FEMA aspects of Private Trusts

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Contents page

Para	Topic
	Part A – Relevant factors and Background for discussion.
1.	Preface and general observations.
2.	Different factors for considering FEMA provisions.
2.1	Residential status of wealth owner, location of the wealth, and residential status of the heir / beneficiary.
2.2	Transactions.
2.3	Manner of distribution.
2.4	Kinds of trust.
2.5	Place of forming a trust.
2.6	Summary of different factors.
2.7	Ground reality.
2.8	Guiding principle.
3.	Some FEMA and Income-tax rules which are relevant to understand the FEMA issues for a private trust.
3.1	Payment to a non-resident by an Indian resident.
3.2	Creating an interest in favour of a non-resident.
3.3	Liberalised Remittance Scheme.
3.4	Receipt of funds.
3.5	Eligible Investor.
3.6	Returning Indian.
3.7	Foreign Direct Investment (FDI) in an eligible Indian entity.
3.8	Appointment as a trustee.
3.9	Distribution from a discretionary trust.

Sr.	Topic
	Part B – Legal discussion.
4.	Status of a trust.
4.1	Personal status.
4.2	Residential status.
4.3	To summarise.
5.	Transactions relating to trust where there can be FEMA implications.
5.1	Indian resident settlor – Mr. IR.
5.2	Non-resident settlor – Mr. NR.
	Part C – Some practical steps.
6.	Practical steps.
6.1	For Indian resident.
6.2	For non-resident.
7.	Summary.
	Annexure A.
	Annexure B.

Part A – Relevant factors and background for discussion:

1. **Preface and general observations:**

1.1 The subject of private trust is amongst the most complicated subjects. It is not so just under FEMA but also under other laws. There are several reasons for it.

One of the issues which gives rise to complexity is - **is trust a contract or a person**?

Under the Indian trust law, a trust is a contract / arrangement. Trust is not a person.

However many times, trust is referred to as a person – not only in general parlance but also under some laws. For example, under SEBI laws mutual fund and venture capital fund is registered as a trust under the Indian Trust Act. However investors can "invest" in it. It is accepted that each law has its own purpose. Treatment under one law may not apply for another law. Therefore it is alright for a trust to be considered as an arrangement under trust law and a person under another law.

For Indian tax purposes, a trust is not considered as an entity. A trustee is taxed as representative assessee.

Under FEMA, there is no clarity on trusts – private or otherwise. Therefore there are many issues. For some purposes (discussed later), a trust is considered as an entity. See para 4 for discussion.

These differences create controversies and at times regulatory arbitrage.

It is acknowledged by the Government too that a trust is an unregulated entity. As the ownership and control can be easily altered, approval for foreign investment in a trust (Venture Capital Fund) is given on a case by case basis. Wherever issues are not clear, approval is not given. (See Annexure A for an extract of the FIPB review report.)

1.2 Another issue which creates difficulties is – ownership of assets and income. A trust creates "**split ownership**". A trustee is a "legal owner" and beneficiary is a "beneficial owner". This is one of the unique features of the trust.

The trust deed lays down the powers, rights and obligations of the trustee and beneficiary. When deciding on an issue, should one consider the status of a trustee or the beneficiary or both?

1.3 A private trust can be used for several purposes. One of the important **purposes is holding of assets, and transfer of assets to the next generation (estate planning)**.

Today assets are held cross border. Foreigners hold assets in India and vice-versa. This gives rise to FEMA issues.

Trust is used for other purposes also like asset protection from undesirable elements, family holding over business, etc. I have discussed the FEMA issues considering the transfer of assets to the next generation.

1.4 For the sake of clarity, the parties involved in a trust are stated below –

Settlor – Person who makes a settlement in a trust (forms a trust) by entrusting assets in a trust. (It refers to the person who wants to transfer assets into a trust. Settlor can be someone else like a professional who forms a trust with nominal funds. Donors are persons who transfer the assets to the trust. For the purpose of this article, "Donor" is a person who gifts funds to a trust. He may or may not be a settlor / trustee / beneficiary.)

(In this article, the words "settlor", "owner", and "donor" have been used inter-changeably.)

Trustee – Person whom the settlor trusts; and to whom the settlor transfers some funds or property to look after for the benefit of the beneficiaries. He is the "legal owner" of assets, is responsible for managing the trust assets and for legal compliance. (A trustee is like a custodian. He has a fiduciary relation with the beneficiary.)

Beneficiary – Person who is entitled to the income and assets of the trust as laid down in the trust deed. The beneficiary may be identified or not. Beneficiary may exist on the date of trust formation or may come into existence in future. (These are usually spouse and children of the settlor. At times the settlor is also the beneficiary.)

(In this article, the words "beneficiary" and "heir" are used interchangeably.)

Outside India, there is a concept of "Protector". A "Protector" is a person who is expected to protect the beneficiaries. He can ensure whether the trustee is performing as per the trust deed or not.

The settlor, trustee and beneficiary can be individuals or non-individuals.

The respective trust law can have a bearing on the rights of beneficiaries. For example, under the Indian law, the beneficiary has a right to demand his shares from the trustees in case of specific trusts. Whereas under the UK law, I understand that the beneficiary's rights are not that strong. One will have to consider the trust law as well as the trust deed.

1.5 A trust can be **revocable or non-revocable**. On formation of trust and revocation of the trust, FEMA provisions should be seen independently.

1.6 I have discussed legal issues in this article. This may appear technical. Therefore at the end, I have taken up some practical issues if persons want to form a trust.

2. **Different factors for considering FEMA provisions:**

Various factors can affect FEMA provisions. Some of the important factors are as under:

2.1 **Residential status of wealth owner, location of the wealth, and residential status of the heir / beneficiary:**

A table below briefly illustrates the different situations of owner, assets and beneficiaries.

