the person/association against which the order is to be passed.
[Association of Voluntary Agencies for Rural Development vs. UOI]

REGISTRATION OF CERTAIN PERSONS WITH CENTRAL GOVERNMENT

Question 16] Which type of person are required to be registered with the Central Government for accepting foreign contribution? Can unregistered person accept foreign contribution? If yes, then how?

Ans.: Registration of certain persons with Central Government [Section 11]: Person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution only after obtaining a certificate of registration from the Central Government.

Every other person not registered with the Central Government can accept any foreign contribution only after obtaining the prior permission of the Central Government and such permission shall be valid for the specific purpose for which it is obtained and from the specific source.

The Central Government may, by notification in the Official Gazette, specify-

- (a) The person or class of persons who shall obtain its prior permission before accepting the foreign contribution
- (b) The area or areas in which the foreign contribution shall be accepted and utilized with the prior permission of the Central Government
- (c) The purpose or purposes for which the foreign contribution shall be utilized with the prior permission of the Central Government
- (d) The source or sources from which the foreign contribution shall be accepted with the prior permission of the Central Government.

Question 17] Sarva Kalyan Morcha, an organization pursuing a definite social programme, is in receipt of \$ 5,000 from a charitable trust in Canada. Does this transaction amount to contravention of the Foreign Contribution (Regulation) Act, 2010? Give reasons in support of your answer and refer to relevant provisions.

CS (Inter) - Dec 2006 (2 Marks)

Ans.: As per Section 11, person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution only after obtaining a certificate of registration from the Central Government.

Thus, Sarva Kalyan Morcha is advised to register with the Central Government before it receives foreign contribution.

Question 18] Ananda Swar Mondal, a cultural association in Kolkata formed for the sole purpose of promoting Rabindra Sangeet, has been offered gift of \$ 5,000 by a society in USA. Can the association receive it without violating the provisions of the Foreign Contribution (Regulation) Act, 2010?

CS (Inter) - June 2005 (3 Marks)

Gurukul Vidyarthi Manch, a body formed for the purposes of imbibing patriotism and character-building among students, receives a grant of £1,500 from Struarts, a British philanthropist. Does it violate the provisions of the Foreign Contribution (Regulation) Act, 2010?

CS (Inter) - Dec 2005 (3 Marks)

Destitutes Rehabilitation (India), an NGO devoted to the cause of ameliorating the lot of destitutes and the needy, has been offered a contribution of \$ 5,000 by an American foundation. Mention the provisions of the Foreign Contribution (Regulation) Act, 2010 regulating the receipt of foreign contribution by an organization pursuing a definite social, cultural, economic, educational or religious programme.

CS (Inter) - Dec 2007 (5 Marks)

Ans.: As per Section 11, person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution only after obtaining a certificate of registration from the Central Government.

Thus, all the organization in given cases are advised to register with the Central Government before it receives foreign contribution.

Question 19] State the formalities to be observed under the Foreign Contribution (Regulation) Act, 2010 relating to "grant of certificate of registration"?

Ans.: Grant of certificate of registration [Section 12]: An application by a person for grant of certificate or giving prior permission shall be made to the Central Government **electronically in Form FC-3** and along with prescribed fee.

On receipt of an application the Central Government shall by an order reject the application if the application is not in the prescribed form or does not contains specified particulars.

If application for grant of certificate or giving prior permission is in order and fulfils the prescribed conditions, then after making inquiry the Central Government within **90 days** from the date of receipt of application, register such person and grant him a certificate or give him prior permission.

If certificate or permission is not granted within 90 days then the Central Government shall communicate the reasons for refusal to the applicant.

A person shall not be eligible for grant of certificate or giving prior permission, if his certificate has been suspended and such suspension of certificate continues on the date of making application.

The certificate granted shall be valid for a period of **5 years** and the prior permission shall be valid for the specific purpose or specific amount of foreign contribution proposed to be received.

Question 20] Under what circumstances the Central Government can suspend the certificate granted as per the Foreign Contribution (Regulation) Act, 2010?

Ans.: Suspension of certificate [Section 13]: Where the Central Government is satisfied that pending consideration of the question of cancelling the certificate, it is necessary so to do, it may, by order in writing, suspend the certificate not exceeding **180 days**.

Every person whose certificate has been suspended shall -

- (a) Not receive any foreign contribution during the period of suspension of certificate
- (b) Utilize the foreign contribution in his custody with the prior approval of the Central Government.

However the Central Government on an application made by such person allow receipt of any foreign contribution by such person on certain terms and conditions.

Question 21] Write a short note on: Cancellation of certificate under the Foreign Contribution (Regulation) Act, 2010 **CS (Executive) - Dec 2013 (5 Marks)**

Ans.: Cancellation of certificate [Section 14]: The Central Government by an order cancel the certificate, if it is satisfied after making such inquiry that-

- (a) The holder of the certificate has made a statement which is incorrect or false or
- (b) The holder of the certificate has violated any of the terms and conditions of the certificate or renewal
- (c) In the opinion of the Central Government, it is necessary in the public interest to cancel the certificate
- (d) The holder of certificate has violated any of the provisions of this Act or rules or order made thereunder
- (e) The holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for 2 consecutive years or has become defunct.

The person concerned has to be given a reasonable **opportunity of being heard** before cancellation of certificate.

Any person whose certificate has been cancelled shall not be eligible for registration or grant of prior permission for a period of **3 years** from the date of cancellation of such certificate.

Question 22] State the provision relating to management of foreign contribution of person whose certificate has been cancelled under the Foreign Contribution (Regulation) Act, 2010.

Ans.: Management of foreign contribution of person whose certificate has been cancelled [Section 15]: The foreign contribution and assets created out of the foreign contribution in the custody of person whose certificate has been cancelled shall vest in prescribed authority.

The authority may manage the activities for such period and in such manner, as the Central Government may direct.

Such authority may utilize the foreign contribution or dispose of the assets created out of it in case adequate funds are not available for running such activity.

The authority shall return the foreign contribution and the assets vested upon it to the person, if such person is subsequently registered under the Act.

Question 23] State the procedure for making an application for renewal of certificate under the Foreign Contribution (Regulation) Act, 2010. CS (Executive) - Dec 2015 (3 Marks)

Ans.: Renewal of certificate [Section 16]: Every person who has been granted a certificate shall have such certificate renewed within **6 months** before the expiry of the period of the certificate.

The application for renewal of the certificate shall be made to the Central Government in **Form FC-5** and accompanied by prescribed fee.

The Central Government shall renew the certificate within **90 days** from the date of receipt of application for renewal and grant a certificate of renewal for a period of **5 years**.

In case the Central Government does not renew the certificate within 90 days, it shall communicate the reasons to the applicant.

The Central Government may refuse to renew the certificate in case where a person has violated any of the provisions of these Act or rules made thereunder.

Question 24] How foreign contribution should be received by the person to whom certificate is granted or prior permission has been given to receive foreign contribution?

Ans.: Foreign contribution through scheduled bank [Section 17]: Every person who has been granted a certificate or given prior permission shall receive foreign contribution in a single account only through one of the branches of a bank as specified in his application for grant of certificate.

However, such person may open one or more accounts in one or more banks for utilizing the foreign contribution received by him.

Only foreign contribution shall be received or deposited in such account. Thus, other funds cannot be deposited in such accounts.

Every bank or authorized person in foreign exchange shall report to prescribed authority as specified amount of foreign remittance; the source and manner in which the foreign remittance was received; and other particulars, in such form and manner as may be prescribed.

Question 25] Write a short note on: Intimation to Central Government regarding foreign contribution

Ans.: Intimation [Section 18]: Every person who has been granted a certificate or given prior approval has to provide an intimation to the Central Government and other specified authority as to the-

- ◆ **Amount** of foreign contribution received
- ◆ **Source** from which foreign contribution was received
- ◆ **Purposes** for which foreign contribution was received
- ◆ **Manner** in which foreign contribution was utilized

Such intimation has to be given within prescribed time and in prescribed manner.

Every person receiving foreign contribution is required to submit a copy of a statement of foreign contribution received duly certified by **officer of the bank or authorized person in foreign exchange** and furnish the same to the Central Government along with the intimation.

Question 26] What are the provisions relating to 'maintenance of accounts' under the Foreign Contribution (Regulation) Act, 2010

Ans.: Maintenance of accounts [Section 19]: Every person who has been granted a certificate or given prior approval shall maintain -

- (a) An account of foreign contribution received and
- (b) A record as to utilization foreign contribution

Such accounts and record has to be maintained in prescribed form and in prescribed manner.

Question 27] What are the provisions relating to 'audit of accounts' under the Foreign Contribution (Regulation) Act, 2010?

Ans.: Audit of accounts [Section 20]: Where any person who has been granted a certificate or given prior permission, fails to furnish any intimation under this Act within the time specified or the intimation so furnished is not as per law or if, after inspection of such intimation, the Central Government has any reasonable cause to believe that any provision of this Act has been, or is being, contravened, the Central Government may, by **general or special order**, authorize such gazetted officer, holding a **Group A post** under the Central Government or any other officer or authority or organization to audit any books of account kept or maintained by such person.

Every such officer shall have the right to enter in or upon any premises at any **reasonable hour, before sunset and after sunrise**, for the purpose of auditing the said books of account:

Any information obtained from such audit shall be kept **confidential** and shall not be disclosed except for the purposes of this Act.

Question 28] Is it obligatory for candidate for election to give intimation to Central Government regarding receipt of foreign contribution?

Ans.: Intimation by candidate for election [Section 21]: Every candidate for election, who had received any foreign contribution at any time **before 180 days** of his nomination as candidate for election shall give, within prescribed time and manner an intimation to the Central Government or prescribed authority or both as to the -

- ◆ **Amount** of foreign contribution received
- ◆ **Source** from foreign contribution received
- ◆ **Manner** in which foreign contribution was received
- ◆ **Purposes** for which foreign contribution was utilized

Question 29] A person who was permitted to accept foreign contribution, ceases to exist or has become defunct. What are the provisions relating to disposal of assets of such person as made under the Foreign Contribution (Regulation) Act, 2010?

Ans.: Disposal of assets created out of foreign contribution [Section 22]: Where any person who was permitted to accept foreign contribution, ceases to exist or has become defunct then all the assets of such person shall be disposed as per law in which the person was registered or incorporated.

In the absence of any such law, the Central Government may by notification specify the manner and procedure for disposal all such assets.

Question 30] What are the provisions relating to 'inspection of accounts' under the Foreign Contribution (Regulation) Act, 2010?

Ans.: Inspection of accounts or records [Section 23]: If the Central Government to suspect that any provision of the Act has been or is being, contravened by any person or organization then it may by general or special order authorize gazetted officer, holding a Group A post or other officer or authority or organization to inspect any account or record maintained by such person or organization or association. Every such inspecting officer shall have the right to enter in or upon any premises at any reasonable hour, before sunset and after sunrise, for the purpose of inspecting the said account or record.

Question 31] What are the provisions relating to 'seizure of accounts and records' under the Foreign Contribution (Regulation) Act, 2010?

Ans.: Seizure of accounts or records [Section 24]: If after inspection of an account or record, the inspecting officer has any reasonable cause to believe that any provision of the Act or of any other law relating to foreign exchange has been, or is being, contravened, he may seize such account or record and produce the same before the court, authority or tribunal in which any proceeding is brought for such contravention. Further, the authorized officer shall return such account or record to the person from whom it was seized if no proceeding is brought within 6 months from the date of such seizure for the contravention disclosed by such account or record.

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

INTRODUCTION : The Foreign Exchange Regulation Act, 1973 in India was replaced on June 2000 by the Foreign Exchange Management Act, 1999. The FERA was passed in 1973 at a time when there was acute shortage of foreign exchange in the country. It had a controversial 27 years stint during which many bosses of the Indian corporate world found themselves at the mercy of the Enforcement Directorate. Moreover, any offence under FERA was a criminal offence liable to imprisonment, but FEMA makes offences relating to foreign exchange civil offences.

FEMA had become the need to support the pro-liberalization policies of the Government of India. The objective of the Act is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments for promoting the orderly development and maintenance of foreign exchange market in India.

Among the various objectives of the FEMA, an important one is to revise and unite all the laws that relate to foreign exchange. Further FEMA aims to promote foreign payments and trade in the country. Another important objective of the FEMA is to encourage the orderly maintenance and development of the foreign exchange market in India.

FEMA extends to the whole of India. It applies to all branches, offices and agencies outside India owned or controlled by a person, who is a resident of India.

Question 1] Outline the objective & scope of the Foreign Exchange Management Act, 1999.

Ans.: As per the preamble, the objective is to consolidate and amend the law relating to foreign exchange with view to:

- (a) Facilitate external trade and payments.
- (b) For promoting development & maintenance of foreign exchange market in India.

Scope: The Act extends to the **whole of India**. It also apply to:

- All branches, offices and agencies outside India owned or controlled by a person resident in India (PRI), and
- Any contravention committed outside India, by any person to whom this Act applies.

Question 2] "FEMA is to facilitate external trade and payments and promotion of orderly development and maintenance of foreign exchange market in India." Discuss.

CS (Executive) - June 2014 (5 Marks)

Ans.: Foreign Exchange Regulation Act, 1973 (FERA) was a relatively strict Act, that had as its main objective to control the foreign exchange movement to and from India. Foreign Exchange Management

Act, 1999 (FEMA), is mainly intended to manage the flows of foreign exchange and encourage FDI in India.

Any offence under FERA was a criminal offence liable to imprisonment, but FEMA makes offences relating to foreign exchange civil offences.

FEMA had become the need to support the pro-liberalization policies of the Government of India. The objective of the Act is to consolidate and amend the law relating to foreign exchange, to facilitate external trade and payments for promoting the orderly development and maintenance of foreign exchange market in India.

As the name indicates, the Act is to 'manage' not to 'regulate'; hence FEMA is investor friendly. FEMA lays down that 'everything is permitted unless what is not covered, controlled or prohibited.

DEFINITIONS

Question 3] Explain the terms Foreign Exchange & Foreign Security as per the Foreign Exchange Management Act, 1999.

CS (Inter) - Dec 2000, June 2004 (3 Marks)

CS (Inter) - June 2007 (3 Marks)

Distinguish between: Foreign Exchange & Foreign Security CS (Executive) - Dec 2010 (5 Marks)

Ans.: Foreign Currency [Section 2(m)]: Foreign currency means any currency other than Indian currency.

Foreign Exchange [Section 2(n)]: Foreign exchange means foreign currency and includes-

- (i) Deposits, credits and balances payable in any foreign currency;
- (ii) Drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but *payable in any foreign currency*;
- (iii) Drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but *payable in Indian currency*.

Foreign Security [Section 2(o)]: Foreign security means any security, in the form of shares, stocks, bonds, debentures or any other instrument in foreign currency. It also includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency.

Question 4] Write a short note on: 'Person' under the FEMA

CS (Executive) - Dec 2013 (5 Marks)

Ans.: Person [Section 2(u)]: Person includes-

- (i) Individual
- (ii) Hindu undivided family
- (iii) Company
- (iv) Firm
- (v) AOP or BOI
- (vi) Every artificial juridical person and
- (vii) Any agency, office or branch owned or controlled by any person

Question 5] Write a short note on: Person Indian of Origin under the FEMA

CS (Executive) - June 2013 (3 Marks)

Ans.: As per FDI Policy, person of Indian origin means a citizen of any country other than Bangladesh or Pakistan, if

- (i) He at any time held Indian Passport
- (ii) 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 or
- (iii) The person is a spouse of an Indian citizen or a person referred to in clause (i) or (ii).

Question 6] Write a short note on: Person Resident in India (PRI)

CS (Inter) - Dec 2003 (3 Marks), Dec 2005 (3 Marks)

Ans.: Person Resident in India [Section 2(v)]: Person resident in India means:

- (i) A person residing in India for more than 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
 - (a) for or on taking up employment outside India
 - (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, **otherwise than**-
 - (a) for or on taking up employment in India
 - (b) for carrying on in India a business or vocation in India or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period
- (ii) Any person or body corporate registered or incorporated in India
- (iii) An office, branch or agency in India owned or controlled by a person resident outside India
- (iv) An office, branch or agency outside India owned or controlled by a person resident in India.

Person resident outside India [Section 2(w)]: Person resident outside India means a person who is not resident in India.

Question 7] Sekhar resided in India for a period of 150 days during the financial year 2014-2015 and thereafter went abroad. He came back to India on 1st April, 2015 as an employee of a business organization. What would be his residential status during the financial year 2015-2016?

CA (Final) - May 2015 (3 Marks)

Ans.: The residential status of an individual for particular financial year is determined with reference to his residence in India in immediately preceding financial year. In given case, Sekhar resided in India for less than 183 days in financial year 2014-2015. Therefore, for financial year 2015-2016 he is a 'Person resident outside India' irrespective of the purpose or duration of his stay. Unless an individual resides in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India.

Question 8] Rahul resided for the period of 170 days in India during the financial year 2014-2015 and thereafter went abroad. He came back to India on 1st April, 2015 as an employee of a business organization. What would be his residential status during financial year 2015-2016 under the Foreign Exchange Management Act, 1999?

CA (Final) - Nov 2008 (3 Marks), May 2011 (3 Marks)

Ans.: The residential status of an individual for particular financial year is determined with reference to his residence in India in immediately preceding financial year. In given case, Rahul resided in India for less than 183 days in financial year 2014-2015. Therefore, for financial year 2015-2016 he is a 'Person resident outside India' irrespective of the purpose or duration of his stay. Unless an individual resides

in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India.

Question 9] Suresh resided in India during the financial year 2008-2009. He left India on 15th July, 2009 for Switzerland for pursuing higher studies in Biotechnology for 2 years. What would be his residential status under the Foreign Exchange Management Act, 1999 during the financial years 2009-2010 and 2010-2011?
CA (Final) – Nov 2010 (5 Marks)

Ans.: Residential status for the financial year 2009-2010:

'Person resident in India' means a person residing in India for more than 182 days during the course of preceding financial year. However, it does not include a person who has gone out of India or who goes outside India for any purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Generally, a student goes out of India for a certain period. In this case, Suresh who resided in India during the financial year 2008-2009 left on 15.7.2009 for Switzerland for pursuing higher studies in Biotechnology for 2 years, he will be 'Person resident in India' for 2009-2010, as he has gone to stay outside India for a 'certain period'.

Residential status for the financial year 2010-2011:

Suresh had not stayed for single day in year 2009-2010. Hence for 2010-2011 he is 'Person resident outside India'.

