CHAPTER TWO

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CHAPTER - 2
THE NON-RESIDENT INDIAN

In its widest form, the term "non-resident investment" encompasses all foreign investments in India whether by foreigners or by Indian citizens settled abroad. This study however, confines itself to investments in India by non-resident Indians.

2.1 Definition of Non-Resident Indian (NRI)

To start with, who is a non-resident Indian (NRI)?

In simple terms an NRI is a person who is not resident in India. It does not, however, follow that a person's residential status keeps changing whenever he goes abroad and irrespective of the duration of his sojourn outside India. For a proper appreciation of the term "NRI", therefore, one has to turn to Section 2(p) of the FERA. According to Section 2(p) which defines "person resident in India", an NRI is an Indian citizen who stays abroad for employment, business or vocation or for any other purpose in circumstances indicating an indefinite period of stay outside India.

Other examples of NRIs are Indian citizens working abroad on assignments with foreign governments / government agencies or international/regional agencies like the United Nations Organisation (UNO) (including its affiliates), the International Monetary Fund (I.M.F.), the International Bank for Reconstruction and Development (IBRD), the World Health Organisation (WHO) etc. Officials of the Central and State Governments and public sector undertakings deputed abroad on temporary assignments or posted to their offices abroad are also regarded as NRIs.
Thus Indian citizens who proceed abroad for higher studies, short business visits, training, medical treatment etc., are treated as resident in India even during their temporary absence from the country. NRI's become residents of the country only when they return to India for permanent stay. They continue to remain NRI's during their visits to the country during vacations. A close examination of Sec. 2(p) will show that "person resident in India" includes:

i) an Indian citizen who has been staying in India at any time after 25/3/47;

ii) a foreign citizen who stays in India for employment, business or vocation or in circumstances indicating an indefinite stay here and

iii) a foreign citizen who comes and stays in India with his/her spouse if the spouse is resident in India.

It was on 25th March, 1947, that the very first Foreign Exchange Regulation Act was passed in India; hence the reference to this date in Sec. 2(p).

Thus while an NRI is necessarily an Indian citizen a "person resident in India" may include a foreigner also in certain circumstances.

2.2 FERA and Income-tax law

It is pertinent to observe here that under the Income Tax Act, 1961, (I.T. Law) the incidence of taxation varies with changes in the status of residence of the tax payer. For income tax purposes an Indian citizen could be regarded a "non-resident" in one year and a "resident" in another. An Indian citizen going abroad for employment in a fiscal year
will not be liable to pay tax in India on his foreign income provided his stay in India during that year is less than 182 days. Such a person would be regarded as "non-resident" for tax purposes for the relevant financial (fiscal) year.

Again, an Indian citizen employed abroad and visiting India and staying here for a period of 60 days or more in a financial year, coupled with a total stay of 365 days in the four preceding financial years, would be considered a "resident" for tax purposes in that year.

Thus a person who is a non-resident under the I.T. Law will not necessarily be regarded as "a person resident outside India" under FERA and vice-versa. In FERA the terms "resident in India" and "resident outside India" are used instead of "resident", "not ordinarily resident" or "non-resident" as in the I.T. Law.

The "resident but not ordinarily resident" which, conceptually, is archaic and peculiar to Indian tax law, is a hybrid variety between the NRI and the person of Indian origin resident abroad. A person is "not ordinarily resident" in India in any previous (financial) year if (i) he was not resident in India in nine out of the ten previous years preceding that year or (ii) he has not, during the seven years preceding that previous year, been in India for a period or periods amounting in all to 730 days or more.

Thus a new comer to India would remain "not ordinarily resident" for the first nine years of his stay in India. Similarly, when a person who is "resident" in India goes abroad and ceases to be a "resident" in India for at least
two years he would upon his return, be treated as "not ordinarily resident" for the next nine years. The person "not ordinarily resident" is taxed only on his Indian income; his foreign income is exempt from Indian income tax unless it is derived from a business controlled or profession set up in this country. The "resident" individual, on the other hand, is taxed in India on his global income.

This anachronistic concept in Indian taxation was originally evolved to help British traders and investors who had investments and business interests in India. However, it is now found advantageous by many Indian trading communities who have migrated from the country for trade or profession but nevertheless maintain links with their motherland. There is thus a vested interest in the retention of this illogical concept in spite of the recommendations of every expert tax committee to abolish it.

2.2.1 Uniformity in the definition of 'non-resident' -- Is it possible?

Income Tax is a yearly charge for which the basis is the stay of a person in a year and his activity in that year. This is why the definition of a resident in the Income Tax Act refers to his stay in the country in that year. In the case of FERA the object is to conserve foreign exchange and hence the stay of a person in a particular year has no relevance. Since the subject matter of the Income Tax Act and that of FERA are so diverse and their purpose, object and philosophy so different there is bound to be a difference in the definition of the term 'non-resident' under Income Tax Law and FERA. We cannot re-define these
definitions without causing damage to the objects of these statutes. The areas of operation of these two Acts are different and there is no overlapping of the two; hence a common, uniform definition of the term 'non-resident' is not feasible.

2.3 Definition of Person of Indian Origin

Since FERA regulations and Income Tax Law relating to non-resident Indians apply, generally, to "persons of Indian origin" as well, it is worthwhile considering the definition of this term.

Under FERA a person shall be deemed to be of Indian origin if -

i) he, at any time, held an Indian passport, or

ii) he or either of his parents or any of his grand parents was an Indian and a permanent resident in undivided India at any time.

The wife of an Indian citizen or of a person of Indian origin shall also be deemed to be of Indian origin even though she may be of non-Indian parentage.

Under I.T. law the definition of "person of Indian origin" is even wider. Any person, not necessarily an Indian, shall be deemed to be of Indian origin if, he, or either of his parents or any of his grand parents, was born in undivided India. The term "undivided India" is not defined, in either FERA or the I.T. law.

Under the Govt. of India Act, 1935, "undivided India", included countries like Burma and Aden, not to speak of Pakistan or Bangladesh. Thus any person whose parents or grand parents were born in any of these countries and
subsequently acquired nationality of other countries would be “a person of Indian origin.” This can be stretched to say that a Briton whose father, mother or any grand parent was born in Aden is a person of Indian origin! It is arguable that most of the persons who are presently residents of Pakistan, Bangladesh, Burma or Aden also qualify to be called “persons of Indian origin”. Thus it is not uncommon to find several non-resident foreign citizens calling themselves “persons of Indian origin.” Facilities available to non-resident Indians are made available, generally, to non-resident foreign citizens of Indian origin as well, treating them on par with Indian nationals.

2.4 Some refinements overdue

It is high time the legislature brought about a uniformity in the definition of the term “person of Indian origin” for the purposes of both FERA and the I.T. Law. The person of Indian origin or either of his parents or any of his grandparents should necessarily be an Indian national holding an Indian passport and a resident of undivided India on or after 25th March, 1947. The term “undivided India” should also be defined as the Indian Sub Continent as it existed on 25th March, 1947.