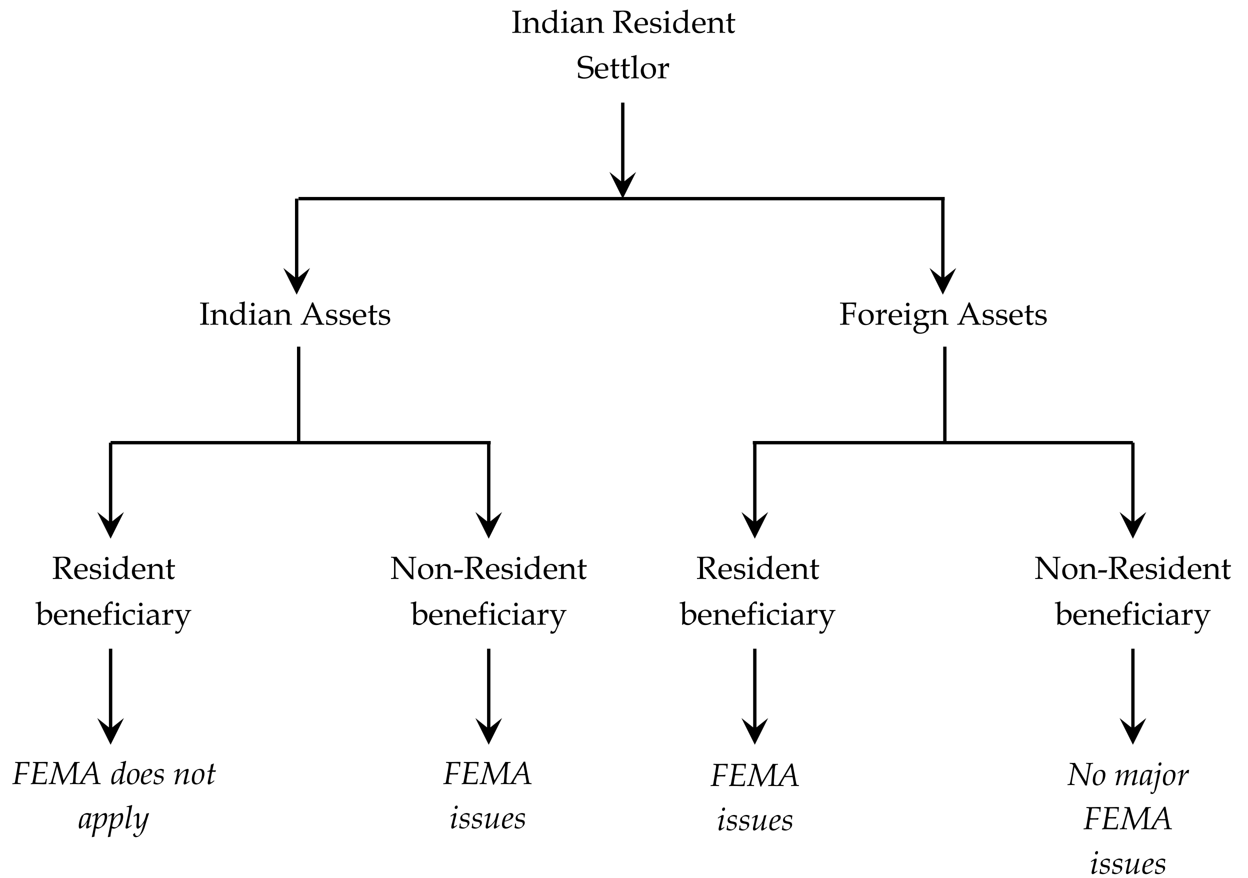
Wealth owner	Assets	Beneficiary / Heir
Indian resident	In and outside India	Resident and Non-resident of India
Non-resident of India	In and outside India	Resident and Non-resident of India

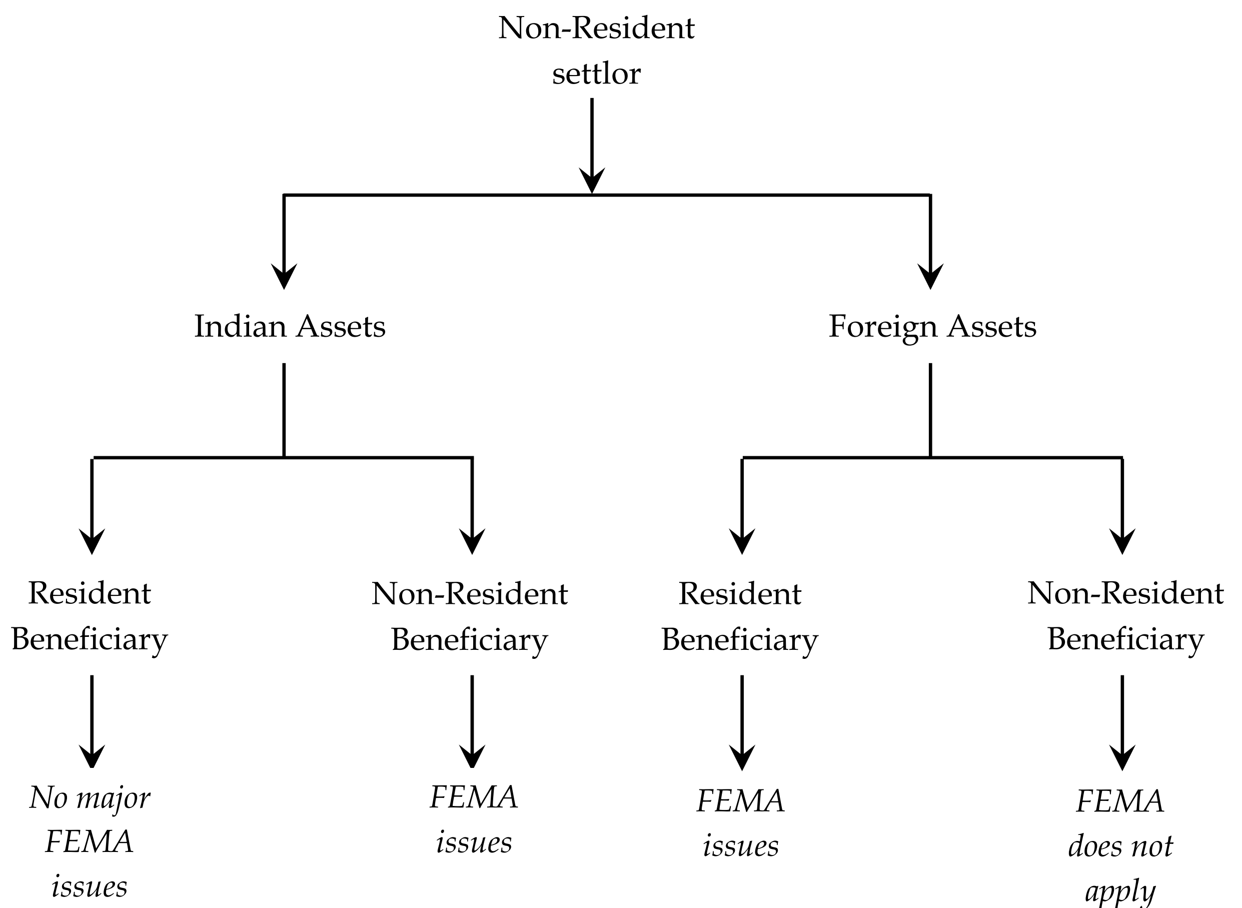
Individual status of a person – whether he is an Non Resident Indian (NRI) or non-NRI can also make a difference. It can also make a difference if the person has always been an Indian resident, or was a non-resident earlier and has now become an Indian resident (Returning Indian).

[A person may want to migrate outside India or into India (change of residential status). That can make a difference for considering future distributions from / dissolution of a trust.]

Permutation of situations:

There can be some more permutations. To give an idea, permutations are given below in a chart.


Indian Resident Settlor
Indian Assets
Foreign Assets
Resident beneficiary
Non-Resident beneficiary
Resident beneficiary
Non-Resident beneficiary
FEMA does not apply
FEMA issues
FEMA issues
No major FEMA issues


Non-Resident settlor
Indian Assets
Foreign Assets
Resident Beneficiary
Non-Resident Beneficiary
Resident Beneficiary
Non-Resident Beneficiary
No major FEMA issues
FEMA issues
FEMA issues
FEMA does not apply

2.2 Transactions:

FEMA issues can arise for the following transactions:

- Settlement of trust.
- Earning of income in the trust.
- Distribution of the trust property – during lifetime of the trust, or on dissolution.