Question 10] Karan resided in India during the financial year 2013-2014 for less than 182 days. He came to India on 1st April, 2014 for business. He closed down his business on 30th April, 2015 and left India on 30th June, 2015 for the purpose of employment outside India. Decide the residential status of Karan during the financial years 2014-2015 & 2015-2016 under the provisions of the Foreign Exchange Management Act, 1999.
CA (Final) – May 2013 (4 Marks)

Ans.: Residential status for the financial year 2014-2015:

Karan has stayed in India for financial year 2013-2014 for less than 182 days. Hence, for financial year 2014-2015 he is 'Person resident outside India'. Unless an individual resides in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India.

Residential status for the financial year 2015-2016:

Karan has stayed in India for financial year 2014-2015 for more than 182 days. Hence, for financial year 2015-2016 he is 'Person resident in India'. Unless an individual resides in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India. However, as per the definition of 'Person resident in India' if a person goes outside the India for taking employment then he will be treated as 'Person resident outside India' even if his stay in preceding financial year was more than 182 days. Thus, Karan is 'Person resident outside India' for the financial year 2015-2016.

Question 11] Examine with reference to the provisions of the Foreign Exchange Management Act, 1999, the residential status of the branches mentioned below:

- (a) NNM Ltd. an Indian Company having its registered office at Mumbai, established a branch at New York USA on 1st April, 2005.
- (b) DDI Ltd. a company incorporated and registered in London established a branch at Kanpur in India on 1st April, 2005
- (c) DDI Ltd. has a branch office at Singapore which is controlled by its Kanpur branch

CA (Final) – May 2005 (7 Marks), Nov 2007 (7 Marks)

Ans.: 'Person resident in India' as defined in Section 2(v) includes the following:

- (i) Any person or body corporate registered or incorporated in India

- (ii) An office, branch or agency in India owned or controlled by a person resident outside India
- (iii) An office, branch or agency outside India owned or controlled by a person resident in India.

Keeping in view above provisions answers to given problem is as under:

- (a) New York Branch of NNM Ltd. is 'Person resident in India', as it falls under the clause "An office, branch or agency outside India owned or controlled by a person resident in India".
- (b) Kanpur Branch of DDI Ltd. (foreign company) is 'Person resident in India', as it falls under the clause "An office, branch or agency in India owned or controlled by a person resident outside India".
- (c) Singapore Branch of DDI Ltd. (foreign company) controlled by its Kanpur branch is 'Person resident in India', as it falls under the clause "An office, branch or agency outside India owned or controlled by a person resident in India".

REGULATION & MANAGEMENT OF FOREIGN EXCHANGE

Question 12] What are the restriction imposed under the Foreign Exchange Management Act, 1999 relating to dealing and holding in foreign exchange and foreign security?

Ans.: Dealing in Foreign Exchange [Section 3]: Following are permitted only as per provision of the Act, rules and regulations or with the general or special permission of the RBI:

- (a) Dealing or transfer any foreign exchange or security to any person
- (b) Making payment to any person resident outside India in any manner
- (c) Receiving any payment on behalf of any person resident outside India in any manner
- (d) Entering into any financial transaction in India for acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Holding of Foreign Exchange [Section 4]: Person resident in India can acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India only after complying the provisions of the Act, Rules and Regulations made thereunder.

Question 13] What are the provisions of the regulations framed by RBI in respect of possession and retention of foreign currency?

Ans.: As per Section 4, person resident in India can acquire, hold, own, possess or transfer any foreign exchange only after complying the provisions of the Act, Rules and Regulations. In this regard the RBI has framed **Foreign Exchange Management (Possession & Retention of Foreign Currency) Regulations, 2000.**

Limits for possession and retention of foreign currency or foreign coins [Regulation 3]: The RBI specifies the following limits for possession or retention of foreign currency or foreign coins:

- (i) An authorized person acting within the scope of his authority may possess foreign currency and coins without any limit.
- (ii) Any person may possess foreign coins without any limit.
- (iii) A person resident in India may possess foreign currency notes, bank notes and foreign currency travellers cheque not exceeding US \$ 2,000 provided that such foreign exchange -
 - (a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India
 - (b) was acquired by him, from any person not resident in India and who is on a visit to India as honorarium or gift or for services rendered or in settlement of any lawful obligation.
 - (c) was acquired by him by way of honorarium or gift while on a visit to any place outside India

or

- (d) represents unspent amount of foreign exchange acquired by him from an authorized person for travel abroad.

Possession of foreign exchange by a person resident in India but not permanently resident [Regulation 4]: A person resident in India but not permanently resident may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

Explanation: For the purpose of this clause, 'not permanently resident' means a person resident in India for employment of a specified duration or for a specific job or assignment, the duration of which does not exceed 3 years.

Question 14] Raman is a software engineer of Armtek Ltd. The company sent him to Japan to develop a software programme there on deputation for 2 years. He earned a sum of US \$ 3,000 as an honorarium there. On his return to India he wants to hold this foreign currency with him. Whether Raman will be allowed to keep the foreign currency with him?

CA (Final) - May 2009 (7 Marks)

Ans.: As per **Regulation 3 of the Foreign Exchange Management (Possession & Retention of Foreign Currency) Regulations, 2000**, a person resident in India may possess foreign currency notes, bank notes and foreign currency travellers cheque not exceeding US \$ 2,000 provided that such foreign exchange was acquired by him by way of honorarium while on a visit to any place outside India.

Raman is a person resident outside India as he was not present in India for the preceding year for a single day. Thus, he may hold foreign currency of US \$ 3,000. When Raman will become a person resident in India, he can hold foreign currency of US \$ 2,000 and will have to surrender to US \$ 1,000 to an authorized person.

Question 15] Dr. Sukant, who is permanently resident in India, retains foreign currency notes of US \$ 5,000 which he had acquired during his visit to USA by way of expert medical advice rendered to patients there. Advise with reference to FEMA.

CS (Executive) - June 2014 (1 Mark)

Ans.: As per **Regulation 3 of the Foreign Exchange Management (Possession & Retention of Foreign Currency) Regulations, 2000**, a person resident in India may possess foreign currency notes, bank notes and foreign currency travellers cheque not exceeding US \$ 2,000 provided that such foreign exchange was acquired by him by way of honorarium while on a visit to any place outside India. Thus, Dr. Sukant can hold foreign currency of US \$ 2,000 and will have to surrender to US \$ 3,000 to an authorized person.

Question 15A] Shyam, who had purchased \$ 15,000 for his business trip overseas, has \$ 550 on his return. Advise with reference to provisions of FEMA.

CS (Inter) - Dec 2007 (1 Mark)

Ans.: As per **Regulation 3 of the Foreign Exchange Management (Possession & Retention of Foreign Currency) Regulations, 2000**, a person resident in India may possess foreign currency notes, bank notes and foreign currency travellers cheque not exceeding US \$ 2,000 provided that such foreign exchange represents unspent amount of foreign exchange acquired by him from an authorized person for travel abroad. Shyam, who had purchased \$ 15,000 for his business trip overseas, has \$ 550 on his return, which is less than amount specified i.e. \$ 2,000; hence Shyam can hold the \$ 550.

However, as per **Foreign Exchange Management (Realization, repatriation & surrender of foreign exchange) Regulations, 2015**, a person being an individual resident in India shall surrender the received/ realized/ unspent/ unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorized person within a period of 180 days from the date of such receipt/ realization/ purchase/ acquisition or date of his return to India, as the case may be. Thus, it is advised to Shyam to surrender \$ 550 to authorized dealer within 180 days from the date of his return.

CURRENT ACCOUNT TRANSACTIONS

Question 16] Can person sell or draw foreign exchange for current account transactions?

Write a short note on: Current Account Transactions

CS (Inter) – Dec 2002 (3 Marks), June 2005 (3 Marks)

CS (Inter) – Dec 2007 (3 Marks)

CS (Executive) – June 2012 (3 Marks)

Ans.: Current Account Transactions [Section 5]: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. As per this rule current account transaction are divided into following categories:

- (1) Transaction for which drawal of foreign exchange is prohibited. **[Rule 3]**
- (2) Transaction for which foreign exchange can be drawn with prior approval of Central Government. **[Rule 4]**
- (3) Transaction for which foreign exchange can be drawn with prior approval of RBI. **[Rule 5]**

Question 17] Write a short note on: Prohibition of drawal of foreign exchange

CS (Inter) – June 2002 (5 Marks)

Ans.: Prohibition on drawal of Foreign Exchange [Rule 3]: Drawal of foreign exchange by any person for the following purpose is prohibited:

- (a) Transaction specified in the **Schedule I** or
- (b) Travel to Nepal and Bhutan or
- (c) Transaction with a person resident in Nepal or Bhutan.

However, the prohibition in clause (c) may be exempted by RBI by special or general order.

Transactions prohibited as per Schedule I are as follows:

- (1) Remittance out of lottery winnings.
- (2) Remittance of income from racing/riding etc. or any other hobby.
- (3) Remittance for purchase of lottery tickets, banned/proscribed magazines, football pools, sweepstakes, etc.
- (4) Payment of commission on exports made towards equity investment in Joint Ventures/ Wholly Owned Subsidiaries abroad of Indian companies.
- (5) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- (6) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (7) Payment related to "Call Back Services" of telephones.
- (8) Remittance of interest income on funds held in Non-Resident Special Rupee (Account) Scheme.

Question 18] State the current account transactions which require approval of Central Government under the FEM (Current Account Transactions) Rules, 2000?

Ans.: Prior approval of Govt. of India [Rule 4]: No person shall draw foreign exchange for a transaction included in the **Schedule II** without prior approval of the Government of India.

However, this restriction shall not apply where the payment is made out of funds held in **Resident Foreign Currency (RFC) Account** of the remitter.

Transactions requiring approval of Central Government as per Schedule II are as follows:

- (1) Cultural Tours
- (2) Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US \$ 10,000) by a State Government and its Public Sector Undertakings
- (3) Remittance of freight of vessel chartered by a PSU
- (4) Payment of import by a Government Department or a PSU on CIF basis (i.e. other than FOB and FAS basis)
- (5) Multi-modal transport operators making remittance to their agents abroad
- (6) Remittance of hiring charges of transponders by TV Channels or Internet Service providers
- (7) Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping
- (8) ~~Remittances under technical collaboration agreements where payment of royalty exceeds 5% on local sales and 8% on exports and lump sum payment exceeds US \$ 2 million [Deleted vide Notification No. GSR 382(E) May 5, 2010; Thus transaction is permitted without prior approval of Central Government].~~
- (9) Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies, if the amount involved exceeds US \$ 1,00,000.
- (10) Remittance for membership of P& I Club.

Question 19] State the current account transactions which require approval of RBI under the FEM (Current Account Transactions) Rules, 2000?

Ans.: Prior approval of RBI [Rule 5]: No person shall draw foreign exchange for a transaction included in the **Schedule III** without prior approval of the RBI. However, this Rule shall not apply where the payment is made out of funds held in **Resident Foreign Currency (RFC) Account** of the remitter.

Rule 4 or Rule 5 shall not apply to drawal made out of funds held in **Exchange Earners Foreign Currency (EEFC) Account** of the remitter.

- (1) Release of exchange exceeding US \$ 10,000 or its equivalent in one calendar year, for one or more private visits to any country (except Nepal & Bhutan).
- (2) Gift remittance exceeding US \$ 5,000 per remitter/donor p.a. Corporate can make remittances on account of donations for the following specified purposes only subject to a limit of 1% of the foreign exchange earned in 3 previous financial years or US \$ 5 million whichever is less-
 - (a) Creation of chairs in reputed educational institutes.
 - (b) Donations to funds (not being investment fund) promoted by educational institutes, or
 - (c) Donation to a technical institution or body or association in the field of activity of the donor company.
- (3) Donation exceeding US \$ 5,000 per remitter/donor p.a.
- (4) Exchange facilities exceeding US \$ 1,00,000 for persons going abroad for employment.
- (5) Exchange facilities for emigration exceeding US \$ 1,00,000 or amount prescribed by country of emigration.
- (6) Remittance for maintenance of close relatives abroad

- (i) Exceeding net salary (after deduction of taxes, contribution to provident fund and other deductions) of a person who is resident but not permanently resident in India and –
 - (a) is a citizen of a foreign State other than Pakistan or
 - (b) is a citizen of India, who is on deputation to the office or branch or subsidiary or joint venture in India of such foreign company.
 - (ii) Exceeding US \$ 1,00,000 per year, per recipient, in all other cases.
- (7) Release of foreign exchange, exceeding US \$ 25,000 to a person, irrespective of period of stay, for business travel, or attending a conference or specialized training or for maintenance expenses of a patient going abroad for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.
 - (8) Release of exchange for meeting expenses for medical treatment abroad exceeding the estimate from the doctor in India or abroad US \$ 100,000 whichever is higher.
 - (9) Release of exchange for studies abroad exceeding the estimate from the institution abroad or US \$ 1,00,000, per academic year, whichever is higher.
 - (10) Commission, per transaction, to agents abroad for sale of residential flats or commercial lots in India exceeding US \$ 25,000 or 5% of the inward remittance whichever is more.
 - (11) ~~Remittance for purchase of trade mark/franchise in India.~~ [Deleted vide Notification No. GSR 382(E) July 10, 2006; Thus transaction is permitted without prior approval of RBI]
 - (12) Remittance exceeding US \$ 1,00,000 per project, for any consultancy service procured from outside India. For consultancy service procured outside India by Indian companies executing infrastructure projects the limit shall be US \$ 10 Million per project. For this purpose infrastructure sector is defined as power, telecommunication, railways, road including bridges, sea port and airport, industrial parks and urban infrastructure (water supply, sanitation and sewage).
 - (13) Remittance exceeding 5% of investment brought in India or US \$ 1,00,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

Question 20] Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:

- (i) Remittance of US \$ 50,000 out of winnings on a lottery ticket.
- (ii) US \$ 1,00,000 for sending a cultural troupe on a tour of USA.
- (iii) US \$ 50,000 for meeting the expenses of his business tour to Europe.

Advise him whether he can get foreign exchange and if so, under what conditions?

CA (Final) – May 2004 (7 Marks), May 2008 (7 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Keeping in view the provisions of these Rules, answer to problem is given below:

- (i) As per **Rule 3**, transactions specified in **Schedule I** are totally prohibited. Remittance of out of winnings on a lottery ticket is specified in Schedule I. Thus, Mr. Sane cannot obtain foreign exchange US \$ 50,000 out of winnings on a lottery ticket.
- (ii) As per **Rule 4**, transactions specified in **Schedule II** require approval of Central Government. Drawal of foreign exchange for 'cultural tour' is specified in Schedule II. Thus, Mr. Sane can obtain foreign exchange US \$ 1,00,000 for sending a cultural troupe on a tour of USA with prior approval of Central Government.

- (iii) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. Drawal of foreign exchange for 'business tour exceeding US \$ 25,000' is specified in Schedule III. Thus, Mr. Sane can obtain foreign exchange US \$ 50,000 for meeting the expenses of his business tour to Europe with prior approval of RBI.

Question 21] Atul desires to obtain foreign exchange for the following purposes:

- (a) Remittance of US \$ 10,000 for payment for goods purchased from a party situated in Nepal.
 (b) US \$ 10,000 for remitting as commission to his agent in USA for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Atul by way of foreign currency inward remittance amounting to US \$ 1,00,000.

Advise him, if he can get the foreign exchange and under what conditions.

CA (Final) - May 2007 (4 Marks), May 2009 (4 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Keeping in view the provisions of these Rules, answer to problem is given below:

- (a) As per **Rule 3**, drawal of foreign exchange by any person for travel to Nepal and Bhutan or transaction with a person resident in Nepal or Bhutan is totally prohibited. However, this prohibition may be exempted by RBI by special or general order. Thus, Atul **cannot** draw foreign exchange for payment for goods purchased from a party situated in Nepal.
 (b) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. "Drawal of foreign exchange to pay commission to agents abroad for sale of residential flats or commercial plots in India exceeding US \$ 25,000 or 5% of the inward remittance whichever is more" is specified in Schedule III. Since, the proposed drawal of US \$ 10,000 is within the permitted limit, such drawal does not require the prior approval of RBI.

Question 22] Examine whether the following transactions are permissible under Foreign Exchange Management Act, 1999:

- (i) Payment of remuneration to foreign technician.
 (ii) Remittance of dividend to non-residents.

CA (Final) - Nov 2003 (7 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Thus, if current account transaction is not prohibited or do not require approval of Central Government or RBI then such transaction is permitted without any restriction.

Payment of remuneration to foreign technician and dividend to non-residents are current account transactions and not prohibited or do not require approval of Central Government or RBI under the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and thus permitted without any restriction.

However, as per RBI circular, the foreign technician should hold an employment visa and salary paid to foreign technician can be remitted outside India only after deduction of tax at source.

Question 23] State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:

- (i) X, a Film Star, wants to perform along with associates in New York on the occasion of Diwali for Indians residing at New York. Foreign exchange US \$ 20,000 is required for this purpose.
- (ii) F International Ltd. has purchased the trade mark from a foreign company to establish retail business chain in India as a joint venture at a consolidated price of US \$ 5,00,000 which is to be paid in foreign currency of that country.
- (iii) R wants to get his heart surgery done at UK. Up to what limit foreign exchange can be drawn by him and what are the approvals required?
- (iv) L wants to pursue a course in fashion design in Paris. The foreign exchange US \$ 20,000 towards tuition fees and US \$ 30,000 for incidental and stay expenses for studying abroad is required for this purpose.

CA (Final) – May 2006 (7 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Keeping in view the provisions of these Rules, answer to problem is given below:

- (i) As per **Rule 4**, transactions specified in **Schedule II** require approval of Central Government. Drawal of foreign exchange for 'cultural tour' is specified in Schedule II. Thus, X a Film Star can obtain foreign exchange US \$ 20,000 only with prior approval of Central Government.
- (ii) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. "Remittance for purchase of trade mark/franchise in India" is deleted from Schedule III. Thus transaction is permitted without prior approval of RBI.
- (iii) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. "Release of exchange for meeting expenses for medical treatment abroad" is covered under Rule 5. If the amount required for medical treatment exceeds the estimate from the doctor in India or abroad or US \$ 1,00,000 whichever is higher, prior approval of RBI is required. Thus, R can draw foreign exchange to get his heart surgery done at UK if without prior approval of RBI if amount do not exceed estimate from the doctor in India or abroad or US \$ 1,00,000 otherwise prior approval of RBI is necessary.

