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IIUSA Member Perspective:

Indian Government's New Foreign Exchange Rules and Taxes on Foreign Investment Will Significantly Impact EB-5 and RCI Industry in India

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India is a very important market for EB-5 stakeholders. At the same time, remitting investment outside of India is very challenging. In August 2022, The Reserved Bank of India (RBI - Central Bank of India) introduced new regulations to allow foreign investment by Indian citizens and entities.

In a move to enhance the ease of doing business and to bring more clarity and transparency in undertaking Overseas Investments (OI), the Government of India, in consultation with RBI, issued revised regulations, rules and guidelines.

The regulations provide several changes which are summarized below:

1. **Foreign investee entity:-**

The term Joint Venture (JV) and Wholly Owned Subsidiary (WOS) has been replaced by the term **'foreign entity'** that is formed or registered or incorporated outside India.

(a) It has been further clarified that such a foreign entity should have 'limited liability' (viz, limited liability company, limited liability partnership, etc.) where the liability of the person resident in India is clear and limited.

(b) This restriction would not be applicable to entities with core activity in any strategic sector which includes energy and natural resource sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups, and any other sector or sub-sector as deemed necessary by the Central Government.

2. **Overseas Direct Investment (ODI) & Overseas Portfolio Investment (OPI):-**

    (i) Overseas Direct Investment is an investment by way of acquisition of:

    (a) Unlisted equity capital of a foreign entity; or
    (b) Subscription as a part of the memorandum of association of a foreign entity; or
    (c) In case of a listed foreign entity:

    i. Investment in 10%, or more of the paid-up equity capital of the listed foreign entity; or
    ii. Investment with control where investment is less than 10% of the paid-up equity capital of the listed foreign entity.

By redefining the ODI definition, an ODI in a foreign entity shall continue to be treated as ODI even if such investment falls below 10% of the paid-up equity capital or the investor loses control in the foreign entity.

3. Overseas Portfolio Investment (OPI) is now defined as:

    (i) Investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a resident individual[1] in India who is not in an Indian Financial System Code (IFSC).

4. A resident individual in India has now been permitted to invest in a foreign entity that has invested or invests into India, directly or indirectly, up to 2 layers of subsidiaries, without RBI approval.

5. A resident individual has been permitted to gift foreign securities to his relative resident in India without RBI approval.

6. A resident individual is permitted to receive foreign securities by way of gift from a person residing outside India, subject to compliance with the provisions of Foreign Contribution (Regulation) Act, 2010 (FCRA).

7. A resident individual making investments from Resident Foreign Currency (RFC) Account will not be subject to liberalized remittance scheme limit.

[1] A resident individual in India is any person who has lived in Indian more than 182 days in an Indian financial year. This includes Indian citizens as well as foreigners. If such a person has generated income in India, they are required to file a tax return. This is used for tax purposes and not for immigration status.

8. Indian entities can make financial remittances towards loans to the foreign entity and/or in respect of the issuance of bank guarantee to/on behalf of the foreign entity is permitted only after ensuring that the Indian entity has made an ODI and has control in the foreign entity. The rate of interest should be charged at arm's length basis.

9. An entity or person who has been investigated for economic offences can make foreign investment only after taking a no objection certificate from RBI.

10. An investment in foreign start up can be made from one's own funds and not from funds borrowed from any financial institute.

11. Deferred Payment Option (DPO) is now permissible for acquiring and transferring foreign securities without RBI approval.

12. A person resident in India is prohibited to make ODI in a foreign entity engaged in gambling business.

The above are only the salient points. The regulations and directives go in much detail regarding the operation of foreign investment by Indian entities and Indian citizens. I have spoken to several bank officials in India and most of them are trying to figure out how to carry out foreign remittance under these new rules.

The main challenges are - RBI does not give any specific guidelines and it is left to the discretion of the banks to carry out foreign transactions. When a bank carries out the transaction, RBI officers may interpret the directive differently and reject the transaction or fine the bank.

Tax Collected at Source (TCS) under the new budget of 2023 for outward remittance/ investment from India:

The Central government announced their last budget in February 2023 before going for general election in 2024. This budget has one provision that will affect RCI and EB-5 industry in a significant way.

TCS (Tax Collected at Source) is not a new concept but now the application of this tax is made to several goods and services with a goal to compel Indian citizens who are buying high ticketed items or certain industry businesspersons operating only on a cash basis to file tax returns.

Tax Collected at Source (TCS) is an income tax collected by the seller of specified goods from the buyer. TCS is a concept where a person selling specific items is liable to collect tax from a buyer at a prescribed rate and deposit the tax with the Government.

The Union Budget of 2023 proposes a Tax Collection at Source (TCS) for foreign outward remittance under LRS (other than for education and medical purposes) of 20% starting July 1, 2023. This will come into effect after the bill is passed.

Under the Liberalised Remittance Scheme (LRS), banks are required to collect TCS at the rate of 5% on the aggregate remittance amount exceeding Rs. 7 lakhs = US$ 8,500 during a financial year before Budget 2023.

Please note that this TCS is applicable to outward remittance and not inward remittance coming into India.

Foreign remittances for other purposes under LRS and the purchase of overseas tour programs, the TCS rates will increase to 20% from the previously applicable 5% from 1st July, 2023.

Type of remittance	**Present TCS Rate**	**Proposed TCS Rate**
For the purpose of education (education loan)	0.5% of the amount or the aggregate of the amounts in excess of Rs. 7 Lakh	No change
For the purpose of education, other than 1st use case	5% of the amount or the aggregate of the amounts in excess of Rs. 7 Lakh	No change
Overseas tour package	5% without any threshold limit	20% without threshold
Any other case	5% of the amount or the aggregate of the amounts in excess of Rs. 7 Lakh	20% without threshold

How does this impact EB-5 and RCI investors from India?

An investor is required to make an investment of US$ 800,000 under the EB-5 program. However, under the new rules, an Indian investor will be required to come up with a cash flow of $800,000 USD + $160,000 USD totalling $ 960,000 USD.

Banks will be required to remit $800,000 USD to the United States and $160,000 USD will be taken as TCS by the banks and deposited with the Government of India’s tax department.

On top of the aforementioned amount, investors will be required to have additional cash flow of approximately $75,000 USD to $85,000 USD towards subscription fees, lawyer’s fees and USCIS fees.

Investors will be required to file tax returns and claim credit for this TCS tax. However, the Government of India may take several months or even years to credit such a large amount of money.

The overall remittance limit of $250,000 per person per financial year[2] remains the same and there is no change. Hence investors will need to make remittance of $800,000 from four different accounts in India.

[2] The Indian financial year runs from April 1 through March 31.