In case of income of a trust, if the settlement of assets is permitted, the consequent income is also permitted. If settlement is permitted, sale of investment normally is permitted. However there could be some restrictions such as on transfer of immovable property from NRI to non-resident.

If settlement is permitted, distribution also is permitted. There could be issues in case of distribution to NRIs. He may not be able to remit the funds outside India beyond US$ 1 mn. per year.

In the past, RBI has permitted distribution of income of the trust to NRIs in the NRO account, if the trust was formed through a Will.

2.3 Manner of distribution:

Assets can be distributed to the next generation through different modes such as:

- Gift.
- Will.
- Insurance.
- Trust.

In this article, the focus is on Trusts. To some extent Will and gift issues are also considered to compare it with Trusts.

It should be noted that bequests by Will, is different from Trust. Even if the purpose may be same, legal implications are different. In case of a Will, there is an "inheritance" of assets. In case of Trust, it is a receipt of funds / gift / distribution. There is no "inheritance".

2.4 Kinds of trust:

While there are several kinds of trusts, the two main kinds being – specific trust (where beneficiaries' shares are specified), and discretionary (where the beneficiaries' shares are not specified). Depending of the kind of trust, there can be different FEMA implications.

A specific trust gives rise to some difficulties. Therefore many times a discretionary trust is set up in an offshore centre. However with the changes in the Income-tax Act and some FEMA rules, discretionary trust gives rise to other issues. These are discussed at appropriate places.

2.5 Place of forming a trust:

A trust can be formed in India or outside India. In this article, the discussion is more on Indian trusts. Some issues about foreign trusts which have implications under FEMA are also discussed. In case of foreign trust, some answers will depend on the trust law of that country.

2.6 Summary of different factors:

Summary of the factors to be considered are as under:

Residential status of:

- settlor.
- beneficiary.
- trustee.

Personal status of (is it a person - an individual, corporate, etc.):

- settlor.
- beneficiary.
- trustee.

Personal status of individual:

- whether settlor is an NRI or Non-NRI.
- whether beneficiary is an NRI or non-NRI.
- whether the settlor wants to change his residential status in future.
- whether the beneficiary wants to change his residential status in future.

Assets:

- location.
- kind of assets – shares, immovable property, etc.
- whether assets are held on repatriable or non-repatriable basis.

Trust:

- location – in India or outside India.
- kind of trust – specific or discretionary.

2.7 Ground reality:

While some transactions are permitted under FEMA, things on the ground could be different. For example, bank account will have to be opened in the name of the trust. Opening a bank account in name of the trust may be accepted by some banks. It may not be accepted by some banks. People have faced difficulties in case of Indian trusts even where all parties are Indian residents.

If the trustee of an Indian trust with Indian beneficiaries is a non-resident, can the bank account be opened in the name of the trustee?

One will have to consider the ground realities also.

2.8 **Guiding principle:**

As discussed above, under FEMA, there are no clear rules for a trust. For some purposes, a trust is considered as a person. That however cannot be a guiding factor.

A peculiar feature of FEMA is that it is not drafted in specific legal language. If one tries to interpret FEMA, it leads to many difficulties. It is best to consider FEMA as a **policy law**. Try and understand the policy behind the rules and follow the same. If there are any doubts, it is safer to obtain an approval. What cannot be done directly, cannot be done indirectly. It is safer to be conservative.

At times FEMA rules can lead to illogical results. For example, if a person inherits foreign property from a resident who had acquired such a property while he was a non-resident (Returning Indian – see para 3.6), he can keep the same outside India. However if he inherits foreign property from a non-resident, he cannot keep it outside India.

The two sections which most often apply are 3 and 8.

Under section 3, without a general or specific approval from RBI, no person can deal in foreign exchange with anyone – except an authorised person (usually a bank). No person can make any payment to or for the credit of any non-resident in any manner. No person can receive any payment from a non-resident in any manner – except through banking channels.

Under section 8, if any person is entitled to any foreign exchange, he should bring it back to India within specified time.

RBI has permitted transactions under sections 3 and 8. However many permissions come with several conditions. If the transactions do not fall under

general permissions, the same cannot be done – except without a specific approval from RBI.

In this article, some legal issues and controversies are discussed. A guiding principle to understand the issues can be – what is the **ultimate effect of the transaction**? Is that ultimate effect permissible under FEMA? If yes, the transaction may be all right. Otherwise, obtain an approval. Or avoid the transaction.

If all persons and assets of a trust – settlor, trustee, beneficiaries, assets and location are in India / resident in India - there is no difficulty under FEMA. Conversely if all persons and assets are outside India / non-residents, FEMA does not apply. If any of the persons or assets in India and the rest outside India, it may be advisable to obtain an approval from RBI.

3. Some FEMA and Income-tax rules which are relevant to understand the FEMA issues for a private trust:

3.1 Payment to a non-resident by an Indian resident:

An Indian resident cannot make any payment to a non-resident or for his credit, unless the payment is permitted under the FEMA rules. [Section 3(b)]. This restriction affects the following transactions:

Gift –

i) While giving a gift is a current account transaction, there is a restriction on the same under the Current Account Rules. An Indian resident is permitted to remit upto US$ 75,000 per year under the Liberalised Remittance Scheme (See paragraph 3.3 below). Under the scheme, an Indian resident can make a gift to a non-resident in foreign exchange through bank transfers. Gift can also be given in rupees to a close relative who is an NRI by depositing the funds in his NRO account. Gifting of movable and immovable property is not permitted under LRS.

ii) If he wants to give a gift of securities of Indian company to an NRI close relative, an approval is required to be taken from RBI. Upto 5% of the total issued securities can be given as gift per year limited to a value of US$ 50,000. [Regulation 10.A.(a) of FEMA notification no. 20].

iii) An Indian resident can give a gift of immovable property to an NRI. [Regulation 3 and 4(b) of FEMA notification no. 20 read with master circular].

This restriction will affect the following transaction:

- Settlement of assets by Indian residents in an Indian or foreign trust with non-resident beneficiaries. (The effect of the transaction is that a non-resident is entitled to property.)

3.2 **Creating an interest in favour of a non-resident –**

An Indian resident cannot create an interest in favour of a non-resident. (Section 2(e) – Capital Account Transaction). Thus if an Indian resident wants to create a trust wherein non-residents are beneficiaries, it requires an approval of RBI.

This restriction will affect the following transactions:

- Settlement of assets by Indian residents in a discretionary trust with non-resident beneficiaries.

- Settlement of some foreign assets in foreign trust with non-resident beneficiaries.

3.3 **Liberalised Remittance Scheme:**

Liberalised Remittance Scheme (LRS) has been formulated for Indian residents to remit funds outside India for almost any purpose. Under this scheme, an Indian resident can remit an amount of upto US$ 75,000 (earlier US$ 2,00,000) per annum. It should be noted that under this scheme, funds can be paid. Assets in kind cannot be paid.

Under the LRS, several Indian families have invested outside India in immovable properties, shares and other assets. (There are some issues regarding investing in shares of a foreign company. However in this article, these are not discussed.)