Question 24] State the kind of approval required for the following transaction under the Foreign Exchange Management Act, 1999:

- (i) M requires US \$ 5,000 to make payment related to 'call back services' of telephone.
- (ii) N wants to pursue a course in business management in New York. He wants to draw US \$ 50,000 towards expenses for studying abroad.
- (iii) R wants to draw US \$ 20,000 to make donation to a charitable trust situated in South Korea.

CA (Final) – May 2009 (7 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Keeping in view the provisions of these Rules, answer to problem is given below:

- (i) As per **Rule 3**, transactions specified in **Schedule I** are totally prohibited. Payment related to Call Back Services of telephones is specified in Schedule I. Thus, M cannot obtain foreign exchange US \$ 5,000 to make payment related to 'call back services' of telephone.
- (ii) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. Drawal of foreign exchange for studying abroad is specified in Schedule III. If the foreign exchange for studies abroad

exceeds the estimate from the institution abroad or US \$ 1,00,000, per academic year, whichever is higher, prior approval of RBI is necessary. Therefore, drawal of US \$ 50,000 does not require prior approval of RBI.

- (iii) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. "Drawal of foreign exchange to make donation" is specified in Schedule III. If the foreign exchange to make donation exceeds US \$ 5,000, prior approval of RBI is necessary. Therefore, F can obtain US \$ 20,000 for making donation to a charitable trust situated in South Korea with the prior approval of RBI.

Question 25] Indotech Ltd. desires to make payments of commission on exports made towards equity investment in its joint venture company abroad. Advice with reference to FEMA.

CS (Executive) - Dec 2008 (1 Mark)

Ans.: As per **Rule 3**, transactions specified in **Schedule I** are totally prohibited. "Payment of commission on exports made towards equity investment in JV/WOS abroad of Indian companies" is specified in Schedule I.

Thus, Indotech Ltd. cannot make payments of commission on exports made towards equity investment in its joint venture company abroad.

Question 26] With reference to the relevant provisions of the Foreign Exchange Management Act, 1999 and the Rules and Regulations made thereunder, advise on the following:

- (i) Naresh, an Indian citizen, is interested in sending ₹ 10,000 to his sister residing in USA as birthday gift.
- (ii) Dinesh, an Indian citizen, wants to use his international debit card for withdrawal of cash during his visit abroad.

CS (Executive) - Dec 2009 (1 × 2 = 2 Marks)

Ans.: Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**. Keeping in view the provisions of these Rules, answer to problem is given below:

- (i) As per **Rule 5**, transactions specified in **Schedule III** require approval of RBI. "Gift remittances" are covered in Schedule III. If the gift remittance exceeds US \$ 5,000, prior approval of RBI is required. In given case Naresh wants to remit ₹ 10,000 to his sister in USA. If rate of exchange is taken ₹ 60 per dollar then ₹ 10,000 = \$ 166.67. Since amount to be remitted does not exceed US \$ 5,000, prior approval of RBI is not required.
- (ii) The transactions do not require RBI approval if payment is made by a person by use of an **International Credit Card**, towards meeting expenses while such person is on a visit outside India.

Question 26A] Shyam, an Indian businessman, is interested in remitting US \$ 8,000 for purchase of trademark/franchise in India. Comment.

CS (Executive) - Dec 2010 (1 Mark)

Ans.: As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, transactions specified in **Schedule III** require approval of RBI. "Remittance for purchase of trademark/franchise in India" is deleted from Schedule III. Thus, transaction is permitted without prior approval of RBI.

Question 27] Anand desires to donate US \$10,000 to Rotary International, an NGO in Chicago, USA. Advise with reference to FEMA.

CS (Executive) - June 2012 (1 Mark)

Ans.: As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, transactions specified in **Schedule III** require approval of RBI. As per Schedule III, donation exceeding US \$ 5,000 per remitter/donor p.a. requires prior approval of RBI.

Thus, Anand can donate US \$ 10,000 to Rotary International, an NGO in Chicago, USA by taking prior approval of RBI.

Question 28] Suresh desires to pay US \$ 10,000 through international credit card being the remittance out of lottery earnings. Advise with reference to FEMA.

CS (Executive) - June 2012 (1 Mark)

Ans.: As per Rule 3 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, transactions specified in Schedule I are totally prohibited. "Remittance out of lottery winnings" is specified in Schedule I.

Thus, Suresh cannot pay US \$ 10,000 being the remittance out of lottery earnings.

Question 29] Rakesh, a person resident in India, is interested in extending an invitation to George, a person resident outside India, to stay as his guest while on a visit to India. Advise with reference to FEMA.

CS (Executive) - June 2011 (1 Mark)

Ans.: There is no prohibition under the FEMA for making any payment in Indian rupee towards meeting expenses on account of boarding, lodging and service related thereto or travels to and from and within the India of a person resident outside who is on visit to India. Thus, Rakesh can invite to George, a person resident outside India, to stay as his guest while on a visit to India.

Question 29A] How much foreign exchange is available to a person going abroad on emigration?

CS (Executive) - Dec 2015 (3 Marks)

Ans.: As per Rule 5 read with Schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 the exchange facilities for emigration exceeding US \$ 1,00,000 or amount prescribed by country of emigration can be availed without permission of RBI. If the amount exceeds the limit prescribed above then prior approval of RBI is necessary.

Question 29B] With reference to the relevant provisions of the Foreign Exchange Management Act, 1999, advise on the following:

- (i) Adarsh Ltd. had export earnings of ₹ 15 lakh, ₹ 20 lakh and ₹ 22 lakh during the years 2013, 2014 and 2015 respectively. It desires to issue advertisements through a foreign TV channel.
- (ii) Paritosh Ltd., an Indian company, wishes to donate \$ 10,000 to a charitable institution in Mauritius.

CS (Inter) - June 2006 (2 × 2 = 4 Marks)

Ans.:

- (i) Issue of advertisements through a foreign TV channel is current account transaction. Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawl is a current account transaction. Earlier there was restriction on advertisements through a foreign TV channel. If the export earnings for last 2 year is less than ₹ 10 lakhs then prior approval of RBI is necessary. However, this restriction has been removed and hence an advertisement through a foreign TV channel is freely permitted without approval of RBI irrespective of export earnings. [RBI/2004/74 A.P. (DIR Series) Circular No. 76]
- (ii) Donation to charitable institution is current account transaction. As per Rule 4 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, transactions in excess of limit specified in Schedule II require approval of Central Government. Schedule II specifies "donation exceeding US \$ 5,000 per remitter/donor p.a.". Paritosh Ltd. wishes to donate \$10,000 to a charitable institution in Mauritius which is in excess of limit specified; hence prior approval of RBI will be necessary.

Question 29C] Somesh, a person resident in India, availed of US \$ 3,000 for his one month's private visit to USA in June, 2016. He intends to make another private visit to Europe for one month in December, 2016 and avail of US \$ 4,000. Comment.

CS (Inter) - Dec 2006 (2 Marks)

Ans.: As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, no person shall draw foreign exchange for a transaction included in the **Schedule III** without prior approval of the RBI. As per **Schedule III**, "release of exchange exceeding US \$ 10,000 or its equivalent in one calendar year, for one or more private visits to any country (except Nepal & Bhutan) requires prior approval of the RBI. Somesh wish to avail of US \$ 3,000 for his one month's private visit to USA which is not in excess of limit specified; hence he can draw \$ 3,000 without prior approval of RBI.

Question 29D] State whether the following transactions are valid and permitted under the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**:

- (i) An NRI sent a gift of US \$ 6,000 to his younger sister on her marriage in June, 2006 and again sent another gift of US \$ 4,000 on the occasion of marriage of his younger brother in November, 2006.
- (ii) An Indian patient is in need of specialized medical treatment in a US hospital at a cost of US \$ 1,25,000.
- (iii) A student, after graduation, wants to proceed to USA for pursuing higher studies in an engineering course for which he requires US \$ 1,25,000 per academic year, which is the estimate from the foreign university.
- (iv) An Indian businessman wants to remit US \$ 10,000 for purchase of a trademark/ franchise in India.
- (v) A company incorporated in India has to make a remittance of US \$ 90,000 by way of reimbursement of pre-incorporation expenses.

CS (Executive) – June 2007 (5 × 1 = 5 Marks)

Ans.:

- (i) Neither Foreign Exchange Management Act, 1999 nor Foreign Exchange Management (Current Account Transactions) Rules, 2000 has put any restriction on receiving gifts from NRI. Hence, NRI can send the gifts to his Indian relative without any limit and without any approval of RBI.
- (ii) As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, no person shall draw foreign exchange for a transaction included in the **Schedule III** without prior approval of the RBI. As per **Schedule III**, release of foreign exchange, exceeding US \$ 100,000 for medical treatment requires prior approval of the RBI. An Indian patient is in need of US \$ 1,25,000 for medical treatment in a US which is in excess of limit specified; hence he can draw US \$ 1,25,000 only after taking prior approval of RBI.
- (iii) As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, no person shall draw foreign exchange for a transaction included in the **Schedule III** without prior approval of the RBI. As per **Schedule III**, release of foreign exchange, exceeding US \$ 100,000 for studies in abroad requires prior approval of the RBI. A student is in need of US \$ 1,25,000 for studies in abroad which is in excess of limit specified; hence he can draw US \$ 1,25,000 only after taking prior approval of RBI.
- (iv) Restrictions on remittance for purchase of trademark/franchise in India contained in **Schedule III** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000** has been deleted. Hence, transaction is permitted without prior approval of RBI.
- (v) As per **Rule 5** of the **Foreign Exchange Management (Current Account Transactions) Rules, 2000**, no person shall draw foreign exchange for a transaction included in the **Schedule III** without prior approval of the RBI. As per **Schedule III**, remittance exceeding 5% of investment brought in India or US \$ 1,00,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses requires prior approval of RBI. Thus, Indian company can remit \$ 90,000 by way of reimbursement of pre-incorporation expenses without prior approval of RBI.

Question 29E] Harish, an agent stationed abroad, desires to receive remuneration of \$ 30,000 for sale of commercial plots in India. Comment. CS (Executive) – Dec 2007 (1 Mark)

Ans.: As per Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, no person shall draw foreign exchange for a transaction included in the Schedule III without prior approval of the RBI. As per Schedule III, remittance of commission to agents abroad for sale of residential flats or commercial plots in India exceeding US \$ 25,000 or 5% of the inward remittance whichever is more, requires prior approval of RBI. As per facts given in case commission payable to Harish is \$ 30,000 which is in excess of limit specified; hence prior approval of RBI is necessary.

Question 29F] With reference to the relevant provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder, advise on the following:

- (i) Tomb Ltd. desires to make payment of commission on the exports made towards equity investment in its wholly owned subsidiary abroad.
- (ii) Hari, while on a visit abroad, used his international credit card for making payment towards meeting stay expenses. CS (Inter) – June 2008 (2× 2 = 4 Marks)

Ans.:

- (i) As per Rule 3 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, transactions specified in Schedule I are totally prohibited. "Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies" is covered in schedule I; hence Tomb Ltd. cannot make payment of commission on the exports made towards equity investment in its wholly owned subsidiary abroad.
- (ii) As per Rule 7 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, restriction of taking prior approval of RBI shall not apply to the use of International Credit Card for making payment by a person towards meeting expenses while such person is on a visit outside India. Thus, Hari, while on a visit abroad can use his international credit card for making payment towards meeting stay expenses.

Question 30] Explain the procedure to be followed for payment of dividend to non-residents.

Ans.: Payment of dividend is current account transaction. Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, such sell or draw foreign exchange can be made after complying the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Payment of dividend is not prohibited or do not require prior approval, hence freely permitted.

The procedure to be followed with regard to payment of dividend to non-residents is as follows:

- (1) **Application:** Application should be submitted in Form A-2 to the Authorized Dealers, accompanied by
 - List of Non-Resident shareholders
 - Dividend to be remitted
- (2) **Documents:** The application should be accompanied by supporting documents to establish that the issue of Shares was permissible under the Regulations, or specific approval was obtained therefore. Copy of the resolution in General Meeting, approving the dividend, should also be submitted.
- (3) **Certificates:** Certificate from CS or CA in respect of the amount payable and details of the calculations, should be submitted. A certificate from a CA that proper TDS deducted should also be submitted.
- (4) **Remittance:** The dividend may be remitted through normal banking channels. In case of NRI, the dividend can be credited to his NRE/FCNR Account.

CAPITAL ACCOUNT TRANSACTIONS**Question 31] Write a short note on: Capital Account Transactions**

CS (Executive) - June 2014 (3 Marks)

Ans.: Capital Account Transactions [Section 2 (e)]: Capital account transaction has been defined to mean any transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person resident outside India and includes the transactions specified in Section 6(3).

Capital Account Transactions [Section 6(1) & (2)]: Any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction.

The RBI may, in consultation with the Central Government, specify-

- (a) Any class or classes of capital account transactions which are permissible
- (b) The limit up to which foreign exchange shall be admissible for such transactions.

However, that the RBI shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

Question 32] State the provisions relating to 'prohibition and restriction for capital account transactions' under the Foreign Exchange Management Act, 2000.

Ans.: Prohibition and restriction for capital account transactions [Section 6 (3)]: The RBI may by regulations, prohibit, restrict or regulate the following-

- (a) Transfer or issue of any foreign security by a person resident in India
- (b) Transfer or issue of any security by a person resident outside India
- (c) Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India
- (d) Any borrowing or lending in rupees in whatever form or by whatever name called
- (e) Any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India
- (f) Deposits between persons resident in India and persons resident outside India
- (g) Export, import or holding of currency or currency notes
- (h) Transfer of immovable property outside India, other than a lease not exceeding 5 years, by a person resident in India
- (i) Acquisition or transfer of immovable property in India, other than a lease not exceeding 5 years, by a person resident outside India
- (j) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred-
 - (i) by a person resident in India and owed to a person resident outside India or
 - (ii) by a person resident outside India.

Question 33] Can a person resident in India hold or own any foreign currency, security or any immovable property outside India?

Ans.: As per Section 6(4), if a person resident in India has acquired, held or owned any foreign currency, foreign security or any immovable property outside India when he was resident outside India, he may continue to hold or own such property.

Similarly, person resident in India may inherit foreign currency, foreign security or any immovable property situated outside India from a person resident outside India. **[Section 6(4)]**

Question 34] Can a person resident outside India hold or own any Indian currency, security or any immovable property in India?

Ans.: As per **Section 6(5)**, a person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Question 35] Kamini, a resident in India is likely to inherit an immovable property in USA from her father, who is a resident outside India. Advise Kamini about the restrictions, if any, in this regard. Will your answer be different if she is likely to inherit foreign securities?

CA (Final) – Nov 2006 (4 Marks)

Ans.: As per **Section 6(4)**, person resident in India may inherit foreign currency, foreign security or any immovable property situated outside India from a person resident outside India. Hence, Kamini can hold the immovable property/foreign security after such inheritance. Further, such inheritance does not require approval of RBI.

Question 36] Patel, who was resident of USA for many years, now permanently returns to India. He continues to hold some immovable property, foreign security and other foreign exchange assets in USA? Can he hold such assets outside India?

CA (Final) – Nov 2010 (4 Marks)

Ans.: As per **Section 6(4)**, if a person resident in India has acquired, held or owned any foreign currency, foreign security or any immovable property outside India when he was resident outside India, he may continue to hold or own such property. Thus, Patel may continue to hold immovable property, foreign security and other foreign exchange assets in USA.

Question 37] Mrs. Chandra, a resident outside India, is likely to inherit from her father some immovable property in India. Are there any restrictions under the provisions of the Foreign Exchange Management Act, 1999 in acquiring or holding such property? State whether Mrs. Chandra can sell the property and repatriate outside India the sale proceeds.

CA (Final) – Nov 2012 (4 Marks)

Ans.: As per **Section 6(5)**, a person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Thus, Mrs. Chandra is entitled to acquire as well as hold the immovable property in India inherited by her. Also Mrs. Chandra is entitled to sell the immovable property in India and repatriate outside India the sale proceeds of such immovable property.

Question 38] State the permissible capital account transactions under the FEM (Permissible Capital Account Transactions) Regulations, 2000.

Ans.: **Permissible Capital Account Transactions [Regulation 3]:** Capital account transactions of a person may be classified under the following heads, namely:

- (A) Transactions, specified in **Schedule I**, of a person resident in India
- (B) Transactions, specified in **Schedule II**, of a person resident outside India.

Any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction specified in the Schedules to the Regulations.

Prohibition [Regulation 4]: No person shall undertake or sell or draw foreign exchange to or from an authorized person for any capital account transaction.

However, subject to FEMA provisions, a resident individual may, draw from an authorized person foreign exchange not exceeding US \$ 2,50,000 per financial year for a capital account transaction specified in Schedule I.

Where the drawal of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds US \$ 2,50,000 per financial year then the limit specified in the relevant regulations shall apply.

Person resident outside India cannot make investment in India in following:

- (i) Business of chit fund
- (ii) Nidhi Company
- (iii) Agricultural or plantation activities
- (iv) Real estate business, or construction of farm houses
- (v) Trading in Transferable Development Rights (TDRs)

Method of payment for investment [Regulation 5]: The payment for investment shall be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorized person in India in accordance with the Relevant Regulations made by the RBI.

Declaration to be furnished [Regulation 6]: Every person selling or drawing foreign exchange to or from an authorized person for a capital account transaction shall furnish to the RBI a declaration in the specified form and within the specified time.

Question 39] State whether there are any restrictions in respect of the following transactions:

- (i) Drawal of foreign exchange for payments due on account of amortization of loans in ordinary course of business.
- (ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.

CA (Final) - Nov 2005 (7 Marks)

Ans.:

- (i) It is specifically provided in **Section 6(1)** that the RBI shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business. Thus, there is no restriction for drawal of foreign exchange for payments due on account of amortization of loans in ordinary course of business.
- (ii) As per **Regulation 4** of the **Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000** person resident outside India cannot make investment in India in agricultural or plantation activities. Thus, person resident outside India cannot purchase shares of a company in India engaged in plantation activities.

Question 40] Mention the classes of capital account transactions which are permissible to the persons resident in India under the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

CS (Inter) - Dec 2006 (4 Marks)

What are the classes of capital account transactions of persons resident of India?

CS (Executive) - Dec 2015 (3 Marks)

Ans.: As per **Schedule I** to the **Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000** a person resident in India may enter into following type of capital account transactions:

- (a) Investment by a person resident in India in foreign securities
- (b) Foreign currency loans raised in India and abroad by a person resident in India
- (c) Transfer of immovable property outside India by a person resident in India
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India
- (e) Export, import and holding of currency/currency notes

- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India
- (i) Loans and overdrafts by a person resident in India to a person resident outside India
- (j) Remittance outside India of capital assets of a person resident in India
- (k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

Question 41] Jay, a person resident in India, desires to take a life insurance policy from a foreign insurance company, the yearly premium of which is US \$ 25,000. Comment.

