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INHERITANCE OF EQUITY SHARES OF AN INDIAN COMPANY BETWEEN NON-RESIDENTS

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The Foreign Exchange Management Act, 1999 ("FEMA") regulates foreign exchange transactions. This note analyses the inheritance of equity shares between non-residents under FEMA. Pursuance of the same, the note analyses the presence of legal provisions governing the same, the permissibility of such inheritance and the regulatory check-boxes for such inheritance, if permissible.

Firstly, section 2(w) of the Foreign Exchange Management Act, 1999 states that anyone who does not satisfy the criteria for being a "Person Resident in India" (PRI) under section 2(v) is a "Person Resident Outside India" (PROI).[603] While the inheritance of equity shares of an Indian company by a PROI from another PRI is legally permissible under section 6(5) of FEMA, 1999, the Act is silent about inheritance between two PROIs.[604] Further, while Rule 9(2) of the FEMA (Non-Debt Instruments) Rule, 2019 (ND Rules) specifically allows for the transfer of equity shares between PROIs[605], it does not cover the situation of inheritance of such shares. This is because, under section 56 of the Companies Act, 2013, the passing of shares due to death is categorised as a "transmission" by operation of law.[606] A transfer is a voluntary, inter vivos act requiring an instrument of transfer and consideration, whereas transmission is automatic and involuntary and is thus placed on a different footing vis-a-vis ordinary commercial transactions.[607] Therefore, the statute is silent on inheritance between PROIs.

Secondly, despite this legislative silence, it is argued that such transactions are permissible so long as the heir is eligible to hold the shares. As a general rule, PROIs are 'eligible' to hold equity shares of an Indian Company by way of transfers (from PRI and PROI) and inheritance (from PRIs). Therefore, their non-residential status does not ipso facto bar them from holding equity shares in India. Given this eligibility, such inheritance should be permissible because in such situations, the heir essentially steps into the shoes of the deceased. If the deceased PROI held the asset validly under FEMA either as an FDI investor or an NRI investor, the transmission of that asset to another PROI is essentially a continuation of the original holding. The asset remains in the "non-resident" category, and only the beneficial owner changes as there is no change in foreign exchange inflow or outflow. Such a position is also supported by *Avani Metals Pvt. Ltd. v. Alkesh Gupta*, in which the NCLAT reinforced that a company cannot refuse transmission once the legal heirs prove their entitlement through a Succession Certificate or Probate.[608]

Thirdly, given the permissibility of these transactions, the question arises as to whether rigorous entry route conditions, pricing

[603] Foreign Exchange Management Act, 1999, § 2(w), No. 42, Acts of Parliament, 1999 (India).
[604] Id. at § 6(5).
[605] Foreign Exchange Management (Non-debt Instruments) Rules, 2019, Rule 9(2), Acts of Parliament, 2019 (India).
[606] Companies Act, 2013, § 56, No. 18, Acts of Parliament, 2013 (India).
[607] Vidya Primlani v. ITC Limited, (2010) CP No. 416(111A)/ERB/2006 (Company Law Board, Kolkata Bench) (India); Killick Nixon Ltd. v. Bina Popatlal Kapadia, (1981) Appeal No. 344 of 1981 (Bombay High Court) (India).
[608] Avanti Metals Private Limited v. Alkesh Gupta, (2024) IA No. 1099 / 2023 (National Company Law Appellate Tribunal, Chennai) (India).

guidelines, reporting requirements, etc., apply to them. It is argued that such restrictions should not apply because the non-resident heir acquires the shares on an "as is" basis and the external foreign exchange liabilities of India remain unaltered. As transfer of ownership is by operation of law and not a commercial transaction, such transactions should be free from additional restrictions beyond any existing lock-in periods or liabilities on partly paid-up shares. Further, under Rule 9(2) of the NDI Rules, transfers by sale to PROIs must comply with pricing guidelines and reporting norms, whereas gifts require prior RBI approval if the value exceeds USD 50,000 or if the donor and donee are not relatives.[609] This rule, however, does not mention "transmission" or "inheritance". Thus, the restrictions under this section should not apply either.

However, a caveat exists vis-à-vis assets held on a non-repatriable basis or shares subject to border restrictions under Rule 6(a) of the NDI Rules. As a general rule, if a testator originally acquired shares as a Foreign Direct Investor or Foreign Portfolio Investor using foreign exchange, those shares maintain their repatriable character.[610] The NDI Rules provide for a continuity of character, allowing a non-resident heir to "step into the shoes" of the deceased. This means the heir can hold the inherited securities and eventually move the sale proceeds out of India without significant regulatory friction, as the law respects the original entry of foreign capital. However, a legal challenge arises when the deceased was a Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) who held shares on a non-repatriation basis under Schedule IV of the NDI Rules. Because foreign citizens are generally prohibited from making non-repatriable investments under the automatic route, they find themselves in a "legal vacuum" in which they hold an asset class they are technically ineligible to hold. In such rare cases, the inheritance is not automatic and requires specific prior approval from the Department for Promotion of Industry and Internal Trade (DPIIT) or the Reserve Bank of India (RBI) to regularise the title and allow for future liquidation. Despite these complexities, the RBI provided major administrative relief in its January 2025 Master Directions. The RBI explicitly stated that when a resident dies and transmits equity to a non-resident heir, the shares are held on a non-repatriation basis and, crucially, no reporting is required.[611] It is argued that this principle applies even more strongly to transmissions between two non-residents since an NR-to-NR inheritance does not change the aggregate foreign equity limit or result in a fresh cross-border flow of funds. Consequently, the standard requirement to file Form FC-TRS should be waived. The only necessary step is for the Indian company to update its internal Entity Master records to reflect the new owner, thereby removing the compliance burden from the heir.

Lastly, while holding shares is automatically permitted, remitting funds derived from them is regulated. Under Regulation 7(1) of the FEMA (Remittance of Assets) Regulations, 2016, a non-resident heir is permitted to remit up to USD 1 Million per financial year out of the balances held in an NRO account, covering the sale proceeds of non-repatriable inherited shares.[612] If the shares were originally fully repatriable under FDI, the entire sale proceeds may be remitted without this cap. Further, under Section 56(2)(x) of the Income Tax Act, 1961, the receipt of shares via inheritance is exempt from taxation[613], and under Section 47(iii), the transmission of a capital asset under a Will does not constitute a "transfer" for Capital Gains Tax.[614] When the PROI heir eventually liquidates the shares, the cost of acquisition is deemed to be the cost to the previous owner under Section 49(1), thereby

[609] NDI Rules, *supra* note 3.
[610] Id. at Rule 6(a).
[611] Reserve Bank of India, Master Direction - Foreign Investment in India, RBI/FED/2017-18/60 (Jan. 4, 2018, updated Jan. 20, 2025).
[612] Foreign Exchange Management (Remittance of Assets) Regulations, 2016, Regulation 7(1), Acts of Parliament, 2016 (India).
[613] Income Tax Act, 1961, § 56(2)(x), No. 43, Acts of Parliament, 1961 (India).
[614] Id. at § 47(iii).

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deferring the tax burden rather than triggering it at death.[615]

Thus, the inheritance of equity shares of an Indian company between two non-residents qualifies as an involuntary operation of law under the Companies Act, and the transaction does not require the stringent pricing and reporting guidelines of the FDI. Rule 9(2) of the NDI Rules explicitly permits this transition. However, assets which are held on a non-repatriable basis and certain border restrictions under Rule 6(a) require regulatory approvals to perfect the heir's title and ensure eventual extrication of capital.

[615] Id. at § 49(1).