This facility permits creation of foreign trusts by Indian residents by sending funds from India. It will help non-resident beneficiaries. However resident beneficiaries will benefit in a limited way as long as funds are not distributed.

3.4 **Receipt of funds:**

If an Indian resident becomes entitled to any sum abroad, he is required to remit the same to India within a specified time (generally 180 days). He cannot retain the same abroad. [Section 8 - Notification no. 9 - Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2000].

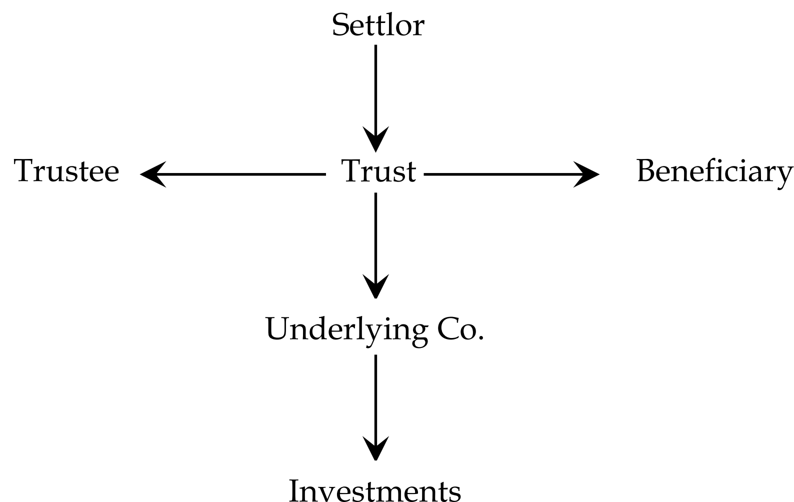
There are exemptions available in a limited manner. For example, if an Indian resident inherits foreign assets from a **Returning Indian,** the assets can be kept abroad. [Section 6(4)]. (See paragraph 3.6 for meaning of Returning India.)

This provision affects distribution of assets from foreign trusts to Indian residents.

3.5 **Eligible Investor:**

A non-resident can invest in India. An individual can of course invest in India subject to Foreign Direct Investment policy. An entity can invest only if it is an incorporated entity. Unincorporated entity cannot invest in India. Assuming that a trust is a person, it is an unincorporated person. It is not eligible to invest in India. [AP circular no. 14 dated 16.9.2003. Also see Annexure A for discussion on trust.]

Therefore a non-resident cannot invest through his private trust in India. One can of course take care of this requirement by having an underlying company. The underlying company can invest in India. This is explained by a chart below:



This provision will affect non-resident settling shares of Indian companies in a foreign trust.

3.6 **Returning Indian:**

"Returning Indian" is not a legal term. It refers to a person who was a non-resident under FEMA, but has returned to India and is now an Indian resident. As the provisions are designed for people of Indian origin who want

to return to India, these are loosely referred to as provisions for "Returning Indians". The provisions were introduced in 1992.

A person who was a non-resident of India and had acquired assets outside India without any contravention of FEMA rules, can continue to retain the assets abroad. He does not have to remit the funds back to India. [Section 6(4)].

He can continue to retain the income on these assets outside India. He can sell the assets and reinvest the proceeds outside India. He can gift the assets to anyone or bequeath the same to anyone.

An Indian resident who inherits such foreign assets from a Returning Indian (assets acquired while the Returning Indian was a non-resident including assets out of incomes and conversions into new assets), can also enjoy the same benefits as a Returning Indian. For example, a father acquired immovable property in the USA while he was working there. After him, the property is inherited by his daughter who was always an Indian resident. The daughter can also hold the property and dispose of the same as she desires. (If the daughter's children inherit the property (while they are Indian residents), they cannot keep the property abroad.)

It should be noted that if the Indian resident receives property as gift, he has to bring it to India. If he receives as inheritance, he can keep it abroad.

This provision will affect the following transactions:

- Settlement of foreign assets by Returning Indians in a foreign trust.
- Settlement of foreign assets by Indian residents in a foreign trust.
- Distribution from foreign trust to Indian beneficiaries.

3.7 **Foreign Direct Investment (FDI) in an eligible Indian entity:**

Under the FDI policy, non-residents investing in India can invest only in companies, LLPs (with prior approval from FIPB), and Venture Capital Fund (which is a trust) (with prior approval from FIPB). Investment in trust is not permitted.

This will affect the following transactions:

- Settlement of assets in India owned by Indian resident in an Indian trust with non-resident beneficiaries.

- Settlement of assets in India owned by non-resident in an Indian trust with non-resident beneficiaries.

RBI has generally taken a view that as long as beneficiaries or trustees are non-residents, the trust should not undertake any activities which is prohibited for non-residents.

3.8 **Appointment as a trustee:**

It should be noted that appointment as a trustee by itself is all right. A trustee is like a manager and a custodian. An appointment as a trustee should not be considered as a transfer of assets to the trustee. However in case of discretionary trusts, there could be difficulties. Generally RBI has considered that appointment as a trustee on an Indian trust is permitted under FEMA. In any case, as long as trustee is a non-resident, the trust should not undertake any activities which are prohibited for non-residents. See para 4 for discussion on status of a trust.

Some variations:

A trustee is a legal owner. If a trust is formed, and a trustee is appointed, it can be considered as a transfer to a trustee. If the trustee is a non-resident, it may affect the transfer of Indian assets. Correspondingly, if the trustee is an Indian resident, it can affect the transfer of foreign assets.

However if there are already some trustees, and one more trustee is appointed, it should not be considered as "transfer" of some assets from existing trustees to a new trustee.

3.9 **Distribution from a discretionary trust:**

Income-tax issues are dealt with in separate articles by various authors. Here I have discussed only one issue. Under section 56, any person who receives any sum without payment of consideration or inadequate consideration, is taxable in the hands of recipient. Receipt from relatives is not liable to tax.

If a beneficiary receives any amount from a discretionary trust, is it taxable in the hands of the beneficiary?

In a specific trust, the beneficiary has clear interest in the assets and income of the trust. Income is taxable in the like manner and to the same extent as it would be in the hands of the beneficiary. Once the income is taxed, then if the beneficiary receives the same, it is not taxable. One of course has to consider section 56 at the time the settlor / donor gifts assets to the trust.

In a discretionary trust, the beneficiary does not have any right in the assets of the trust. One cannot say that a beneficiary has a vested / specific interest in the assets which he receives. Further, a trustee is not a relative. Hence a distribution from a trust cannot be said to be received from a relative. Here section 56 is to be applied at the time of distribution and not on settlement / gift to a trust.

In such a situation, will the distribution from discretionary trust be taxable under section 56?

Is that the intention? Perhaps not. However the language is clear. In the case of Ashok Pratap (23 taxmann.com 347), Mumbai ITAT has held that distribution on dissolution cannot be considered as "without consideration". Hence section 56 cannot apply. However the matter is not settled.

The correct position should be that if the beneficiary receives any distribution from the trustees, where the assets were contributed by the relatives, then such a distribution should not be taxable. This will be in line with the spirit of section 56, where gift from relatives is not liable to tax.

As on today, this is a serious risk factor which one should consider.