CS (Executive) – Dec 2008 (1 Mark), Dec 2010 (1 Mark)
CS (Executive) – June 2013 (1 Mark), June 2014 (5 Marks)

Ans.: 'Insurance' is capital account transaction as commitments are for very long period. As per Schedule I to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 a person resident in India may take insurance policy from an insurance company outside India. As per RBI Circular, life insurance policy can be taken having a yearly premium up to US \$ 25,000.

Thus, Jay, a person resident in India, can take a life insurance policy from a foreign insurance company with the yearly premium of US \$ 25,000.

Question 42] Karan, a person resident in India, borrows US \$ 20,000 from his friend resident outside India. Advice with reference to FEMA.

CS (Executive) – June 2011 (1 Mark)

Ans.: Taking loan or borrowing amount by a person resident in India from person resident outside India is 'capital account transaction' and covered by Schedule I of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. As per Regulation 4, subject to FEMA provisions, a resident individual may, draw from an authorized person foreign exchange not exceeding US \$ 2,50,000 per financial year for a capital account transaction specified in Schedule I. Therefore Karan can borrow US \$ 20,000 from his friend resident outside India.

Question 43] An Indian company intends to open a foreign currency account in India as well as outside India. Advice with reference to FEMA.

CS (Executive) – Dec 2009 (1 Mark)

Ans.: As per Schedule I to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 a person resident in India may enter into capital account transactions specified in the Schedule. "Maintenance of foreign currency accounts in India and outside India by a person resident in India" is covered by the said Schedule. Thus, an Indian company can open a foreign currency account in India as well as outside India.

Question 44] Ram, a person resident in India, intends to invest ₹ 25,000 in foreign securities in a calendar year. Advice with reference to FEMA.

CS (Executive) – Dec 2011 (1 Mark)

Ans.: As per Schedule I to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 a person resident in India may enter into capital account transactions specified in the Schedule. "Investment by a person resident in India in foreign securities" is specified in Schedule I.

Thus, Ram can invest ₹ 25,000 in foreign securities.

Question 44A] Yogesh, a person resident in India, is desirous of taking a life insurance policy from a foreign insurance company, the yearly premium of which is US \$ 25,000. Mention the provisions of the Foreign Exchange Management Act, 1999 and the FEMA Regulations in support of your answer.

CS (Executive) – June 2014 (5 Marks)

Ans.: Insurance is capital account transaction as commitments are for very long period. As per **Schedule I to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulation, 2000** a person resident in India may take insurance policy from an insurance company outside India. As per RBI Circular, life insurance policy can be taken having a yearly premium up to US \$ 25,000. Thus, Yogesh, a person resident in India, can take a life insurance policy from a foreign insurance company with the yearly premium of US \$ 25,000.

Question 45] Which type of capital account transactions can be entered by a person resident outside India as per Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000?

Ans.: As per **Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000**, a person resident outside India may enter into following type of capital account transactions:

- (i) Investment in India by a person resident outside India, that is to say,
- (ii) Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
- (iii) Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- (iv) Acquisition and transfer of immovable property in India by a person resident outside India.
- (v) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (vi) Import and export of currency/currency notes into/from India by a person resident outside India.
- (vii) Deposits between a person resident in India and a person resident outside India.
- (viii) Foreign currency accounts in India of a person resident outside India.
- (ix) Remittance outside India of capital assets in India of a person resident outside India.

Question 46] Examine whether the following transactions are permissible or not under the above act as Capital Account transactions:

- (i) Investment by person resident in India in foreign securities
- (ii) Foreign currency loans raised in India and abroad by a person resident in India
- (iii) Export, import and holding of currency/currency notes
- (iv) Trading in transferable development rights
- (v) Investment in a Nidhi Company

CA (Final) - Nov 2007 (7 Marks)

Ans.:

- (i) "Investment by person resident in India in foreign securities" is a capital account transaction. As per **Regulation 3 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000** any person can enter into capital account transaction specified in Schedule I. Investment by person resident in India in foreign securities is specified in Schedule I; hence it is permitted. However, as per **Regulation 5** compliance has to be made with regard to Relevant Regulation made in this behalf. The Relevant Regulation is **Foreign Exchange Management (Investment in Foreign Securities by a Person Resident in India) Regulations, 2000**. Thus, investment by person resident in India in foreign securities is permitted subject to compliance of above stated provisions.
- (ii) "Foreign currency loans raised in India and abroad by a person resident in India" is a capital account transaction. As per **Regulation 3 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000** any person can enter into capital account transaction

specified in Schedule I. Foreign currency loans raised in India and abroad by a person resident in India is specified in Schedule I; hence it is permitted. However, as per **Regulation 5** compliance has to be made with regard to Relevant Regulation made in this behalf. The Relevant Regulation is **Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000**. Thus, foreign currency loans raised in India and abroad by a person resident in India is permitted subject to compliance of above stated provisions.

- (iii) "Export, import and holding of currency" is a capital account transaction. As per **Regulation 3** of the **Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000** any person can enter into capital account transaction specified in Schedule I. Export, import and holding of currency is specified in Schedule I; hence it is permitted. However, as per **Regulation 5** compliance has to be made with regard to Relevant Regulation made in this behalf. The Relevant Regulation is **Foreign Exchange Management (Possession & Retention of Foreign Currency) Regulations, 2000**. Thus, Export, import and holding of currency is permitted subject to compliance of above stated provisions.
- (iv) "Trading in transferable development rights" is prohibited under the Regulation 4 of the **Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000**; hence not permitted.
- (v) "Investment in a Nidhi Company" is prohibited under the **Regulation 4** of the **Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000**; hence not permitted.

Question 47] A French Manufacturing Company desirous of setting up its branch office at Pune, seeks your advice on the objects for which the company may be allowed to set up the desired branch office. Advise the company about the procedure as required under the Foreign Exchange Management Act, 1999 to be followed in this regard. CA (Final) - May 2006 (7 Marks)

Ans.: As per **Section 6(5)**, the RBI may by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India. In exercise of such power, the RBI has framed **Foreign Exchange Management (Establishment in India of Branch Office or Other Place of Business) Regulations, 2000**. Provisions of this Regulation are explained below:

Prohibition against establishing branch or office in India [Regulation 3]: Person resident outside India can establish in India a branch or a liaison office or a project office or any other place of business only with prior approval of the RBI. However, no approval shall be necessary for a banking company, if such company has obtained necessary approval under the provisions of the **Banking Regulation Act, 1949**.

No approval shall be necessary from RBI for a company to establish a branch or unit in Special Economic Zones (SEZs) to undertake manufacturing and service activities if following conditions are complied with:

- (i) Such units are functioning in those sectors where 100% FDI is permitted,
- (ii) Such units comply with provisions of the Companies Act
- (iii) Such units function on a stand-alone basis
- (iv) In the event of winding-up of business and for remittance of winding-up proceeds, the branch shall approach an Authorised Dealer.

Prohibition against establishing a branch or office in India by citizens of certain countries [Regulation 4]: Person, who is citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China shall not establish in India a branch or a liaison office or a project office or any other place of business without prior approval of the RBI.

Application to RBI for opening branch or liaison or project office [Regulation 5]: A person resident outside India desiring to establish a branch or liaison office in India shall apply to the RBI, in Form FNC 1. The RBI may grant permission subject to such terms and conditions as may be considered necessary.

Activities which may be undertaken by the branch or office in India [Regulation 6]:

- (i) A person resident outside India permitted by the RBI to establish a branch or a liaison office in India may undertake or carry on any activity specified in Schedule I or in Schedule II, but shall not undertake or carry on other activity unless otherwise specifically permitted by the RBI.
- (ii) A person resident outside India permitted by the RBI to establish a Project or Site Office in India shall not undertake or carry on any activity other than the activity relating and incidental to execution of the project.

Remittance of profit or surplus [Regulation 7]: A person resident outside India permitted to establish a branch or Project Office in India may remit outside India the profit of the branch or surplus of the Project on its completion, net of applicable Indian taxes, on production of the prescribed documents, and establishing the net profit or surplus to the satisfaction of the authorised dealer.

For remittance of profit of a branch or surplus on completion of the Project a certificate from Chartered Accountants certifying that provisions of this Regulation has been complied is also required.

Question 48] Indel Manufacturing Inc., a company incorporated outside India, engaged in software development, intends to open its branch in a Special Economic Zone (SEZ) in India. Advice with reference to FEMA.

CS (Executive) – Dec 2009 (1 Mark), Dec 2012 (1 Mark)

Ans.: As per Regulation 3 of the Foreign Exchange Management (Establishment in India of Branch Office or Other Place of Business) Regulations, 2000, no approval shall be necessary from RBI for a company to establish a branch or unit in SEZ to undertake manufacturing and service activities if conditions mentioned in that regulation are complied with.

Thus, Indel Manufacturing Inc., open its branch in a SEZ in India subject to compliance of conditions mentioned Regulation 3.

Question 49] Explain the provisions of the Foreign Exchange Management (Investment in Firm or Proprietary concern in India) Regulations, 2000.

Ans.: **Restrictions on investment in a firm or a proprietary concern in India by a person resident outside India [Regulation 3]:** No person resident outside India shall make any investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in India. However, the RBI may, on an application may permit a person resident outside India to make an investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in India.

Permission for investment in certain cases [Regulation 4]: A non-resident Indian or a Person of Indian Origin resident outside India may invest by way of contribution to the capital of a firm or a proprietary concern in India, provided that -

- (a) The amount invested is received either by inward remittance through normal banking channels or out of an account maintained with an authorized person by the non-resident Indian or the person of Indian origin in accordance with the relevant Regulations.
- (b) The firm or the proprietary concern 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.
- (c) The amount invested shall not be eligible for repatriation outside India
- (d) Where investment is made out of NRSR Account of the non-resident investor, the income earned on investment or proceeds of investment shall be credited only to the NRSR Account of the investor.

Permission to a firm or a proprietary concern to make payment to a non-resident Indian or a person of Indian origin who has made investment [Regulation 5]: A firm or a proprietary concern in India may make payment to or for the credit of a non-resident Indian or a person of Indian origin the sum invested by such person in that firm or the proprietary concern or the income accruing to such person by way of profit on such investment.

Question 50] A person resident outside India desires to contribute ₹ 10 lakh as capital in a firm engaged in software business in India. Advice with reference to FEMA.

CS (Executive) – Dec 2009 (1 Mark)

Ans.: As per **Regulation 3** of the **Foreign Exchange Management (Investment in Firm or Proprietary concern in India) Regulations, 2000**, the RBI may, on an application may permit a person resident outside India to make an investment by way of contribution to the capital of a firm or a proprietary concern or any association of persons in India. Such permission is subject to conditions laid down in Regulation 4. Thus, person resident outside India can contribute ₹ 10 lakh as capital in a firm engaged in software business in India.

Question 51] Explain the provisions of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000.

Ans.: **Acquisition & transfer of property in India by an Indian Citizen resident outside India [Regulation 3]:** A person resident outside India who is a citizen of India may -

- (a) Acquire any immovable property in India *other than agricultural/plantation/farm house*, and
- (b) Transfer any immovable property in India to a person resident in India.
- (c) Transfer any immovable property to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India.

Acquisition & transfer of property in India by a person of Indian origin [Regulation 4]: A person of Indian origin resident outside India may -

- (a) Acquire any immovable property *other than agricultural land/farm house/plantation property* in India by purchase, from out of funds received in India by way of inward remittance from any place outside India or funds held in any non-resident account.
- (b) Acquire any immovable property in India by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India
- (c) Acquire any immovable property in India by way of inheritance from a person resident outside India
- (d) Transfer any immovable property in India by way of sale to a person resident in India.
- (e) Transfer agricultural land/farm house/ plantation property in India, by way of gift or sale to a person resident in India who is a citizen of India
- (f) Transfer residential or commercial property in India by way of gift to a person resident in India or to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India.

Acquisition of immovable property for carrying on a permitted activity [Regulation 5]: A person resident outside India who has established in India a branch, office or other place of business for carrying on in India any activity, excluding a liaison office in accordance with the **Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000**, may -

- (a) Acquire any immovable property in India for carrying on such activity. However, all applicable laws, rules, regulations or directions are duly complied with and the person files with the RBI a declaration in the **Form IPI** within 90 days from the date of such acquisition.
- (b) Transfer by way of mortgage to an authorized dealer as a security for any borrowing, the immovable property acquired.

Acquisition of immovable Property by Foreign Embassies/Diplomats/Consulate Generals [Regulation 5A]: Foreign Embassy/Diplomat/Consulate General, may purchase or sell immovable property (other than agricultural land/plantation property/farm house) in India provided -

- (i) Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase or sale, and
- (ii) The consideration for is paid out of funds remitted from abroad through the normal banking channels.

Repatriation of sale proceeds [Regulation 6]: A person resident outside India or his successor shall not except with the prior permission of the RBI, repatriate outside India the sale proceeds of any immovable property.

In the event of sale of immovable property, the authorized dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied:

- (i) The immovable property was acquired by the seller in accordance with the provisions FEMA.
- (ii) The sale takes place after 3 years from the date of acquisition of such immovable property or from the date of payment of final instalment of consideration for its acquisition, whichever is later.
- (iii) The amount to be repatriated does not exceed-
 - (a) The amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account or
 - (b) The foreign currency equivalent of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property.
- (iv) In the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries [Regulation 7]: No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan without prior permission of the RBI shall acquire or transfer immovable property in India, other than lease, not exceeding 5 years.

Prohibition on transfer of immovable property in India [Regulation 8]: No person resident outside India shall transfer any immovable property in India. However, the RBI may for sufficient reasons permit the transfer, subject to certain conditions.

Question 52] Amit, a citizen of India, left India for employment in Australia on 1st June, 2007. Amit purchased a flat at New Delhi for ₹ 15 lakhs in September, 2008. His brother, Sumit employed in New Delhi, also purchased a flat in the same building in September, 2008 for ₹ 15 lakhs. Sumit's flat was financed by a loan from a housing finance company and the loan was guaranteed by Amit. Examine with reference to the provisions of Foreign Exchange Management Act, 1999, whether purchase of flat and guarantee by Amit are capital account transactions and whether these transactions are permissible.

CA (Final) – Nov 2003 & Nov 2008 (7 Marks)

Ans.:

- (i) In the given case, Amit left India for employment in June 2007. Therefore, he becomes a person resident outside India from June 2007. The purchase of flat in India by Amit (a person resident outside India) is a capital account transaction and is permissible in accordance with Regulation framed in this behalf, i.e. **Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000.**

As per **Regulation 3**, a person resident outside India can acquire immovable property if fulfils the following conditions:

- The person resident outside India is a citizen of India.
- The immovable property acquired in India is not *agricultural/plantation/farm house*.

- (ii) Guarantee involves a long term commitment which alters the assets and liabilities of a person and therefore it is considered as a capital account transaction and thus restricted under FEMA.

Accordingly, Amit can give guarantee to the Housing Finance Company in respect of purchase of flat by Sumit with the permission of RBI.

Question 53] An Indian citizen resident outside India is interested in acquiring a house in Chennai and a farm house on the outskirts of Delhi. Advice with reference to FEMA.

CS (Executive) - June 2010 (1 Mark)

Mohan, an Indian citizen resident outside India, intends to acquire immovable property in India.

CS (Executive) - Dec 2011 (1 Mark)

Ans.: As per Regulation 3 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, a person resident outside India who is a citizen of India may acquire any immovable property in India *other than agricultural/plantation/farm house*.

Thus, an Indian citizen resident outside India can acquire a house in Chennai *but he cannot acquire a farm house on the outskirts of Delhi*.

Question 54] A person, resident outside India, is interested to repatriate outside India the sales proceeds of an immovable property held in India. Advice with reference to FEMA.

CS (Executive) - June 2011 (1 Mark)

Ans.: As per Regulation 6 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, a person resident outside India or his successor shall not except with the prior permission of the RBI, repatriate outside India the sale proceeds of any immovable property.

Question 55] Shyam, a non-resident Indian working in the USA intends to sell his ancestral house in India to a person resident in India. Advise with reference to FEMA.

CS (Executive) - Dec 2012 (1 Mark)

Ans.: As per Regulation 3 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, a person resident outside India who is a citizen of India may transfer any immovable property in India to a person resident in India.

Thus, Shyam, a non-resident Indian working in the USA can sell his ancestral house in India to a person resident in India.

Question 56] A Malaysian diplomat entered into an agreement with a real estate company in India to purchase non-agricultural land near New Delhi to establish a laboratory. Advice with reference to FEMA.

CS (Executive) - June 2013 (1 Mark)

Alex, a foreign diplomat desires to buy immovable property in India. Is he permitted to do so? Give reasons in brief.

CS (Executive) - Dec 2015 (3 Marks)

Ans.: As per Regulation 5A of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, Foreign Diplomat may purchase or sell immovable property (other than agricultural land/plantation property/farm house) in India provided -

- (i) Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase or sale and
- (ii) The consideration is paid out of funds remitted from abroad through the normal banking channels.

Thus, a Malaysian diplomat can enter into an agreement to purchase non-agricultural land to establish a laboratory.

Question 57] Discuss the regulations in respect of acquisition and transfer of immovable property outside India.
CS (Executive) - Dec 2016 (5 Marks)

Ans.: Restriction on acquisition or transfer of immovable property outside India [Regulation 3]: No person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the RBI.

Acquisition and Transfer of Immovable Property outside India [Regulation 5]:

- (1) A person resident in India may acquire immovable property outside India, -
 - (a) by way of gift or inheritance from a person resident in India or person resident outside India or person resident in India who is a national of a foreign state
 - (b) by way of purchase out of foreign exchange held in RFC Account
- (2) A person resident in India, who has acquired immovable property outside India may transfer it by way of gift to his relative who is a person resident in India.
- (3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the RBI from time to time.

Question 58] A person, resident in India, wants to acquire immovable property outside India by way of gift from a person who is resident outside India. Advice with reference to FEMA.

CS (Executive) - June 2011 (1 Mark)

Ans.: As per Regulation 5 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property outside India) Regulations, 2000, a person resident in India may acquire immovable property outside India by way of gift from a person resident outside India.