Thus this provision will affect distribution from discretionary trust.

Part B – Legal discussion:

4. **Status of a trust:**

4.1 **Personal status:**

4.1.1 As discussed above, there is no clarity under FEMA about trusts. Foreign investment policy does not permit non-resident investment in a trust – except VCF. In following situations, a trust is considered as an entity – not because of law, but by way of practice.

Where Indian entity is a trust:

i) Venture capital fund.

ii) Mutual fund.

Where foreign entity is a trust:

i) A trust formed by process of law (e.g. charitable trust).

ii) Foreign Institutional Investor (FII) (will be known as Foreign Portfolio Investor under SEBI) - pension funds, etc. which can be trusts.

4.1.2 **Legal analysis:**

What is a status of a trust under the FEMA law? Section 2(u) defines a "person" on the lines of income-tax law. It includes several persons including agency, office and branch of a person. However a trust is not considered as a person.

A trustee is considered as a legal owner under the trust law. Can the status of the trust be considered according to the status of the trustee? A trustee operates in dual capacity. One is in his personal capacity. **His personal transactions and status is independent of status as a trustee.** As a trustee, he is in fiduciary capacity in relation to the beneficiaries. In this capacity he is acting as a custodian and manager of the funds. The beneficial owners are the beneficiaries. Hence in my view, a trustee's status cannot be considered.

The transactions in a trust are undertaken for the benefit of the beneficiary. If immovable property is acquired, the beneficiary gets a beneficial right in the property. If at all, the transaction should be considered considering the status of the beneficiary.

However if the trust is a discretionary trust, does it make any difference as the beneficiary's share cannot be identified? In such a situation, one should consider trustee as the owner. **However the trust does not get the status of a person due to trustee's status.**

4.1.3 Can a trust be considered as an Association of Persons (AOP) or Body of Individuals (BOI)? FEMA does not define these terms. We can take guidance from the Income-tax Act and General Clauses Act.

Under the General Clauses Act, a person "*shall include any company or association or body of individuals, whether incorporated or not*". If a law refers to a person but has not defined it, one may rely on the General clauses Act. "Association or body of individuals" has not been defined. AOP and BOI are juristic persons. These terms take their meaning from the law in which these are referred to. Under different laws, a family, managing committee and other kinds of groups have been considered as persons. These terms have been explained by the courts.

Under the income-tax law, person includes an AOP and BOI. Here also, AOP and BOI have not been defined. The courts have explained these terms. AOP requires a voluntary coming together of persons to carry out some activities jointly. (The purpose of "deriving income" has been done away with in the Income-tax act.).

BOI is a body of individuals. It is similar but not the same as AOP. If individuals happen to be together with a common purpose, they may be considered as BOI. The requirement of BOI is less strict compared to AOP. Holding investments and receiving income jointly cannot make the group a BOI. There should be some unity and common purpose. If the persons come together to trade in investments or manage assets jointly, it will be considered as BOI.

The courts have held that one has to see the totality of facts and decide whether a group is an AOP or BOI.

Who should be considered for the purpose of considering a group - trustees or beneficiaries?

For Income-tax Act, the courts are unanimous in their view that trustees are representatives only. Even if there are co-trustees, they cannot be considered as AOP of BOI. One has to look at the status of the person represented – i.e. the beneficiaries. If beneficiary is an individual, co-trustees will be assessed as an individual. If the beneficiaries are BOI or AOP, even a single trustee will be assessed as BOI or AOP.

As far as beneficiaries are concerned, can they be considered as AOP / BOI? It depends on situation. If the trust has only investments and the income is being received for the benefit of all beneficiaries, it cannot be considered as BOI. Merely holding investment and receiving income for the joint benefit of the beneficiaries is not considered as sufficient to hold the group as BOI. Even if the trustee looks after the business for the joint benefit of beneficiaries, it will not be a BOI.

Can it be considered that beneficiaries have a common purpose for which they have grouped together? It is difficult to say that beneficiaries have come together to form a BOI. Beneficiaries are specified by the trustees. They do not come together to do some activity. The assets of a trust are being managed for the beneficiaries, not by the beneficiaries. However under some situations, say if the beneficiaries come together and want the trustee to managed the assets for the joint benefit of the beneficiaries, it may become a BOI.

Thus it is very difficult and perhaps rare that a trust for passively managing the assets for the beneficiaries will be considered as BOI. Trust cannot have an independent status of its own. In practice, for some purposes, a trust is considered as a person.

If the trust is considered as a person, it will have different implications. If the trust is an Indian trust, then any non-resident interest will be considered

as a capital in the trust. Correspondingly, in a foreign trust, if a resident has any interest, it will be considered as his capital. FEMA rules will apply accordingly.

4.2 **Residential status:**

4.2.1 The residential status of a trust is relevant only on the assumption that a trust is a person. If it is considered as a contract or an arrangement, there can be no residential status of a contract.

Assuming that a trust is a person, how does one determine the residential status. There is no provision under FEMA which helps in this matter. Section 2(v) which defines "person resident in India", discusses the situation only in case of an individual; a person or body corporate which is registered or incorporated; and branch, office or agency.

In case of unincorporated person, there is no definition. Even if the trust is considered as AOP or BOI, the definition does not apply.

4.2.2 In case the document of trust settlement is registered with the sub-registrar's office, will it be considered as sufficient to claim that a trust is an Indian resident? In my view the use of word "registered" means a person which **comes into existence** due to the process of law. For that process, there may be a registration required. However registration of a document for procedure or administration reasons cannot be considered as sufficient for a person's residential status.

4.2.3 If there is no definition, one will have to consider the facts and situation and then attempt to determine the residential status. For example, in case of mutual fund or a venture capital fund registered with SEBI, clearly it will be considered as an Indian resident trust.

If a foreign pension trust is investing in India, clearly it is a foreign trust / person incorporated outside India.

4.2.4 However in case of private trusts, there can be difficulties. Which factors should be considered for determining the residential status:

- Residential status of settlor.
- Location of assets.
- Residential status of beneficiaries.
- The governing law as stated in the trust deed.
- Residential status of trustee.
- Place of effective management (or similar criteria.)

For determining the residential status of a trust, one can safely say that location of settlor is not relevant as once he settles the trust, his role is over.

The location of assets also cannot be considered.

As far as beneficiaries are concerned, they could be located in different countries. Further, they do not play a role in management of the trust. Hence prima facie their status cannot be considered.

A good starting point could be the governing law as stated in the trust document. If a trust is formed in India with an Indian address, quite likely it is an Indian trust. If a trust has Indian trustees, it could again be considered as an Indian trust. However, if the management of the trust is in a different country compared to the country of governing law, it will be unfair to consider only the governing law.

The trustee's status could be considered to determine prima facie residential status. The trustees also could be located in different countries. Even if there is one trustee (say in UK), but the beneficiaries, governing law and assets are in another country (say India), it is difficult to consider only the trustee's status as the sole factor.

Place of effective management can be considered to determine the residential status. The place from where trustees manage the trust may be considered.

This in short, there is no test for determining the residence of s trust. It may be prudent to avoid controversies. It is advisable to state in the trust document itself that the trust will be considered as resident of XXX country. It will be governed by the law of XXX country.

One should consider the ultimate impact and then decide (para 2.8).

4.3 **To summarise:**

Thus in short, there is no clarity on the status of the trust. One may keep debating and there will be no solution. It will be advisable to consider the following:

4.3.1 In case of **specific trust**, beneficiaries have a clear right. Hence for any transaction, **one should consider as if the transaction is with the beneficiary**. Thus if an Indian resident wants to settle an Indian trust with non-resident beneficiaries, it should be considered as Indian resident giving a gift to a non-resident. FEMA rules will apply accordingly. Even if it is considered that trust is a person, it will have non-resident interest. FEMA rules will apply accordingly.

4.3.2 If the non-resident wants to transfer assets in an Indian specific trust where he himself or some non-residents are beneficiaries, prima facie it appears that this is permitted transaction. However the FDI policy states that non-resident cannot invest in a trust (except VCF). Practically such a trust will be considered as an entity with a non-resident share. It is not permitted without FIPB approval.

This is where there is confusion between trust being considered as a person and trust being considered as a contract.

A better policy will be to obtain an approval from RBI for any **Indian trust where there is a non-resident interest**.

4.3.3 If the trust is discretionary trust with Indian assets, and the trustee is a non-resident, it can be considered as if the non-resident is the owner. One should consider FEMA provisions accordingly. For example, if the trust has immovable property as its asset and the trustee is a non-resident, it would be considered as if a non-resident owns property. That is not permitted. Even if beneficiaries are residents or NRIs, it would not be permitted.

Even for a specific trust, if a trustee is a non-resident, it will better to obtain RBI approval. If primarily the trust is an Indian trust with Indian trustees; and a non-resident is appointed as one of the trustees, it should be alright. (See Para 3.8 also.)

4.3.4 In case of **foreign trusts**, if an Indian resident has any interest, it will be considered as his property and accordingly, FEMA will apply. Under section 8, he has to bring the assets back in India.

4.3.5 A foreign trust will not be able to invest in India as it is considered as **unincorporated entity** and is ineligible to invest.

4.3.6 Finally, consider the effect of a transaction. (See para 2.8 on guiding principle.)

Let us consider some issues of an Indian trust and foreign trust.

5. Transactions relating to trust where there can be FEMA implications:

Mathematically, if we consider four factors – i) Place of trust (India or foreign), ii) residential status of owner (resident or non-resident), iii) location of assets (in India or outside India), and iv) residential status of beneficiaries (resident of non-resident) – it gives 16 permutations!

We can add further factors like discretionary / specific trust, intention of owner and beneficiary to remain in India or become NRIs, etc. There can be umpteen number of situations. This just gives an idea of the complexities.

In the paragraphs below (5.1 and 5.2), I have covered most common and practical situations. These situations are where Indian assets are to be transferred to an Indian trust and foreign assets are to be transferred to a foreign trust.

The remaining situations are those which involve settling Indian assets in a foreign trust and foreign assets in an Indian trust. These remaining situations out of the 16 permutations, have been covered in a table in Annexure B at the end of this article.

In this article, it will be useful to consider following two illustrations so that practical aspects can be better understood.

Illustration A:

Mr. IR is an Indian resident under FEMA.

He has assets in India - shares, immovable properties, mutual funds, bank accounts, etc.

He also has assets abroad – immovable properties, mutual funds and bank accounts, shares.

He may migrate abroad in future.

His children are in India and abroad.

Illustration B:

Mr. NR is a non-resident of India under FEMA. He is of Indian origin (NRI).

He has assets abroad – shares, portfolio investment, immovable properties, bank accounts, etc.

His Indian assets are - shares, bank deposits, mutual funds, etc.

He may return to India in future.

He has children in India and abroad.

Issues which Mr. IR and Mr. NR may consider:

i) They would like to transfer the assets to their children. They would like to keep a discretion to give funds as per their requirement and not equally.

ii) They would like to maintain flexibility of location of assets. If assets are abroad, they should be able to keep it abroad. If these are in India, they would like to take it out to the extent permitted.

iii) Other people / relatives should not be able to challenge the bequests. In case of a trust, if the assets have been transferred and are lying in the trust for a few years, the chances of it being challenged are less compared to a Will. A discretionary trust gives maximum flexibility.

They have thought of making trusts in India for Indian assets, and trusts abroad for the assets outside India.

A specific trust and discretionary trust can have different implications.

In this situation, what can be the FEMA issues?

[As may be relevant, M/s. IR and NR are referred to in this article as settlor, or donor, or owner of assets, or the persons who want to transfer their assets to the next generation.

It may noted that these are simplified facts. There can umpteen permutations and combinations. Several personal issues have to be considered. For example, the company could be in India but has assets located abroad and vice-versa; children in India may want to migrate abroad and vice-versa. One has to see complete picture and then decide.]

5.1 **Indian resident settlor – Mr. IR:**

5.1.1 Mr. IR proposes to settle **Indian assets in an Indian trust** where beneficiaries are residents and non-residents.

i) **Resident beneficiary:**

As long as **beneficiaries are Indian residents**, FEMA provisions do not apply. It is a transfer of assets from one Indian resident to another Indian resident.

ii) **Non-resident beneficiary:**

If an Indian resident settles Indian assets where **non-residents are beneficiaries**, it is like a gift in favour of a non-resident. Upto a certain limit (US$ 75,000), an Indian resident can make a gift to a non-resident. The gift

however has to be in cash and not in kind. Settlement of property in a trust would not be in line with FEMA. (See para 3.3)

Under the LRS, gift can be given in rupees by transfer to the NRO account of the NRI relative. If a gift is given to a trust, it may not be a transfer to a relative. Can one consider that if the beneficiary in the trust is a NRI relative, the effect is that a gift is given to a relative; and hence it is permitted! It is doubtful. The funds have to be transferred to the NRO account of the relative.

Any interest sought to be created by an Indian resident in favour of a non-resident requires an approval from RBI. (See para 3.2 and 3.7.) There are no guidelines. However considering the requirement of estate planning, RBI may consider the application.

If however a **trust comes into existence through a Will** of an Indian resident, in that situation, a non-resident can become a beneficiary in a trust. In such a situation, an approval is not required from RBI.

iii) It will not make any difference whether the trust is **specific or discretionary**. The issues remain the same. In some specific situation, there may be some issues. For example, Mr. IR wants to make discretionary trust, but wants to make his NRI brother as a trustee. Will a transfer of assets be considered as a transfer from resident to non-resident? It will be better to obtain an approval from RBI. (See para 4.2 also.)

iv) One has to consider the implications of distribution of funds from the trust. If a non-resident receives any **distribution from a trust**, the funds can be deposited in an NRO account of the non-resident. Subsequently he can deal with the funds as may be permitted. This is subject to the condition that non-resident has become a beneficiary as permitted by RBI. (See clause (i) and (ii) above.)

5.1.2 Mr. IR proposes to settle **foreign assets in a foreign trust** where beneficiaries are Indian residents and non-residents.