Question 59] Distinguish between: Current Account Transactions & Capital Account Transactions

CS (Executive) - Dec 2008 (5 Marks)

Ans.: Following are the main points of difference between current account transactions & capital account transactions:

Points	Current Account Transactions	Capital Account Transactions
Meaning	Current account transaction means a transaction other than a capital account transaction and includes,- (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business (ii) payments due as interest on loans and as net income from investments (iii) remittances for living expenses of parents, spouse and children residing abroad, and (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children.	Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to Section 6(3).
Nature	Current account transactions are short term in nature.	Capital account transactions are long term in nature.
Control or prohibition	All current account transactions are freely permitted unless specifically controlled or prohibited under the FEMA.	Capital account transactions are permitted to the extent specifically allowed by the relevant regulations made under the FEMA.

Points	Current Account Transactions	Capital Account Transactions
Rule/ Regulation	Current account transactions are regulated by the Central Government through Foreign Exchange Management (Current Account Transactions) Rules, 2000.	Capital account transactions are regulated by the RBI through Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.
Section	As per Section 5 , any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction.	As per Section 6 , any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction subject to regulation as may be prescribed by the RBI.

**FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF SECURITY BY A PERSON RESIDENT OUTSIDE INDIA) REGULATIONS, 2000
(FOREIGN DIRECT INVESTMENT IN INDIA)**

Question 60] What are the restriction on issue or transfer of Security by/to a person resident outside India under the FEMA?

Ans.: Restriction on issue or transfer of Security by a person resident outside India [Regulation 3]: No person resident outside India shall issue or transfer any security. However, the RBI may, on an application made to it and for sufficient reasons, permit a person resident outside India to issue or transfer any security subject to certain conditions.

Restriction on an Indian entity to issue security to a person resident outside India or to record a transfer of security from or to such a person in its books [Regulation 4]: An Indian entity shall not issue any security to a person resident outside India or shall not record in its books any transfer of security from or to such person. However, the RBI may, on an application made to it and for sufficient reasons, permit an entity to issue any security to a person resident outside India or to record in its books transfer of security from or to such person subject to certain conditions.

Question 61] Write a short note on: Purchase of shares by certain persons resident outside India under the FEMA.

Ans.: Permission for purchase of shares by certain persons resident outside India [Regulation 5]: A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment (FDI) Scheme, complying conditions specified in **Schedule 1**.

A registered Foreign Institutional Investor (FII) may purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme, subject to the terms and conditions specified in **Schedule 2**.

A NRI or an OCB may purchase shares or convertible debentures of an Indian company-

- (i) On a stock exchange under the Portfolio Investment Scheme complying conditions specified in **Schedule 3**
- (ii) On non-repatriation basis other than under Portfolio Investment Scheme, complying conditions specified in **Schedule 4**.

A NRI or an OCB or registered FII may purchase securities, other than shares or convertible debentures of an Indian company, complying conditions specified in **Schedule 5**.

Question 62] Ram, an NRI resident in Nepal, is interested to invest in shares and convertible debentures of an Indian company. Advice with reference to FEMA.

CS (Executive) - June 2009 (1 Mark)

Ans.: As per **Regulation 5** of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, a person resident outside India (other than a citizen

of Bangladesh or Pakistan or Sri Lanka) or an entity outside India (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under FDI Scheme, complying conditions specified in **Schedule 1**.

NRI resident in Nepal is not prohibited in making FDI in India. Thus, Ram can invest in shares and convertible debentures of an Indian company.

Question 63] A Bangladeshi millionaire is interested to invest in India subject to FDI policy of the Government of India. Advice with reference to FEMA. CS (Executive) - June 2009 (1 Mark)

Ans.: As per **Regulation 5 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000**, a person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under FDI Scheme, complying conditions specified in **Schedule 1**.

Thus, citizen of Bangladesh are prohibited from making FDI in India.

Question 63A] ABC Ltd., a company listed on the National Stock Exchange, is interested in investing in a company in the USA. CS (Executive) - June 2009 (3 Marks)

Ans.: As per **Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulation, 2000**, an Indian party may make direct investment in a Joint Venture or Wholly Owned Subsidiary outside India. If an Indian Party, which does not satisfy the eligibility norms may apply to the RBI for approval.

Foreign Direct Investment Scheme [Schedule 1]

Purchase by a person resident outside India of equity/preference/convertible preference shares and convertible debentures issued by an Indian company: If the person purchasing the shares under FDI Scheme proposes to be collaborator or proposes to acquire the entire share holding of a new Indian company, he should obtain a prior permission of Central Government if he has a previous venture or tie-up in India through investment in shares or debentures or a technical collaboration or a trade mark agreement or investment by whatever name called in the same field or allied field in which the Indian company issuing the shares is engaged.

Automatic Route of RBI for Issue of shares by an Indian company:

An Indian company which is not engaged in any activity or in manufacturing of item included in **Annexure A** may issue shares or convertible debentures to a person resident outside India up to the extent specified in **Annexure B**, subject to compliance with the provisions of the Industrial Policy and procedures as notified by Ministry of Commerce and Industry and subject to following conditions:

- (i) The activity of the issuer company does not require an industrial licence under the provisions of the **Industries (Development & Regulation) Act, 1951** or under the Locational Policy notified by Government of India under the **Industrial Policy of 1991** as amended from time to time.
- (ii) The shares or convertible debentures are not being issued by the Indian company with a view to acquiring existing shares of any Indian company.

A trading company incorporated in India may issue shares or convertible debentures to the extent of 51% of its capital, to persons resident outside India, subject to the condition that remittance of dividend to the shareholders outside India is made only after the company has secured registration as an Export/Trading/Star Trading/Super Trading House from the Directorate General of Foreign Trade (DGFT).

FDI in SSI: A company which is a small scale industrial unit and which is not engaged in any activity or in manufacture of items included in Annexure A, may issue shares or convertible debentures to a persons resident outside India to the extent of 24% of its paid-up capital. However, such a company may issue shares in excess of 24% of its paid up capital if

- (a) it has given up its small scale status

- (b) it is not engaged or does not propose to engage in manufacture of items reserved for small scale sector, and
- (c) it complies with the ceilings specified in Annexure B.

An Export Oriented Unit (EOU) or a Unit in Free Trade Zone (FTZ) or in Export Processing Zone (EPZ) or in a Software Technology Park (STP) or in an Electronic Hardware Technology Park (EHTP) may issue shares or convertible debentures to a person resident outside India in excess of 24% provided it complies with the ceilings specified in Annexure B.

Issue of shares by a company requiring the Government approval: A company which is engaged or proposes to engage in any activity specified in Annexure A or which proposes to issue shares to a person resident outside India beyond the sectoral limits stipulated in Annexure B or which is otherwise not eligible to issue shares to a person resident outside India, may issue shares to a person resident outside India provided it has secured prior approval of Secretariat for Industrial Assistance or Foreign Investment Promotion Board of the Government of India and the terms and conditions of such an approval are complied with.

Issue Price: Price of shares issued to persons resident outside India shall not be less than

- (a) The price worked out in accordance with the SEBI guidelines, where the issuing company is listed on any recognized stock exchange in India, and
- (b) Fair valuation of shares done by a SEBI registered Category - I Merchant Banker or Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognized stock exchange in India
- (c) The price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the RBI from time to time, where the issue of shares is on preferential allotment.

Dividend Balancing: Where a company is engaged in any of the industries in the consumer goods sector, specified in Annexure E, or in any other activity where the condition of dividend balancing has been stipulated in terms of the provisions of Industrial Policy and Procedures notified by Secretariat for Industrial Assistance, the cumulative outflow of foreign exchange on account of payment of dividend over a period of 7 years from the date of commencement of commercial production to investors outside India shall not exceed cumulative amount of export earning of the company during those years.

However, such condition shall not apply

- In respect of shares held in such a company by International Finance Corporation (IFC), the Deutsche Entwicklungsgesellschaft (DEG), the Commonwealth Development Corporation (CDC) and Asian Development Bank (ADB).
- To a company that has completed a period of 7 years from the date of commencement of commercial production.

In case of an existing company that has issued fresh equity to persons resident outside India, the restriction shall apply to the fresh shares from the date of their issue.

Rate of Dividend on Preference Shares: The rate of dividend on preference shares or convertible preference shares issued under these Regulations shall not exceed 300 basis points over the Prime Lending Rate of SBI prevailing as on the date of the board meeting of the company in which issue of such shares is recommended.

Mode of payment for shares issued to persons resident outside India: A company in India issuing shares or convertible debentures under this Schedule to a person resident outside India shall receive the amount of consideration for such shares -

- (i) by inward remittance through normal banking channels, or
- (ii) by debit to NRE/FCNR account of the person concerned maintained with an authorized dealer/authorized bank.

Report by the Indian company: An Indian company issuing shares or convertible debentures to persons resident outside India shall submit to RBI within 30 days from the date of receipt of the amount of consideration, a report indicating:

- Name and address of the foreign investors.
- Date of receipt of funds and their rupee equivalent.
- Name and address of the authorized dealer through whom the funds have been received
- Details of the Government approval.
- A report in Form **FC-GPR** together with, a certificate from the **Company Secretary** of the company accepting investment from persons resident outside India certifying that all the requirements of the Companies Act, 2013 and all the terms and conditions of the Government approval have been complied with.
- A certificate from Statutory Auditors or CA indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

Permission for retaining share subscription money received from persons resident outside India in a foreign currency account: RBI may on an application made to it and on being satisfied that it is necessary so to do, permit an Indian company issuing shares to persons resident outside India, to retain the subscription amount in a foreign currency account, subject to such terms and conditions as it may stipulate.

Question 64] A foreign investor is interested to invest in an Indian company which is a small scale industrial unit. Advice with reference to FEMA.

CS (Executive) – June 2009 (1 Mark), June 2013 (1 Mark)

Infotech Ltd., an Indian company owning a small enterprise, intends to issue shares against foreign direct investment.

CS (Executive) – Dec 2011 (1 Mark)

Ans.: As per **Schedule I to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000**, a company which is a small scale industrial unit and which is not engaged in any activity or in manufacture of items included in Annexure A, may issue shares or convertible debentures to a persons resident outside India to the extent of **24%** of its paid-up capital. However, such a company may issue shares in **excess of 24%** of its paid up capital if

- (a) it has given up its small scale status
- (b) it is not engaged or does not propose to engage in manufacture of items reserved for small scale sector, and
- (c) it complies with the ceilings specified in Annexure B.

Thus, foreign investor may invest in an Indian company which is a small scale industrial unit subject to compliance of above provisions.

Question 65] ABC Ltd., a company incorporated in India, is eligible to issue shares to persons resident outside India under the FDI policy and intends to retain the share subscription amount in a foreign currency account. Advice with reference to FEMA. CS (Executive) – June 2013 (1 Mark)

Ans.: RBI may on an application made to it and on being satisfied that it is necessary so to do, permit an Indian company issuing shares to persons resident outside India, to retain the subscription amount in a foreign currency account, subject to such terms and conditions as it may stipulate. Thus, ABC Ltd. can retain the share subscription amount in a foreign currency account with approval of RBI.

Annexure A

(List of activities or items for which automatic route of RBI for Investment from Persons Resident Outside India is not available)

1. Banking
2. NBFC's activities in Financial Services Sector

3. Civil Aviation
4. Petroleum including exploration/refinery/marketing
5. Housing & Real Estate Development sector for investment from persons other than NRIs/OCBs.
6. Venture Capital Fund & Venture Capital Company
7. Investing companies in Infrastructure & Service Sector
8. Atomic Energy & related projects
9. Defence and strategic industries
10. Agriculture (including plantation)
11. Print Media
12. Broadcasting
13. Postal services

**** Annexures A & B as originally framed in year 2000 is given just for the reference for the student. (for latest updates students are advised to log in at RBI website)**

Annexure B		
Sector	Investment Cap	Description of Activity/Items/Conditions
Telecommunications	49%	In basic, Cellular Mobile, paging and Value Added Services, and Global Mobile Personal Communications by Satellite subject to the licence from Department of Telecommunication of Government of India.
	100%	In manufacturing activities
Housing & Real Estate	100%	ONLY NRIs/OCBs are allowed to invest in the areas listed below: (i) Development of serviced plots and construction of residential premises (ii) Investment in real estate covering construction of residential and commercial premises including business centres and offices (iii) Development of townships (iv) City and regional level urban infrastructure facilities, including both roads and bridges. (v) Investment in manufacture of building materials (vi) Investment in participatory ventures in (a) to (e) above (vii) Investment in housing finance institutions
Coal & Lignite	49%	in Public Sector Undertakings (PSU) and
	50%	in other than PSUs (a) Where Private Indian companies are setting up or operating power projects as well as coal or lignite mines for captive consumption (b) For setting up coal processing plants provided the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing. (c) For exploration or mining of coal or lignite for captive consumption .
Drugs & Pharmaceuticals	74%	For bulk drugs, their intermediaries and Formulations (except those produced by the use of recombinant DNA technology)
Hotel & Tourism	51%	(i) Hotels include restaurants, beach resorts, and other tourist complexes providing accommodation and/or catering and food facilities to tourists. (ii) Tourism related industry includes travel agencies, tour operating agencies and tourist transport operating agencies, units providing facilities for cultural, adventure and wild life experience to tourists, surface, air and water transport facilities to tourists, leisure, entertainment amusement, sports, and health units for tourists and Convention/ Seminar units and organizations.

Annexure B		
Sector	Investment Cap	Description of Activity/Items/Conditions
Mining	74%	Exploration and mining of diamonds and precious stones.
	100%	Exploration and mining of gold and silver and minerals other than diamonds and precious stones, metallurgy and processing
Advertising	100%	Film industry (i.e. film financing, production, distribution, exhibition, marketing and associated activities relating to film industry) subject to the following: (i) Companies with an established track record in films, TV, music, finance and insurance (ii) The company should have a minimum paid up capital of US \$ 10 million if it is the single largest equity shareholder and at least US\$ 5 million in other cases (iii) Minimum level of foreign equity investment would be US\$ 2.5 million for the single largest equity shareholder and US\$ 1 million in other cases (iv) Debt equity ratio of not more than 1:1 i.e. domestic borrowings shall not exceed equity (v) Provisions of dividend balancing would apply.
Any other sector/activity (other than those included in Annexure A)	100%	----

Question 66] State the provisions for issuance of GDRs or ADRs under the FEMA.

Ans.: Issue of Shares by International offering through GDR or ADR [Schedule 1, Para 4]: An Indian company may issue to a person resident outside India GDR or ADR. Such Indian company has to comply with the following conditions:

- (a) It has obtained an approval from the Ministry of Finance, Government of India to issue such GDR or ADR
- (b) The GDR or ADR are issued in accordance **Foreign Currency Convertible Bonds & Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993** and guidelines issued by the Central Government.
- (c) The Indian company shall furnish to the RBI, full details of issue in the form specified in **Annexure C**, within 30 days from the date of closing of the issue.
- (d) It shall furnish a quarterly return in the form specified in **Annexure D** to RBI within 15 days of the close of the calendar quarter.
- (e) It may invest the foreign currency funds in -
 - Deposits with or Certificate of Deposits or other instruments of banks who have been rated not less than **A1+** by Standard and Poor or **P1** by Moody's for short term obligations
 - Deposits with branch outside India of an authorized dealer in India, and
 - Treasury bills and other monetary instruments with a maturity or un-expired maturity of the instrument of 1 year or less.

Question 66A] Mehta Investments Ltd., a company incorporated in India, wishes to issue shares to its employees who are residents outside India. Comment. CS (Executive) - Dec 2007 (1 Mark)

Ans.: As per **Regulation 4 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulation, 2000**, an Indian entity shall not issue any security to a person resident outside India or shall not record in its books any transfer of security from or to such person. However, the RBI may, on an application made to it and for sufficient reasons, permit an entity to issue

any security to a person resident outside India or to record in its books transfer of security from or to such person subject to certain conditions. Thus, Mehta Investments Ltd. can issue shares to its employees who are residents outside India subject permission of RBI and complying other conditions laid down in above Regulation.

Question 67] You are the Company Secretary of United Holding Ltd. Your company is about issue right shares to existing shareholders. Some the shareholders of your company are the persons resident outside India. State the provisions to be complied in this regard under the FEMA?

Ans.: Acquisition of Right Shares & Bonus [Regulation 6]:

- (1) A person resident outside India may purchase or acquire equity or preference shares or convertible debentures offered on right or bonus basis by an Indian company which satisfies the conditions specified below:
 - (i) The offer on right or bonus basis does not result in increase in the percentage of foreign equity already approved or permissible under the FDI scheme.
 - (ii) The original shares or debentures were acquired and are held by the person resident outside India in accordance with the Regulations.
 - (iii) The offer on right basis to the persons resident outside India is at a price which is not lower than that at which the offer is made to resident shareholders.
- (2) The right or bonus shares or debentures purchased by the person resident outside India shall be subject to same conditions as are applicable to the original shares. However, the amount of consideration for purchase of right shares or debentures is paid by way of inward remittance in foreign exchange through normal banking channels or by debit to NRE/FCNR Account if the shares or debentures are issued on repatriation basis. If the shares or debentures issued on non-repatriation basis, the amount of consideration may be paid by debit to NRO/NRSR/NRNR Account.

Question 68] A non-resident shareholder has applied for the issue of additional shares over and above his entitlement of rights shares in an Indian company. Comment.

CS (Executive) - Dec 2008 (1 Mark)

Ans.: As per Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, a person resident outside India may purchase equity or preference shares or convertible debentures offered on right basis by an Indian company which satisfies the conditions specified that regulation.

Question 69] An Indian public limited company wants to issue bonus shares to an existing non-resident shareholder. Comment.

CS (Executive) - June 2010 (1 Mark)

Ans.: As per Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, a person resident outside India may purchase or acquire equity or preference shares or convertible debentures offered on right or bonus basis by an Indian company which satisfies the conditions specified in that regulation.

Thus, an Indian public limited company can issue bonus shares to an existing non-resident shareholder.

Question 70] What are the provisions under the FEMA for issue of shares after merger or demerger or amalgamation of Indian companies?

Ans.: Issue and acquisition of shares after merger or demerger or amalgamation of Indian companies [Regulation 7]: Where a Scheme of merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger of an Indian company has been approved by a Court in India, the transferee company or the new company may issue shares to the shareholders of the transferor company resident outside India, subject to the following conditions:

- (a) The percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the specified percentage in the approval granted by the Central Government or the RBI. However, if the percentage is likely to exceed the specified percentage then approval from the Central Government and RBI should be taken.
- (b) The transferor or transferee or new company shall not engage in agriculture, plantation or real estate business or trading in TDRs.
- (c) The transferee or new company files a report within 30 days with the RBI giving full details of the shares held by persons resident outside India in the transferor and transferee or new company, before and after the merger/amalgamation/reconstruction, and also furnishes a confirmation that all the terms and conditions stipulated in the scheme approved by the Court have been complied with.