This situation is a bit complicated. Let us consider this situation first from the **angle of Indian resident settlor** (Mr. IR). It would depend in the manner in which he has acquired assets.

i) **Indian settlor:**

a) **Assets acquired by Mr. IR under Liberalised Remittance Scheme (LRS):**

Indian residents can acquire almost any foreign assets under the LRS. There are some restrictions. If the IR has acquired assets which are not permitted under LRS, settlement of those funds will have difficulties. However I will not get into more details on this situation.

Funds can be directly sent from India into the foreign trust.

Assets acquired under LRS can be dealt with in any manner. In other words, the assets can be settled in the trust. The trust can be specific or discretionary.

If Mr. IR has invested in shares under FEMA Notification no. 120 (Regulation 20A), he will not be able to transfer those share in a trust.

Where the trust is discretionary, it may be considered as gift for section 56 of Income-tax Act. Even if the trust is specific, and any non-resident beneficiary is not a relative, there could be a tax exposure.

b) **Assets inherited by Mr. IR from a Returning Indian:**

Assets inherited from a Returning Indian can be dealt with in the same manner as could be dealt with by a returning Indian. i.e. It can be settled in a trust. [Section 6(4)].

c) **Assets inherited by Mr. IR from a non-resident:**

There could be property inherited from a non-resident. That cannot be kept outside India. It leads to an absurd situation where assets inherited from an Indian resident who had acquired assets when he was a non-resident, can be kept abroad and dealt with in any manner. However assets inherited from a non-resident, cannot be kept outside India. Hence their bequeathing them can have difficulties.

ii) Non-resident beneficiary:

As a non-resident, prima facie FEMA does not apply to such a person. He can become a beneficiary if Mr. IR can transfer assets to the foreign trust.

There is no problem in receiving the funds on distribution.

iii) **Resident beneficiary:**

This situation is tricky. If the trust is **discretionary**, on settlement there is no impact on the resident beneficiary. He does not have a right in the trust funds. Hence he is not required to do anything.

If the trust is **specific**, then there are issues. In a specific trust, a beneficiary has a clear beneficial right. A resident who receives any asset or income, is required to bring in the funds within the specified time.

Can an Indian beneficiary be required to bring in the funds in which he has a beneficial interest? Probably yes. It would depend on the trust deed. For example, if as per the trust deed the beneficiary can withdraw the funds only after a certain age, then even though he may be entitled to the funds, he cannot bring the same in India. However if he has a right to withdraw the funds, he will have to bring in the funds in India.

If the trust law is on the lines of Indian law, an adult beneficiary can demand that he be paid his share of funds. In such a situation, he will have to bring in the funds.

There could be practical difficulties. For example, if the asset in the trust is a share in immovable property, it may be difficult to sell and bring the funds.

Such a person should ideally take approval from RBI to hold on to such right outside India.

Let us compare this situation against inheritance.

Inheritance:

An Indian resident who receives an inheritance from a returning Indian, can keep the assets outside India. He need not bring the funds back to India. He can also deal with the assets the way he wants. He can sell the same, reinvest, etc.

If he receives an inheritance from a non-resident, he is required to bring back the funds into India.

In case of assets of Returning Indians, one needs to balance the issue of flexibility of a trust, vis-a-vis keeping the assets abroad by the resident beneficiary.

5.2 **Non-resident settlor – Mr. NR:**

A non-resident wanting to settle a trust can have implications under FEMA in following situations:

5.2.1 Mr. NR proposes to settle **Indian assets in an Indian trust** where some beneficiaries are residents and some are non-residents.

i) **Resident beneficiary:**

If the **beneficiaries are Indian residents**, for all practical purposes, the residents have beneficial interest in the assets of the trust. It is like a gift from a non-resident to an Indian resident. The trustees may be residents or non-residents. Trustees are like administrators. However beneficial ownership is of Indian residents. There should be no difficulty under FEMA.

For assets like shares and immovable property, there is a specific permission for residents to accept gifts from a non-residents. However for some assets like debentures or loans, there is no specific approval. Despite this, as long as an Indian resident is receiving a gift, there should be no difficulty under FEMA.

It will not make any difference whether the trust is **specific or discretionary**.

However if the trustee is a non-resident, legally he is the owner. FEMA provisions may apply accordingly. The problem is more in case of discretionary trust. The beneficiaries do not have clear right in the trust assets. (See paras 3.8 and 4.) It may be best to avoid such a situation.

ii) **Non-resident beneficiary:**

If the **beneficiaries are non-residents**, the situation is similar to a situation of transfer from one non-resident to another non-resident.

A transfer from a non-resident to another non-resident is normally a permitted transaction. However there could be some transactions which are not under automatic route. In such a case a prior approval from RBI will be required.

If the asset is an immovable property in India, the beneficiary should be a person eligible for holding the property. An NRI can hold immovable property. However a non-resident (who is not of Indian origin) cannot hold immovable property. If the property is an agricultural property, even an NRI cannot hold the same.

If the assets are shares of an Indian company, transfer of shares from an NRI to a non-resident (non-NRI), requires prior RBI approval.

Further a trust with non-resident interest is not permitted. Hence it will be better to obtain RBI approval.

Thus one cannot generalise that if the settlor and the beneficiary are non-residents, the trust can be made. One needs to look at complete facts.

5.2.2 Mr. NR proposes to settle **foreign assets in a foreign trust** where beneficiaries are residents and non-residents.

i) **Non-resident beneficiary:**

If the **beneficiaries are non-residents**, then FEMA does not come into picture. A non-resident wanting to give foreign assets to a non-resident can do so freely. (One will of course have to check the other country's laws.)

ii) **Resident beneficiary:**

If the **beneficiary is an Indian resident**, then there are some issues. In essence, a non-resident is giving a gift to an Indian resident by giving him a right in the benefits of a trust. All issues discussed in paragraph 5.1.2 will apply here also.

The Indian resident who receives a gift will have to bring in funds into India.

There are however some exceptions. If an Indian resident receives gift of foreign shares, he can retain the same. There is no need for him to sell the shares and bring back the funds. [Regulation 22(1)(i) of FEMA notification no. 120.]

If he receives gift of foreign shares from an Indian resident, he is required to bring the same back to India.

If foreign shares are received as inheritance (whether from an Indian resident or a non-resident), the same can be retained. [Regulation 22(1)(iii).]

The situation is different in case of discretionary trusts. As long as there is no distribution, the resident cannot be asked to bring in the funds. If the trustee distributes any funds, the same will have to be brought into India.

Part C – Some practical steps:

As seen in Parts A and B, there are several legal issues. There are several permutations. It becomes a difficult exercise to capture all issues. And at the end, one may still be confused as to what exactly is permitted and what is not. Therefore in this part, some practical steps which one may consider are discussed.

6. **Practical steps:**

6.1 **For Indian resident:**

i) For Indian residents, settling Indian assets in an Indian trust where non-resident are beneficiaries, requires an approval from RBI. This is because creating an interest in assets in favour of non-residents is like a gift. It does not fall under automatic route. If assets are bequeathed, a non-resident can inherit assets without any difficulty.

It will be prudent to apply to RBI and take an approval for settling assets in a trust where non-resident are beneficiaries.

ii) If he has non-resident heirs, it may be better to bequeath it through a Will.