Question 71] What are the provisions under the FEMA for issue of shares under Employees Stock Options Scheme (ESOS) to persons resident outside India?

XYZ Ltd., a company listed on the Bombay Stock Exchange Ltd., wants to issue shares under the ESOS to the employees of its joint venture abroad. CS (Executive) – June 2009 (1 Mark)

Ans.: Issue of shares under Employees Stock Options Scheme to persons resident outside India [Regulation 8]: An Indian company may issue shares under the Employees Stock Options Scheme (ESOS) to its employees or employees of its JV/WOS abroad who are resident outside India after complying the following conditions:

- (a) The ESOS has been drawn in terms of regulations issued under the SEBI Act, 1992.
- (b) Face value of the shares to the non-resident employees does not exceed 5% of the paid-up capital of the issuing company.
- (c) The issuing company shall ensure that value of shares held by persons resident outside India does not exceed the specified limit of 5%.
- (d) The issuing company shall furnish to the RBI within 30 days from the date of issue of shares a report giving the following particulars/documents -
 - (i) Names of persons to whom shares are issued and number of shares issued
 - (ii) A certificate from the Company Secretary of the issuing company that the value of shares issued under the scheme does not exceed 5% of the paid up capital of the issuing company and that the shares are issued in compliance with the regulations issued by the SEBI in this behalf.

Question 72] State the provision of transfer of shares and convertible debentures of an Indian company by a person resident outside India under the FEMA.

Ans.: Transfer of shares and convertible debentures of an Indian company by a person resident outside India [Regulation 9]:

- (1) A person resident outside India may transfer the shares or debentures of an Indian company in compliance with the conditions specified in the relevant Schedule of the Regulations.
- (2) A person resident outside India may transfer by way of sale, shares or convertible debentures held by him to any person resident outside India. However, the person to whom the shares are being transferred has obtained prior permission of Central Government to acquire the shares if he has previous venture or tie up in India through investment in shares or debentures or a technical collaboration or a trade mark agreement or investment in the same field or allied field in which the Indian company whose shares are being transferred is engaged.
- (3) A non-resident Indian or an OCB may transfer by way of sale, the shares or convertible debentures held by him or it to another non-resident Indian or an OCB only.

- (4) A person resident outside India may transfer any security held by him, to a person resident in India by way of gift.

Question 73] Can a person resident in India gift or sale the shares to person resident outside India?

Girish intends to transfer his shareholding in as gift to his son who is a resident outside India. Advice with reference to FEMA. CS (Executive) – Dec 2008 (1 Mark)

Ans.: Transfer by way of gift or sale [Regulation 10]: A person resident in India can transfer by way of gift any security to a person resident outside India after making an application to the RBI. He should furnish the following information for this purpose:

- Name and address of the transferor and the proposed transferee
- Relationship between the transferor and the proposed transferee
- Reasons for making the gift.

A person resident in India can transfer by way of sale share/convertible debenture of an Indian company to a person resident outside India after obtaining the approval of the Government and RBI.

Question 73A] Brown, a UK citizen, is interested to make investment in the form of Foreign Direct Investment (FDI) in retail trading business. Comment. CS (Executive) – June 2009 (1 Mark)

Ans.: Investment in the form of FDI is also prohibited in certain sectors such as:

- Retail Trading
- Atomic Energy
- Lottery Business
- Gambling and Betting
- 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)

Thus, Brown a UK citizen, cannot make investment in the form of Foreign Direct Investment (FDI) in retail trading business.

Question 73B] Desire Ltd., a company incorporated outside India, wants to buy shares up to 10% of paid-up capital of an Indian company engaged in infrastructure development. Comment.

CS (Executive) – Dec 2010 (1 Mark)

Ans.: As per Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, 100% FDI is allowed in infrastructure development. Thus, Desire Ltd., a company incorporated outside India, can buy shares up to 10% of paid-up capital of an Indian company engaged in infrastructure development subject to fulfilment of other conditions laid down in Regulation.

Question 73C] Aadarsh Education Society, engaged in education sector, intends to make investment in the education sector in a joint venture in USA. Comment.

CS (Executive) – June 2012 (1 Mark)

Ans.: Registered Trusts and Societies engaged in manufacturing/educational sector are allowed make investment in the same sector(s) in a Joint Venture or Wholly Owned Subsidiary outside India, with the prior approval of the RBI. Trusts/Societies satisfying the eligibility criteria may submit the application in Form ODI-Part I, through their Authorized Dealer. Thus, Aadarsh Education Society, engaged in education sector can make investment in the education sector in a joint venture in USA by taking prior approval of RBI.

Question 73D] Abhay Ltd., an Indian company, which won the bid, has approached the authorized dealer for further remittance towards acquisition of a company in Romania. Comment.

CS (Inter) – June 2006 (2 Marks), Dec 2006 (2 Marks)

Ans.: As per Regulation 14 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, an Indian party may remit earnest money deposit or issue a bid bond guarantee for acquisition of a foreign company through bidding and tender procedure and also make subsequent remittances through an AD Bank.

Question 73E] A mutual fund, registered in India, is interested to invest in the rated bonds of a listed overseas company which has shareholding of 5% in a listed Indian company. Comment.

CS (Inter) – Dec 2006 (2 Marks)

Ans.: As per Regulation 22 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, RBI may, on application, permit a Mutual Fund, to purchase foreign securities subject to such terms and conditions as it may stipulate.

Question 73F] Vijeta Ltd., a company incorporated in India, is interested in issuing 'Foreign Currency Convertible Bonds' (FCCBs) for \$ 500 million to a person resident outside India. Comment.

CS (Executive) – Dec 2007 (1 Mark)

Ans.: As per Regulation 18 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000, an Indian company or a body corporate created by an Act of Parliament, which has obtained an approval of Government of India, Ministry of Finance, may issue FCCBs to a person resident outside India.

The company/body corporate issuing the FCCBs shall, within 30 days from the date of issue, furnish a report to the RBI giving the details and documents as under:

- (a) A copy of Government's approval for issue of FCCBs
- (b) Total amount for which FCCBs have been issued
- (c) Names of the investors resident outside India and number of FCCBs issued to each of them.
- (d) The amount repatriated to India through normal banking channels or the amount received by debit to NRE/FCNR Accounts in India of the investors.

Thus, Vijeta Ltd., a company incorporated in India may issue FCCBs for \$ 500 million to a person resident outside India, subject to compliance of above stated provisions.

FOREIGN EXCHANGE MANAGEMENT (TRANSFER OR ISSUE OF FOREIGN SECURITIES) REGULATIONS, 2000

(Direct Investment Outside India)

Question 74] State the prohibition on issue or transfer of foreign security by a person resident in India. Also state for what purposes he can purchase or sale a foreign security?

Ans.: Prohibition on issue or transfer of foreign security [Regulation 3]: No person resident in India shall issue or transfer any foreign security. However, the RBI may permit any person resident in India to issue or transfer any foreign security on application made to it.

Purchase and sale of foreign security by a person resident in India [Regulation 4]: A person resident in India may-

- (a) Purchase a foreign security out of funds held in RFC Account
- (b) Acquire bonus shares on the foreign securities

- (c) Purchase a foreign security from out of his foreign currency resources outside India (when not permanently resident in India)
- (d) Sell the foreign security purchased or acquired under clause (a), (b) or (c).

Explanation: 'Not permanently resident' means a person resident in India for employment of a specified duration or for a specific job or assignment, the duration of which does not exceed 3 years.

Question 75] An Indian resident wants to purchase foreign securities by making remittances from his resident foreign currency (RFC) Account. Advice with reference to FEMA.

CS (Executive) – June 2010 (1 Mark)

Ans.: As per Regulation 4 of the Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000, a person resident in India may purchase a foreign security out of funds held in RFC Account.

Thus, an Indian resident can purchase foreign securities by making remittances from his RFC Account.

Question 76] Ashok, a person resident in India, has been offered bonus shares of the value of US \$ 20,000 by a company incorporated outside India. Advice with reference to FEMA.

CS (Executive) – Dec 2012 (1 Mark)

Ans.: As per Regulation 4 of the Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000, a person resident in India may acquire bonus shares on the foreign securities.

Thus, Ashok can take bonus shares of the value of US\$ 20,000 of a company incorporated outside India.

Question 77] State the provisions relating to making direct investment outside India under the FEMA. Discuss the method of funding of foreign direct investment under the Foreign Exchange Management Act, 1999.

CS (Executive) – Dec 2014 (5 Marks)

Ans.: Prohibition on Direct Investment outside India [Regulation 5]: With prior approval of RBI -

- (1) No person resident in India shall make any direct investment outside India and
- (2) No Indian party shall make any direct investment in a foreign entity engaged in *real estate business* or *banking business*.

Permission for Direct Investment in certain cases [Regulation 6]:

1. An Indian party has been permitted to make investment in overseas Joint Ventures (JV)/Wholly Owned Subsidiaries (WOS), not exceeding 400% of the net worth of the Indian party as on the date of the last audited balance sheet. This ceiling will not be applicable where the investment is made out of balances held in EEFC account of the Indian party or out of funds raised through ADRs/GDRs.

The above ceiling includes contribution to the capital of the overseas JV/WOS, loan granted to the JV/WOS, and 100% of guarantees issued to or on behalf of the JV/WOS. Such investments are subject to the following conditions:

- (a) The Indian entity may extend loan/guarantee to an overseas concern only in which it has equity participation. Indian entities may offer any form of guarantee - corporate or personal/primary or collateral/guarantee by the promoter company/guarantee by group company, sister concern or associate company in India; provided that
 - (i) All financial commitments including all forms of guarantees are within the overall ceiling prescribed for overseas investment by the Indian party i.e. currently within 400% of the net worth of the Indian party.

- (ii) No guarantee is 'open ended' i.e. the amount of the guarantee should be specified upfront, and
 - (iii) As in the case of corporate guarantees, all guarantees are required to be reported to RBI, in Form ODI Part II. Guarantees issued by banks in India in favour of WOSs/JVs outside India, are outside this ceiling and are subject to prudential norms issued by RBI from time to time.
- (b) The Indian party should not be on the RBIs Exporters caution list/list of defaulters to the banking system circulated by the RBI/The Credit Information Bureau (India) Ltd (CIBIL) or under investigation by any investigation/enforcement agency or regulatory body. All transactions relating to a JV/WOS should be routed through one branch of an authorized dealer bank to be designated by the Indian party.
 - (c) In case of partial/full acquisition of an existing foreign company, where the investment is more than US\$ 5.00 million, valuation of the shares of the company is required to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant. However, in cases of investment by way of swap of shares, in all cases irrespective of the amount, valuation of the shares is required to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.
 - (d) Approval of the Foreign Investment Promotion Board (FIPB) is also a precondition.
 - (e) In case of investment in overseas JV/WOS abroad by a registered Partnership firm, where entire funding for such investment is done by the firm, it will be in order for individual partners to hold shares for and on behalf of the firm

2. Funding Source: Investment or financial commitment in an overseas JV/WOS may be funded out of one or more of the following sources:

- (a) Drawal of foreign exchange from an AD bank in India
 - (b) Capitalization of exports
 - (c) Swap of shares
 - (d) Proceeds of ECBs/FCCBs
 - (e) In exchange of ADRs/GDRs issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued thereunder from time to time by the Government of India
 - (f) Balances held in EEFC account of the Indian party and
 - (g) Proceeds of foreign currency funds raised through ADR/GDR issues.
- 3. For the purpose of reckoning net worth of an Indian party, the net worth of its holding company or its subsidiary company may be taken into account provided such holding subsidiary company has not availed of the facility of direct investment abroad during the relevant block of 3 years and has furnished a letter of disclaimer in favour of the Indian Party.
 - 4. An Indian Party may extend a loan or a guarantee to or on behalf of the JV/WOS abroad, within the permissible financial commitment, provided that the Indian Party has made investment by way of contribution to the equity capital of the JV.
 - 5. An Indian Party may make direct investment without any limit in any foreign security out of the proceeds of its international offering of shares through the mechanism of ADR or GDR subject to following conditions:

- (a) The ADR/GDR issue has been made in accordance with the Scheme for **Issue of Foreign Currency Convertible Bonds & Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993** and the guidelines issued by the Central Government.
- (b) The proposed investment together with investments already made does not exceed 50% of the proceeds of GDR or ADR issued and
- (c) The Indian Party files with RBI, in **Form ODA** within 30 days of such investment.

Question 78] An Indian company intends to make direct investment in a joint venture outside India. Advice with reference to FEMA. **CS (Executive) – Dec 2012 (1 Mark)**

Ans.: As per **Regulation 4** of the **Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000**, an Indian party has been permitted to make investment in JV/WOS, not exceeding 400% of the net worth of the Indian party as on the date of the last audited balance sheet. This ceiling will not be applicable where the investment is made out of balances held in EEFC Account or out of funds raised through ADRs/GDRs.

Thus, an Indian company can make direct investment in a joint venture outside India.

Question 79] An Indian company engaged in financial sector is interested in making investment in banking business abroad. Advice with reference to FEMA. **CS (Executive) – June 2010 (1 Mark)**

Ans.: As per **Regulation 5** of the **Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000**, no Indian party shall make any direct investment in a foreign entity engaged in *real estate business* or *banking business*. Thus, an Indian company cannot make investment in banking business abroad.

Question 80] Can Indian party engaged in the financial services activities make investment in an entity outside India engaged in financial services activities? If yes, also state the conditions to be complied in this regard under the FEMA.

Ans.: **Investment in Financial Services Sector [Regulation 7]:** An Indian party engaged in the financial services activities may make investment in an entity outside India engaged in financial services activities subject to following conditions:

- (i) The Indian party has earned net profit during the preceding 3 financial years.
- (ii) The Indian party is registered with the appropriate regulatory authority in India for conducting the financial services activities.
- (iii) The Indian party has a minimum net worth of **₹ 15 Crores** as on the date of the last audited balance sheet and
- (iv) The Indian party has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

Question 81] State the provisions for making direct investment outside India as per "Approval Route" under the FEMA.

Ans.: **Approval of RBI in certain cases [Regulation 9]:**

- (1) An Indian Party which does not satisfy the eligibility norms under Regulation 6 or 7 or 8, may apply to the RBI for approval.
- (2) Application for direct investment in JV/WOS outside India, or by way of exchange for shares of a foreign company, shall be made in **Form ODI** or **Form ODB**, respectively.
- (3) RBI may take into account following factors while considering the application:
 - (a) *Prima facie* viability of the JV/WOS outside India

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

Question 82] On which type of documents 'Unique Identification Number' is required to indicated under the FEMA.

Ans.: Unique Identification Number [Regulation 10]: RBI will allot a unique Identification Number for each JV/WOS outside India and the Indian Party shall quote such number in all its communications and reports to the RBI and the authorized dealer.

Question 83] Your Company has exported some goods to USA to foreign entity. Amount to be received on account of such export has to be used for making direct investment outside India. State the compliance to be made in this behalf under the FEMA.

Ans.: Method of Investment by capitalization [Regulation 11]:

- (1) An Indian Party may also make direct investment outside India in accordance with the Regulations in Part I by way of capitalization in full or part of the amount due to the Indian Party from the foreign entity as follows:
 - (i) Payment for export of plant, machinery, equipment and other goods/software to the foreign entity
 - (ii) Fees, royalties, commissions or other entitlements of the Indian Party due from the foreign entity for the supply of technical know-how, consultancy, managerial or other services.

However, where the export proceeds have remained unrealized beyond a period of 6 months from the date of export, such proceeds shall not be capitalized without the prior permission of RBI.

- (2) An Indian Software exporter may receive in the form of shares up to 25% of the value of exports to an overseas software startup company without entering into JV agreement by filing an application with the RBI through the Authorized Dealer.

Question 84] Microtech Ltd., a software exporter company, desires to receive 25% of the value of its exports in the form of shares in an overseas software company without entering into joint venture agreement. Advice with reference to FEMA. CS (Executive) – Dec 2008 (1 Mark)

Ans.: As per Regulation 11 of the Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000, an Indian Software exporter may receive in the form of shares up to 25% of the value of exports to an overseas software startup company without entering into JV agreement by filing an application with the RBI through the Authorized Dealer.

Thus, Microtech Ltd. can receive 25% of the value of its exports in the form of shares in an overseas software company without entering into joint venture agreement.

Question 85] What are the provisions for exporting goods or software or plant & machinery from India towards equity contribution in a JV/WOS outside India under the FEMA?

Ans.: Export of Goods towards Equity [Regulation 12]:

- (1) An Indian Party exporting goods or software or plant and machinery from India towards equity contribution in a JV/WOS outside India shall declare it on GR/SDF/SOFTEX Form, which shall be superscribed as "Exports against equity participation in the JV/WOS abroad" and also quoting Unique Identification Number allotted by RBI.
- (2) The Indian Party within 15 days of the shipment of the goods shall submit to the RBI a custom certified copy of the invoice through the branch of an authorized dealer.

- (3) An Indian Party capitalizing exports under Regulation 11 shall, within 6 months from the date of export, or any further time as allowed by RBI, submit to RBI copies of the share certificates or any document issued by the JV/WOS outside India to the RBI evidencing the investment together with the duplicate of GR/SDF/SOFTEX form through the branch of an authorized dealer.

Question 86] What are the obligations cast on Indian party making direct investment outside India and acquiring foreign security?

Ans.: Obligations of the Indian Party [Regulation 15]: An Indian Party which has acquired foreign security shall -

- (i) Receive share certificates or any other document as an evidence of investment in the foreign entity to the satisfaction of the RBI within 6 months or such further period as RBI may permit, from the date of effecting remittance or the date on which the amount to be capitalized became due to the Indian Party or the date on which the amount due was allowed to be capitalized.
- (ii) Repatriate to India, all dues receivable from the foreign entity, like dividend, royalty, technical fees etc., within 60 days of its falling due, or such further period as the RBI may permit.
- (iii) Submit to the RBI every year within 60 days from the date of expiry of the statutory period as prescribed by the respective laws of the host country for finalization of the audited accounts of the JV/WOS outside India or such further period as may be allowed by RBI, an annual performance report in Form APR in respect of each JV/WOS outside India set up or acquired by the Indian Party and other reports or documents as may be stipulated by the RBI.

Question 87] Write a short note on Transfer or pledge of shares of JV/WOS

Ans.: Transfer by way of sale of shares of a JV/WOS [Regulation 16]: Indian Party can transfer any share or security held by him in a JV/WOS outside India to any person whether resident in India or outside India only after obtaining the permission of the RBI.

Pledge of shares of JV/WOS [Regulation 17]: An Indian Party may transfer, by way of pledge, shares held in a JV/WOS outside India as a security for availing of fund based or non-fund based facilities for itself or for the JV/WOS from an authorized dealer or a Public Financial Institution in India.

Question 88] State the compliance to be made for issuance of FCCB under the FEMA.

Ans.: Prohibition on issue of foreign security by a person resident in India [Regulation 18]:

- (1) No person resident in India shall issue or transfer a foreign security.
- (2) A person resident in India, being an Indian company or a body corporate created by an Act of Parliament, which has obtained an approval of Government of India, Ministry of Finance, may issue FCCBs to a person resident outside India.
- (3) The company/body corporate issuing the FCCBs shall, within 30 days from the date of issue, furnish a report to the RBI giving the details and documents as under:
 - (a) A copy of Government's approval for issue of FCCBs
 - (b) Total amount for which FCCBs have been issued
 - (c) Names of the investors resident outside India and number of FCCBs issued to each of them.
 - (d) The amount repatriated to India through normal banking channels or the amount received by debit to NRE/FCNR Accounts in India of the investors.

Question 89] State the provisions of FEMA relating to acquiring foreign securities by person resident in India by way of gift or under ESOS or purchase of foreign securities by employee or a director of Indian office or branch?

Ans.: Permission for purchase/acquisition of foreign securities in certain cases [Regulation 19]:

- (1) A person resident in India being an individual may acquire foreign securities:

- (i) by way of gift from a person resident outside India or
 - (ii) issued by a company incorporated outside India under Cashless Employees Stock Option Scheme, provided it does not involve any remittance from India, or
 - (iii) by way of inheritance from a person whether resident in or outside India.
- (2) A resident individual, who is an employee or a director of Indian office or branch or a subsidiary of a foreign company or of an Indian company in which foreign equity holding is not less than 51%, may purchase the equity shares offered by the said foreign company subject to following conditions:
- (a) The shares are offered at a concessional price and
 - (b) The consideration for purchase does not exceed US \$ 10,000 or its equivalent in a block of 5 calendar years.
- (3) An authorized dealer may allow the remittance by the person eligible to purchase the shares as per clause (2) if the conditions specified in that sub-regulation are fulfilled.

Question 90] Can a person holding foreign security pledge it for obtaining funds?

Ans.: Transfer of a foreign security by a person resident in India [Regulation 20]: A person resident in India, who has acquired or holds foreign securities in accordance with FEMA, may transfer them by way of pledge for obtaining fund based or non-fund based facilities in India from an authorized dealer.

Question 91] State the provisions of FEMA relating to following :

- (i) Acquiring qualification shares of a foreign company
- (ii) Acquiring right shares of a foreign company
- (iii) Purchase of shares by employees or directors of an Indian promoter company of a JV/WOS outside India in the field of software

Ans.: Prior Permission from RBI in certain cases [Regulation 21]:

- (1) RBI, on an application, may permit a person resident in India to acquire foreign securities in following cases:
 - (a) To acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a Director in the company provided that the number of shares so acquired shall be the minimum required to be held for holding the post of director and shall not exceed 1% of the paid-up capital of the company.
 - (b) To acquire foreign securities as right shares issued by a company incorporated outside India. However, the consideration for acquisition of such shares does not exceed US \$ 10,000 in a block of 5 calendar years. Such right shares are being issued by virtue of holding original shares in accordance with the provisions of FEMA.
 - (c) To acquire foreign securities by the employees or directors of an Indian promoter company of JV/WOS outside India, in the field of software. However, the consideration for purchase does not exceed US \$ 10,000 or its equivalent per employee in a block of 5 calendar years. The shares so acquired do not exceed 5% of the paid-up capital of the JV/WOS and after allotment of such shares, the percentage of shares held by the Indian promoter company, together with shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment.
- (2) RBI may, on an application made to it by the Indian software company allow its resident employees (including working directors) to purchase foreign securities under the ADR/GDR linked stock option schemes. However, the consideration for purchase does not exceed US \$ 50,000 or its equivalent in a block of 5 calendar years.

Question 92] Rajiv, a person resident in India, wishes to acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the position of a director in the company. Advise with reference to FEMA.

CS (Executive) – Dec 2011 (1 Mark), Dec 2012 (1 Mark)

Ans.: As per **Regulation 21 of the Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000**, RBI, on an application, may permit a person resident in India to acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a Director in the company provided that the number of shares so acquired shall be the minimum required to be held for holding the post of director and shall not exceed 1% of the paid-up capital of the company.

Thus, Rajiv can acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the position of a director subject to compliance of above stated provisions.

Question 92A] With reference to the relevant provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder, advise on the following:

- (i) Jolly, a resident in India, desires to acquire 5% of the paid-up share capital of the company abroad to hold the post of director in the foreign company, as qualification shares.
- (ii) Ramesh, an NRI, desires to invest on repatriation basis in derivatives contracts, approved by the Securities and Exchange Board of India through stock exchanges.

CS (Inter) – June 2008 (2 × 2 = 4 Marks)

Ans.:

- (i) As per **Regulation 21 of the Foreign Exchange Management (Transfer or Issue of Foreign Securities) Regulations, 2000**, RBI, on an application, may permit a person resident in India to acquire foreign securities to acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a Director in the company provided that the number of shares so acquired shall be the minimum required to be held for holding the post of director and shall not exceed 1% of the paid-up capital of the company. Thus, Jolly, a resident in India, cannot acquire 5% of the paid-up share capital of the company abroad to hold the post of director in the foreign company, as qualification shares.
- (ii) As per **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000**, NRIs are allowed to invest in Exchange Traded Derivative Contracts approved by SEBI from time to time out of Rupee Funds held in India on *non-repatriation basis*, subject to the limits prescribed by SEBI. Such investments will not be eligible for *repatriation benefits*. Hence, Ramesh, an NRI, cannot invest on repatriation basis in derivatives contracts.

Question 93] Zenith Ltd., a foreign company is interested in purchasing its shares issued to some of its employees, who are residents in India, under the ESOP scheme. Advise with reference to FEMA.

CS (Executive) – June 2013 (1 Mark)

Ans.: As per RBI circular, foreign companies are permitted to repurchase the shares issued to residents in India under any ESOP Scheme provided:

- (i) The shares were issued in accordance with provisions of FEMA
- (ii) The shares are being repurchased in terms of the initial offer document and
- (iii) An annual return is submitted through the Authorized Bank giving details of remittances/beneficiaries, etc.

Thus, Zenith Ltd., a foreign company can re-purchase the shares issued to its employees, who are residents in India, under the ESOP scheme.

Question 94] Can a mutual fund registered in India purchase foreign securities?

Ans.: Investment by Mutual Funds [Regulation 22]: RBI may, on application, permit a Mutual Fund, to purchase foreign securities subject to such terms and conditions as it may stipulate.

Question 95] Aadarsh Ltd., an India Company, wants to use issue of FCCB for the purpose of investing in the stock market.
CS (Executive) - Dec 2010 (1 Mark)

Ans.: Prohibited end use of Foreign Security: As per RBI FDI Policy and clarification, Indian Party has been prohibited from making end use of proceeds received by issuing foreign securities in following activities or area:

- ◆ Investment in real estate excluding integrated townships.
- ◆ On-lending
- ◆ Investment in capital markets
- ◆ Acquisitions
- ◆ As working capital
- ◆ For general corporate purposes
- ◆ For repayment of rupee loans

Thus, Aadarsh Ltd. cannot use issue of FCCB for the purpose of investing in the stock market.

EXPORT OF GOODS & SERVICES

Question 96] What are the provisions of the FEMA relating to export of goods and services?

Ans.: Export of Goods & Services [Section 7]: Every exporter of goods shall-

- (a) Furnish to the RBI or other authority a declaration in prescribed form and in prescribed manner containing true and correct material particulars, including the amount representing the full export value or the value which the exporter expects to receive.
- (b) Furnish to the RBI such other information as may be required by the RBI for the purpose of ensuring the realization of the export proceeds by such exporter.

The RBI may direct any exporter to comply with specified requirements for the purpose of ensuring that export value of the goods is received without any delay.

Every exporter of services shall furnish to the RBI or other authorities a declaration in such prescribed form and in prescribed manner containing the true and correct material particulars in relation to payment for such services.

Realization & Repatriation of Foreign Exchange [Section 8]: Where any amount of foreign exchange is due any person resident in India then such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within prescribed period and in prescribed as may be specified by the RBI.

Question 97] State the provisions relating to declaration as regards export of goods and services under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000.

Write a short note on: Declaration for export of goods and services under the FEMA.

(Executive) - Dec 2010 (3 Marks)

Ans.: Declaration as regards export of goods and services [Regulation 3]: Every exporter of goods or software (other than export to Nepal and Bhutan) shall furnish the details to the specified authority with a declaration in prescribed forms set out in the Schedule along with supporting evidence containing true and correct material particulars of the following:

- (i) Amount representing the full export value of the goods or software or
- (ii) If the full export value is not ascertainable at the time of export, the value which the exporter expects to receive on the sale of the goods or the software in overseas market.

In respect of export of services, if no Forms has been specified, the exporter may export such services without furnishing any declaration, but shall be liable to realize the amount of foreign exchange and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

Question 98] State the type of export for which no declaration is required to be filed under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000.

CS (Executive) - Dec 2013 (8 Marks)

Ans.: Exemptions [Regulation 4]: Export of goods or services may be made without furnishing the declaration in the following cases:

- (a) Trade samples of goods and publicity material supplied free of payment.
- (b) Personal effects of travellers, whether accompanied or unaccompanied.
- (c) Ship's stores, transshipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements.
- (d) Goods or software accompanied by a declaration by the exporter that they are not more than ₹ 25,000 in value.
- (e) By way of gift of goods accompanied by a declaration by the exporter that they are not more than ₹ 1 lakh in value.
- (f) Aircrafts or aircraft engines and spare parts for overhauling or repairs abroad subject to their re-import into India after overhauling or repairs within a period of 6 months from the date of their export.
- (g) Goods imported free of cost on re-export basis.
- (h) Goods not exceeding US \$ 1,000 per transaction exported to Myanmar under the Barter Trade Agreement between the Central Government and the Government of Myanmar.
- (i) The following goods which are permitted by the Development Commissioner of the EPZ or FTZ to be re-exported, namely:
 - Imported goods found defective, for the purpose of their replacement by the foreign suppliers or collaborators
 - Goods imported from foreign suppliers or collaborators on loan basis
 - goods imported from foreign suppliers or collaborators free of cost, found surplus after production operations.
- (j) Replacement goods exported free of charge in accordance with the provisions of foreign trade policy.

Question 99] Atul Ltd., an Indian company intends to export its software of the value of ₹ 15,000. Advice with reference to FEMA.

CS (Executive) - June 2012 (1 Mark)

Ans.: As per Regulation 4 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000, certain export of goods or services may be made without furnishing the declaration. As per said regulation, goods or software accompanied by a declaration by the exporter that they are not more than ₹ 25,000 in value may be made without furnishing the declaration.

Thus, Atul Ltd. can export its software of the value of ₹ 15,000 without furnishing the declaration.

Question 100] On which type of documents Importer-Exporter Code Number is required to indicated under the FEMA.

Ans.: Indication of Importer-Exporter Code Number [Regulation 6]: The importer-exporter code number allotted by the DGFT shall be indicated on all:

- Copies of the declaration forms submitted by the exporter to the specified authority and
- Correspondence of the exporter with the authorized dealer or the RBI.

Question 101] State the various types of Forms that are required to be filed when goods or services are exported. Also state the authorities with whom such forms are required to be filed with reference to relevant regulation under the FEMA.

Ans.: Authority to whom declaration is to be furnished and the manner of dealing with the declaration [Regulation 7]:

- (1) The declaration in **Form GR/SDF** shall be submitted in *duplicate* to the Commissioner of Customs. After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form to the nearest office of the RBI and hand over the duplicate form to the exporter for being submitted to the authorized dealer.
- (2) The declaration in **Form PP** shall be submitted in *duplicate* to the authorized dealer. The authorized dealer after countersigning, hand over the original form to the exporter who shall submit it to the postal authorities. The postal authorities after dispatch of the goods shall forward the declaration form to the nearest office of the RBI.
- (3) The declaration in **Form SOFTEX** for export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official of Department of Electronics of Government of India. After certifying all 3 copies, the said designated official shall forward the original to the nearest office of the RBI and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

Submission of duplicate declaration Forms to the RBI: On realisation of the export proceeds, the authorized dealer after due certification shall submit the duplicate of the GR/SDF, PP or SOFTEX Form to the nearest office of the RBI.

Question 102] State the provision of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000 relating to Realisation of export proceeds.

Ans.: Manner of payment of export value of goods [Regulation 8]: The amount representing the full export value of the goods exported shall be paid through an authorized dealer in the manner specified in the **Foreign Exchange Management (Manner & Receipt and Payment) Regulations, 2000.**

Period within which export value to be realized [Regulation 9]: The amount representing the full export value of goods or software exported shall be realized and repatriated to India within 6 months from the date of export.

However, where the goods are exported to a warehouse established outside India, the amount representing the full export value of goods exported shall be paid to the authorized dealer within 15 months from the date of shipment of goods.

The authorized dealer may extend the period of 6 or 15 months if a sufficient and reasonable cause is shown.

Export on Elongated Credit Terms [Regulation 10]: No person shall enter into any contract to export goods on the terms which provide for a period longer than 6 months for payment of the value of the goods to be exported. However, the RBI may grant approval to enter into a contract on such terms if reasonable and sufficient cause is shown.

Question 103] Which type of exports requires prior approval of RBI under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000 ?

Ans.: Certain exports requiring prior approval [Regulation 14]:

- A. **Export of goods on lease or hire:** No person shall without prior permission of the RBI, take or send out by land, sea or air any goods to any place outside India on lease or hire or under any arrangement other than sale or disposal of such goods.

B. Counter Trade: Any arrangement involving adjustment of value of goods imported into India against value of goods exported from India, shall require prior approval of the RBI.

Question 104] An Indian company engaged in software business intends to adjust the value of its exports towards the value of imported items. CS (Executive) – Dec 2010 (1 Mark)

Ans.: As per Regulation 14, of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000, any arrangement involving adjustment of value of goods imported into India against value of goods exported from India, shall require prior approval of the RBI.

Thus, an Indian company engaged in software business can adjust the value of its exports towards the value of imported items only by taking prior approval of the RBI.

Question 105] Naresh, an Indian citizen, enters into an agreement for the lease of machinery to a foreign party and intends to ship the machinery abroad. CS (Executive) – Dec 2010 (1 Mark)

Ans.: As per Regulation 14, of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000, no person shall without prior permission of the RBI, send out any goods to any place outside India on lease.

Thus, Naresh can enter into an agreement for the lease of machinery to a foreign party by taking prior approval of RBI.

Question 106] Tomco Ltd. A vehicles manufacturing company situate at Pune, Maharashtra has received an order from a transport company in Italy for supply of 100 Trucks on lease. You are required to state, how the said Tomco Ltd. can accept such an order.

CA (Final) – Nov 2004 (3 Marks), May 2007 (3 Marks)

Ans.: As per Regulation 14, of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000, no person shall without prior permission of the RBI, take or send out by land, sea or air any goods to any place outside India on lease or hire or under any arrangement other than sale or disposal of such goods.

Accordingly, if Tomco Ltd. wants to accept the order for dispatching 100 trucks to Italy on lease, it has to take prior permission of the RBI.

Question 107] What are the obligations of exporter when he receives advance payment against export under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000?

Ans.: Advance payment against exports [Regulation 16]: Where an exporter receives advance payment from a buyer outside India, the exporter shall be under an obligation to ensure that -

- (i) The shipment of goods is made within 1 year from the date of receipt of advance payment
- (ii) The rate of interest payable on advance payment does not exceed LIBOR + 100 basis points
- (iii) The documents covering the shipment are routed through the authorized dealer.

If the exporter's not enable to make the shipment within 1 year, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of 1 year without the prior approval of the RBI.

Where the export agreement provides for shipment of goods extending beyond the period of 1 year from the date of receipt of advance payment, the exporter shall require the prior approval of the RBI.

Question 108] Write a short note on: Project Exports

Ans.: Project Exports [Regulation 18]: Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the RBI from time to time.

REALIZATION & REPATRIATION OF FOREIGN EXCHANGE

Question 109] What is meant by 'repatriate to India'? State the cases where foreign exchange can be held or need not be repatriated to India by a person resident in India.

CA (Final) – May 2002 (7 Marks)

Discuss the exemptions from the provisions relating to holding, realization and repatriation of foreign currency under the Foreign Exchange Management Act, 1999.

CS (Inter) – June 2006 (4 Marks)

Ans.: Repatriate to India [Section 2(y)]: Repatriate to India means bringing into India the realized foreign exchange and -

- (i) The selling of foreign exchange to an authorized person in India in exchange for rupees, or
- (ii) The holding of realized amount in an account with an authorized person to the extent notified by the RBI and includes use of the realized amount for discharge of a debt or liability denominated in foreign exchange.

Realization & repatriation of foreign exchange [Section 8]: Where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within specified period and in specified manner by the RBI.

Exemption from realization and repatriation in certain cases [Section 9]: In following cases foreign exchange need not be repatriated to India:

- (a) Possession of foreign currency or coins by any person up to specified limit
- (b) Foreign currency account held or operated as specified by RBI
- (c) Foreign exchange acquired or received before 8.7.1947 or any income arising or accruing which is held outside India by any person in pursuance of a general or special permission granted by the RBI
- (d) Foreign exchange acquired and held by way of gift or inheritance by a person resident in India up to limit as specified by RBI
- (e) Foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to limit specified by the RBI
- (f) Such other receipts in foreign exchange as may be specified by the RBI.

AUTHORIZED PERSON

Question 110] What do you understand by the expression 'authorized person'? Explain the provisions relating to authorized person?

CS (Executive) – Dec 2013 (5 Marks)

Define the term 'authorized person' under the Foreign Exchange Management Act, 1999 and state the powers of the Reserve Bank of India to issue direction to an authorized person.

CS (Executive) – Dec 2015 (5 Marks)

Ans.: Authorized Person [Section 2(c)]: Authorized person means an authorized dealer, money changer, off-shore banking unit or any other person for the time being authorized Section 10 to deal in foreign exchange or foreign securities.