Alternatively, a trust can be created so that it comes into existence through a Will. Such a trust with non-resident beneficiaries does not require an approval from RBI.

iii) Appointing non-resident trustees on Indian specific trusts should be permitted under FEMA as long as the assets are in India and beneficiaries are Indian residents. However in case of discretionary trusts, it may lead to a situation where the legal owner of assets becomes a non-resident. It may be better to take an approval from RBI. (See para 3.8)

iv) Foreign assets can be settled in a foreign trust. However where Indian residents are beneficiaries, they may have to bring the assets back to India even during the lifetime of a trust. A discretionary trust can help keeping the assets abroad till dissolution of the trust. Distribution from a discretionary trust has risks of section 56 of Income-tax Act. If the beneficiaries are likely to migrate outside India, discretionary trust may be better.

6.2 **For non-resident:**

i) A non-resident wanting to transfer Indian assets to Indian trust has issues similar to an Indian settlor. If the trust has resident beneficiaries, there is no difficulty.

If there are non-resident beneficiaries, it amounts to an Indian trust with non-resident interest. An approval from RBI should be obtained.

ii) For foreign assets, a foreign trust can be settled without any approval. If there are resident beneficiaries, they may have to bring the assets into India. If the trust has sufficient restrictions for withdrawal of funds, the resident's shares of assets can be continued outside India till the trust is dissolved or assets are distributed. Alternatively, the trust can be discretionary.

If the non-resident is planning to return to India, he may consider a Will so that the resident beneficiary can keep the assets abroad on inheritance.

7. **Summary:**

Trust issues are complex. It will be best if Government or RBI can clarify situation at the earliest.

Annexure A

FIPB review 2009, pages 27 and 28

3.1.2 Ownership and Control of a Trust

14. DIPP had the occasion of examining the issue of ownership and control for a trust in the context of Press Note 2 of 2009 with respect to the proposal of **M/s India Rizing Fund**. As per the proposal, M/s India Rizing Fund is a trust formed under the Indian Trusts Act and is also a Domestic Venture Capital Fund registered with SEBI. The fund has obtained FIPB approval for receiving foreign contribution in the form of units for launching a Defence SME Scheme. This approval was subject to certain conditions applicable to the Defence Sector, as incorporated in para 7 of the approval letter. The said para stipulated that all the investments to be made by the trust are subject to adherence to the sectoral caps of the FDI Policy in Defence Sector.

15. M/s India Rizing Fund requested for deletion of the para 7 on the following grounds:

    (i) Domestic Venture Capital Funds and other mutual funds in India are structured as trusts and so is the Fund. The Fund anticipates foreign as well as domestic investors to subscribe to the units issued by the fund from time to time. These units are rupee denominated. Since, the Fund is issuing "units" and not "equity shares" to its foreign and domestic investors, such units cannot partake the functionalities of the equity shares and therefore neither foreign investors nor domestic investors will have ownership or any other rights in the Fund for example. by investing in a unit of SBI Mutual Fund, the unit-holder does not have any rights, either ownership or control, on the operations of the mutual fund or in the companies where downstream investments are made by the mutual fund.

    (ii) The fund has also furnished undertaking to the Indian Government that it shall maintain necessary registration as a Domestic Venture Capital Fund under the SEBI (Venture Capital Funds) Regulation 1996, and comply with all applicable provisions of the SEBI (Venture Capital Funds) Regulations 1996.

16. The DIPP responded as follows:

    i. It is seen that the control of trust can be at any of the 4 levels viz. the Settler, Board of Trustees, Asset Management Company (AMC) and the unit holders. Trusts are essentially largely unregulated bodies and the trust deed and inter-se agreements between the unit holder and other entities decide the control. In this proposal Rs. 550 Crore is to be sourced from international investors, through issue of units, but the Settler of the Trust, the Board of Trustees and the AMC (which is controlled by resident India citizen settler) are all Indian owned and controlled. Since the unit holders' investment is equity-like, with a

desire for high returns, even though the other three entities are fully Indian owned and controlled, the unit holders exercise tremendous influence over all fiduciary decision making.

ii. The regulatory control of SEBI over the trust structure is minimal and there are no norms for diversified unit holding, limits on individual unit holding etc. As such, trusts remain unregulated entities for all practical purposes. Thus, until and unless proper regulations are made to exercise control over such entities, it will not be appropriate to permit them to invest in sectors where there are FDI caps and conditionalities. Alternatively the entire downstream investment should be taken as indirect foreign investment as per Press Note 2 of 2009.

iii. In view of the above, it is extremely difficult to clearly define the ownership and control of the trust in the way it is defined for a company and, therefore, the analogy for trusts, on the pattern of Press Notes 2, 3 and 4 of 2009, is extremely difficult to lay out.

17. DIPP, therefore, recommended that the conditions incorporated in para 7 of the approval letter should continue and not be deleted.

Annexure B

Trusts – Various permutations
(Refer para 5. It excludes situations covered in paras 5.1 and 5.2)

Sr.	Location of assets	Location of Trust	Residential status of beneficiary	Comments
1	**Indian resident settlor / donor:**			
1.1	In India	Foreign Trust	Non-Resident	Funds can be transferred under LRS to a foreign trust. That is discussed in para 5.1.1. Other assets cannot be transferred to a foreign trust.
1.2	In India	Foreign Trust	Resident	Funds can be transferred under LRS. However no purpose will be served. Only if it is a discretionary trust, with a foreign trustee, legally there can be saving of taxes on incomes. However there is a risk of section 56 of Income-tax Act. Theoretically, the assets can be settled in the foreign trust as residents are beneficiaries. So in effect there is a transfer of assets from one resident to another resident. However it will be nearly impossible to administer such a trust. How will one register the assets in the foreign trust's name? Again no purpose will be served.
1.3	Outside India	Indian Trust	Resident	The trustee or the beneficiary may be asked to bring back the assets to India. People would not like to undertake such a transaction.
1.4	Outside India	Indian Trust	Non-Resident	Practically no one would like to undertake such a transaction. An Indian trust with non-resident beneficiary will require RBI approval. It will not be approved. Hence practically it is not workable.

Sr.	Location of assets	Location of Trust	Residential status of beneficiaries	Comments
2	**Non-resident settlor / donor:**			
2.1	Outside India	Indian Trust	Resident	This would be all right. However the assets will have to be brought back to India. Further, people would not like to undertake such a transaction.
2.2	Outside India	Indian Trust	Non-Resident	Practically no one would like to undertake such a transaction. An Indian trust with non-resident beneficiary will require RBI approval. It will not be approved. Even if in substance, it is a transfer of foreign asset from one non-resident to another, there will be difficulties. Hence practically it is not workable.
2.3	In India	Foreign Trust	Resident	This will be an academic exercise. In substance assets remain with residents. However it will be nearly impossible to administer such a trust. If NRIs have funds in India, they can repatriate upto US$ 1 mn. in a foreign trust. However assets cannot be transferred.
2.4	In India	Foreign Trust	Non-Resident	RBI will not permit a transfer of assets to a non-resident. If trust comes into effect through a Will, it may be workable. However there will be several practical difficulties.