Generally, all nationalized banks, leading non-nationalized banks and foreign banks are appointed as authorized dealers to deal in foreign exchange.

- (1) **Authorization to act as Authorized Person [Section 10(1) & (2)]:** The RBI may, on an application made to it, authorize any person to be known as authorized person to deal in foreign exchange or securities. An authorization shall be in writing and shall be subject to the prescribed conditions.

(2) **Revocation of authorization [Section 10(3)]:** An authorization granted may be revoked by the RBI at any time if the RBI is satisfied that-

- (a) It is in public interest so to do
- (b) The authorized person has failed to comply with the condition or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made there under

However, a reasonable opportunity of making a representation in the matter should be given to authorized person before revocation.

(3) **Duties of Authorized Person [Section 10(4)]:** An authorized person shall comply with general or special directions or orders given by the RBI. An authorized person shall not engage in any transaction which is not in conformity with the terms of his authorization without the previous permission of the RBI.

(4) **Obtaining information & refusal to deal [Section 10(5)]:** An authorized person shall before undertaking and declaration from a person to satisfy himself that the transaction in is not violation of FEMA. If authorized person has any doubt, he should refuse the transaction in writing. If the authorized person has reason to believe that transaction is contemplated, he should the matter to the RBI.

(5) **Effect of misuse [Section 10(6)]:** A person who has foreign exchange shall be deemed to have committed contravention of the provisions of the FEMA if such person

- Does not use foreign exchange for purpose for which it was acquired or
- Does not surrender it to authorized person within the specified period
- Uses the foreign exchange for any other purpose other than for which it was acquired

RBI's powers to issue directions to authorized person [Section 11]: The RBI may give to the authorized persons any direction in regard to making of payment or the doing or desist from doing any act relating to foreign exchange or foreign security for the purpose of securing compliance with the provisions of FEMA.

The RBI may also direct any authorized person to furnish necessary information in prescribed manner for the purpose of ensuring the compliance with FEMA.

Where any authorized person contravenes any direction or fails to file any return, the RBI may after giving reasonable opportunity of being heard impose on the authorized person a penalty which may extend to ₹ 10,000. In the case of continuing contravention an additional penalty up to ₹ 2,000 per day can be imposed.

Power of RBI to inspect authorized person [Section 12]: The RBI can inspect the business of any authorized person for the purpose of-

- (a) Verifying the correctness of any statement, information or particulars furnished to the RBI
- (b) Obtaining any information or particulars which authorized person has failed to furnish
- (c) Securing compliance with the provisions of FEMA.

It shall be the duty of every authorized person and every director, partner or other officer of authorized person to produce to any officer making an inspection books, accounts and other documents in his custody within such time and in such manner as the said officer may direct.

Question 111] The Reserve Bank of India issued certain directions to Dream Construction Limited, an authorized person under the Foreign Exchange Management Act, 1999 to file certain returns. The Company failed to file the said returns. Decide, as to what penal provisions are applicable against the said authorized person under the said Act.

CA (Final) - May 2010 (3 Marks)

Ans.: Section 11 provides that where any authorized person contravenes any direction given by the RBI under the said Act or fails to file any return as directed, the RBI may, after giving reasonable opportunity of being heard impose a penalty which may extend to ₹ 10,000 and in the case continuing contraventions with an additional penalty which may extend to ₹ 2,000 for every day during which such contravention continues.

CONTRAVENTION & PENALTIES

Question 112] What are the penalties provided under the FEMA for contravention of provision of Act?

Ans.: Penalties [Section 13]: If any person contravenes any provision of FEMA, he shall be liable to a penalty as stated below:

- If amount is **quantifiable** then penalty up to **thrice the sum** involved in such contravention
- If amount is **not quantifiable** then penalty up to **₹ 2 lakhs**

In case of continuing contravention additional penalty up to **₹ 5,000 per day** can be imposed.

Adjudicating Authority can also order confiscation of any currency, security or any other money or property in respect of which the contravention has taken place.

Adjudicating Authority can also direct that foreign exchange holdings of any person committing the contraventions shall be brought back into India or shall be retained outside India as per directions.

Question 113] Explain the provisions in respect of enforcement of the orders of the Adjudicating Authority.

Ans.: Enforcement of the orders of Adjudicating Authority [Section 14]: If any person fails to make full payment of the penalty imposed on him within a period of **90 days** of receipt of notice. If such payment is not made, he shall be liable to civil imprisonment.

Order for arrest and detention in civil prison of a defaulter cannot be made unless a notice is issued to the defaulter. After he appears, he will be asked to show cause why he should not be committed to civil prison. Pending inquiry, he can be released on furnishing security.

A warrant for the arrest of the defaulter may be issued if the Adjudicating Authority is satisfied that:

- The defaulter has dishonestly transferred, concealed or removed his property or he is refusing or neglecting to pay even if he has means to pay.
- He is likely to abscond the local limits.

If a person to whom show cause notice is issued does not appear before Adjudicating Authority, warrant of arrest can be issued.

Every person arrested in pursuance of a warrant of arrest shall be brought before the Adjudicating Authority within 24 hours of his arrest.

The defaulter can be released if he pays the amount entered in the warrant of arrest and the costs of the arrest to the officer arresting him.

Question 113A] Write a short note on: **Power of the RBI to compound contraventions of the foreign exchange transactions.**

CS (Inter) - Dec 2006 (3 Marks)

Ans.: Section 15 of the Foreign Exchange Management Act, 1999 empowers the Directorate of Enforcement or Officers of the Directorate of Enforcement of the RBI to compound the offences. **The Foreign Exchange (Compounding Proceedings) Rules, 2000** deals with procedure for compounding of contravention of the provisions of the Act.

Rule 4 empowers the RBI to compound only quantifiable contravention committed by any person of the provisions of **Section 7, 8 or 9, or Third Schedule** to the **Foreign Exchange Management (Current Account Transactions) Rules, 2000** in the following manner:

<i>Sum involved</i>	<i>Officer of RBI that can compound the offence</i>
₹ 10 lakhs or below	Assistant General Manager
More than ₹ 10 lakhs but less than ₹ 40 lakhs	Deputy General Manager
More than ₹ 40 lakhs but less than ₹ 100 lakhs	General Manager
More than ₹ 100 lakhs	Chief General Manager

ADJUDICATION & APPEAL

Question 114] Write a short note on: Adjudicating Authority under the FEMA.

Ans.: Appointment of Adjudicating Authority [Section 16]: The Central Government is empowered to appoint the Adjudicating Authorities for holding an inquiry under the FEMA.

If the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish bond or guarantee subject to such conditions as it may deem fit.

No Adjudicating Authority shall hold an enquiry except upon a complaint in writing made by any officer authorized by a general or special order by the Central Government.

Person against whom inquiry is started may appear either in person or take the assistance of a legal practitioner or a Chartered Accountant of his choice for presenting his case before the Adjudicating Authority.

Every Adjudicating Authority shall have the same powers of a Civil Court and all proceedings before it shall be deemed to be judicial proceedings within the meaning of the Indian Penal Code.

Every Adjudicating Authority shall deal with the complaint as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within 1 year from the date of receipt of the complaint. However, if the complaint cannot be disposed of within 1 year, the Adjudicating Authority shall state the reasons in writing for not disposing of the complaint within 1 year.

Question 115] Joseph, a resident in India has failed to realize and repatriate the foreign exchange into country and in this regard a complaint has been made to the Government authorities by somebody inimical to Joseph. Explain briefly the powers of the Adjudicating Authorities to enquire and deal with the complaint of violation of the provisions of the Foreign Exchange Management Act, 1999.

CS (Final) - Dec 2000 (8 Marks)

Ans.: As per **Section 8**, a person resident in India shall take all reasonable steps to realize and repatriate the foreign exchange due him.

As per **Section 16**, no Adjudicating Authority shall hold an enquiry except upon a complaint in writing made by any officer authorized by a general or special order by the Central Government.

In present case, the complaint against Joseph has been made by a person who is inimical to Joseph and not by an officer authorized by a general or special order of the Central Government. Therefore, the Adjudicating Authority cannot hold the inquiry on the basis of the complaint.

Question 116] Explain the provisions relating to filing of appeal with Special Director (Appeals) under the Foreign Exchange Management Act, 1999.

Ans.: Appeal to Special Director (Appeals) [Section 17]: The Central Government has been empowered to appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities.

Who may prefer an appeal: Any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Special Director (Appeals), if Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement.

Time limit for filing appeal: Every appeal shall be filed within **45 days** from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. Such appeal shall be filed in prescribed form, verified in prescribed manner and be accompanied by prescribed fee.

However, the Special Director (Appeals) may entertain an appeal after the expiry of 45 days, if he is satisfied that there was sufficient cause for not filing it within that period.

Passing of Order: On receipt of an appeal, the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.

The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

Powers of Special Director (Appeals): The Special Director (Appeals) shall have the same powers of a Civil Court and all proceedings before him shall be deemed to be judicial proceedings within the meaning of the Indian Penal Code.

Question 117] Explain the provisions relating to filing of appeal with Appellate Tribunal under the Foreign Exchange Management Act, 1999.

Ans.: Establishment of Appellate Tribunal [Section 18]: The Central Government has been empowered to establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals).

Appeal to Appellate Tribunal [Section 19]: An appeal can be filed by with Appellate Tribunal against the order made by –

- Special Director (Appeals)
- An Adjudicating Authority *other than* Assistant Director of the Enforcement or Deputy Director of Enforcement.

Deposit of Penalty: Any person filing appeal to the Appellate Tribunal shall deposit the amount of penalty as may be notified by the Central Government.

Discretion to dispense with deposit of penalty: The Appellate Tribunal may dispense with the deposit of penalty, if it is of the opinion that the deposit of penalty would cause undue hardship to such person.

Time limit for filing appeal: Every appeal shall be filed within a period of **45 days** from the date of receipt of copy of the order made by the Adjudicating Authority or the Special Director (Appeals). However, the Appellate Tribunal may entertain an appeal after the expiry of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.

Passing of Order: On receipt of an appeal, the Appellate Tribunal pass such orders as it thinks fit, confirming, modifying or setting aside the order appealed against after giving the parties an opportunity of being heard.

The Appellate Tribunal shall send a copy of every order to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals).

Time limit for disposal of appeal: The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within **180 days** from the date of receipt of the appeal. However, if appeal could not be disposed of within the period of 180 days, the Appellate Tribunal shall record its reasons in writing for not disposing off the appeal within the said period.

Question 118] TKM Exporters of New Delhi are engaged in Export Business. It made certain exports, but failed to realize and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999. Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeals. You are required to advise on the matter.

CA (Final) – Nov 2005, May 2008 (7 Marks)

Ans.: Sections 17 & 19 provide for appeals against orders of Adjudicating Authority. If Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

Appeal to Special Director (Appeals): Every appeal to Special Director (Appeals) shall be filed within **45 days** from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. Such appeal shall be filed in prescribed form, verified in prescribed manner and be accompanied by prescribed fee. However, the Special Director (Appeals) may entertain an appeal after the expiry of 45 days, if he is satisfied that there was sufficient cause for not filing it within that period.

Special Director (Appeals) will hear the parties and then pass his order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal: Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made directly to the Appellate Tribunal within 45 days from the date on which the copy of the order made by Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal.

Any person filing appeal to the Appellate Tribunal shall deposit the amount of penalty as may be notified by the Central Government. The Appellate Tribunal may dispense with the deposit of penalty, if it is of the opinion that the deposit of penalty would cause undue hardship to such person.

Question 119] Who may present the case before Appellate Tribunal or the Special Director (Appeals) under the FEMA?

Ans.: Right of appellant to take assistance of legal practitioner or Chartered Accountant and of Government, to appoint presenting officers [Section 32]: A person preferring an appeal to the Appellate Tribunal or the Special Director (Appeals) may either appear in person or take the assistance of a Legal Practitioner or a Chartered Accountant to present his case.

The Central Government may authorize one or more Legal Practitioners or Chartered Accountants or any of its officers to act as presenting officers to present the case with respect to any appeal before the Appellate Tribunal or the Special Director (Appeals).

Question 120] Whether the Civil Court have jurisdiction to entertain the cases of contravention of FEMA provisions?

Ans.: Civil Court not to have jurisdiction [Section 34]: No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine. No Civil Court shall grant injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under FEMA.

Question 121] Write a short note on: Appeal to High Court under the FEMA

Ans.: Appeal to High Court [Section 35]: Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within **60 days** from the date of communication of the decision or order of the Appellate Tribunal to him on any *question of law* arising out of such order.

However, if the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within period 60 days it may allow to filed appeal within a further period 60 days.

MISCELLANEOUS

Question 122] Write a short note on: Depository Receipts CS (Executive) – Dec 2012 (3 Marks)

Ans.: The Depository Receipts are physical certificates, which allow investors to hold shares in equity of other countries. These types of instruments first started in USA in late 1920 and are commonly known as American Depository Receipt (ADR). Later on these have become popular in other parts of the world also in the form of Global Depository Receipts (GDRs). Some other common types of DRs are European DRs and International DRs.

In nut shell we can say ADRs are typically traded on a US national stock exchange, such as the New York Stock Exchange (NYSE) or the American Stock Exchange, while GDRs are commonly listed on European stock exchanges such as the London Stock Exchange. Both ADRs and GDRs are usually denominated in US dollars, but these can also be denominated in Euros.

Question 123] Distinguish between: Depository Receipt & Foreign Currency Convertible Bonds

CS (Executive) – June 2013 (5 Marks)

Ans.: Following are the main points of difference between Depository Receipt & Foreign Currency Convertible Bonds:

Points	Depository Receipt	Foreign Currency Convertible Bonds
Meaning	Depository Receipts are physical certificates, which allow investors to hold shares in equity of other countries and are commonly known as American depository receipts (ADRs) & Global Depository Receipts (GDRs).	Foreign Currency Convertible Bonds (FCCBs) means a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which is payable in foreign currency.
Trading	ADRs are typically traded on a US national stock exchange, such as the New York Stock Exchange while GDRs are commonly listed on European stock exchanges such as the London Stock Exchange.	FCCBs are not traded in foreign stock exchanges.
Type of instrument	Depository Receipts are is basically a negotiable instrument denominated in foreign currency i.e. US dollars.	A Foreign Currency Convertible Bond (FCCB) is a quasi debt instrument.
Nature	Depository Receipts represents the beneficial interest in shares issued by the company.	FCCBs can be exchanged for equity shares at later date after the issue of the bond.
Investors option	Depository Receipts are nothing but the shares denominated in foreign currency and investor get the return just like dividend. Investor can also sale or transfer it other person and get back the money invested by him.	Investors have option to convert FCCBs into shares or GDRs. If investors choose to hold the bond till maturity, the company has to redeem them at maturity date.

Question 124] Distinguish between: Automatic Route & Government Route

CS (Executive) – Dec 2010 (3 Marks)

Ans.: Following are the main points of difference between automatic & government route:

Points	Automatic Route	Government Route
Meaning	FDI is allowed under the automatic route with-out prior approval either of the Government or the RBI in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time.	FDI in activities not covered under the automatic route requires prior approval of the Government.

Points	Automatic Route	Government Route
Procedure	The investors are only required to notify the regional office concerned of RBI within 30 days of receipt of inward remittances and file the required documents with that office within 30 days of issue of shares to foreign investors.	Such proposals are considered by the Foreign Investment Promotion Board (FIPB), a Government body that offers single window clearance for proposals on foreign investment in the country that are not allowed access through the automatic route.
Example	Activities/sectors, where FDI is not covered under the Government route comes under the Automatic Route.	Some of the sectors requiring Central Government approval are as follows: - Tea sector, including plantations - 100%. - Satellites - 74%. - Private securities agencies - 49%. - Telecom-beyond 49%. - Single brand retail - beyond 49%.

Question 125] Mention the activities/sectors in which Foreign Direct Investment (FDI) is prohibited.
CS (Executive) - Dec 2015 (3 Marks)

Ans.: FDI is prohibited under the Government Route as well as the Automatic Route in the following sectors:

- (a) Atomic Energy
- (b) Lottery Business
- (c) Gambling and Betting
- (d) Business of Chit Fund
- (e) Nidhi Company
- (f) Agricultural (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 activities (other than Tea Plantations).
- (g) Housing and Real Estate business (except development of townships, construction of residential/commercial premises, roads or bridges).
- (h) Trading in Transferable Development Rights (TDRs).
- (i) Manufacture of cigars, cheroots, cigarillos & cigarettes, of tobacco or of tobacco substitutes.

Question 126] Discuss the method of funding of foreign direct investment under the Foreign Exchange Management Act, 1999.
CS (Executive) - Dec 2014 (5 Marks)

Ans.: There are two methods of funding Foreign Direct Investment (FDI). They are discussed below:

- (1) **Automatic Route:** FDI is allowed under the automatic route without prior approval either of the Government or the RBI in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time. The investors are only required to notify the regional office concerned of RBI within 30 days of receipt of inward remittances and file the required documents with that office within 30 days of issue of shares to foreign investors.
- (2) **Government Route:** FDI in activities not covered under the automatic route requires prior approval of the Government. Such proposals are considered by the Foreign Investment Promotion Board (FIPB), a Government body that offers single window clearance for proposals on foreign investment in the country that are not allowed access through the automatic route.

Investment or financial commitment in an overseas JV/WOS may be funded out of one or more of the following sources:

- (i) Drawal of foreign exchange from an AD bank in India

- (ii) Capitalization of exports
- (iii) Swap of shares
- (iv) Proceeds of ECBs/FCCBs
- (v) In exchange of ADRs/GDRs issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued thereunder from time to time by the Government of India
- (vi) Balances held in EEFC account of the Indian party and
- (vii) Proceeds of foreign currency funds raised through ADR/GDR issues.

Question 127] What is meant by 'person of Indian origin'?

CS (Executive) – June 2013 (3 Marks), June 2015 (3 Marks)

Ans.: As per FDI Policy, person of Indian origin means a citizen of any country other than Bangladesh or Pakistan, if

- (i) He at any time held Indian Passport
- (ii) 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 or
- (iii) The person is a spouse of an Indian citizen or a person referred to in clause (i) or (ii).

Question 128] What is meant by Foreign Currency Convertible Bond (FCCB)?

CS (Executive) – June 2015 (3 Marks)

Ans.: Foreign Currency Convertible Bonds (FCCB) means a bond issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and ordinary shares (through depository receipt mechanism) Scheme, 1993 and subscribed by a non-resident entity in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part.