

Preface

1. ***Author*** has felt when he ***qualified*** as Chartered Accountant (CA) in Year 1985 that ***legal provisions' interpretations*** are ***big challenge*** for legal professionals, govts' officials and public at large ***in India and outside India***.
 2. ***Author*** has ***realized*** that ***something*** should ***be developed to resolve this challenge*** in India and outside India.
 3. ***Author*** has ***started compiling*** Frequently Asked Questions (FAQs) on many subjects where his 100% ***answers are precisely based on Yes or No i.e. white or black nothing is grey***
 4. ***Author*** has ***compiled approximately 150 +(plus) research papers / books with 25 thousand + (plus) pages*** on many prevailing subjects / acts in India and outside India.
 5. ***Author's 1st paper book*** is now ***being published*** under head FAQs on Enforcement Directorate (ED) ***where 571 FAQs are replied*** based on Yes or No i.e. white or black nothing is grey
 6. This ***book*** is also ***containing***
 - (i) Foreign Exchange Management Act (***FEMA***) 1999 and rules / regulations
 - (ii) Prevention of Money Laundering Act (***PMLA***) 2002 and rules / regulations
 - (iii) Fugitive Economic Offenders Act (***FEOA***) 2018 and rules / regulations
 7. This ***book*** is ***published with Sai Kripa and dedicated*** to my father (late) ***Mr. M.R. Agarwal***, Mother ***Mrs. R.D. Agarwal***, wife ***Mrs. Snigdha Agarwal***, daughter ***Ms. Soumya Agarwal***, daughter ***Ms. Sanya Agarwal*** and dedicated team headed by ***Rajat Kumar***
- ***I trust that you will be enriched by reading this book***

With best wishes,
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Author's Profile

Mr. Satish Agarwal (FCA) is heading M/s Satish S Agarwal & Co. Chartered Accountants since 1985 with a team of dynamic young professionals serving clients from various business sectors including public listed companies and government undertakings. Firm was also registered with PCAOB (USA) for undertaking audits and other work of US GAAP.

He is regularly advising on several matters to Institute of Chartered Accountant of India (ICAI) and also to Ministry of Commerce (MoC) for Foreign Trade Agreements (FTAs) and World Trade Organization (WTO) for securing India's best interests.

He is continuously advising on Foreign Investments (FIs) in India and also on Overseas Direct Investments (ODIs) outside India.

He is known for his expertise in incorporating companies in most of countries across the world.

He has written around 150 +(plus) Research papers / books containing 25 thousand +(plus) pages available "freely" on certain portals like:

https://taxguru.in/author/satishagarwal307_1957

Or

www.femainindia.com

Few out of abovementioned Research papers / books are as under:

- 1. Book on Enforcement Directorate (ED) in India- (Book with 617 pages)***
- 2. Director of Revenue Intelligence (DRI) in India***
- 3. Central Bureau of Investigation (CBI) in India***
- 4. National Investigation Agency (NIA) in India***
- 5. Serious Fraud Investigation Office (SFIO) in India***
- 6. Financial Intelligence Unit (FIU-IND) in India***
- 7. Central Vigilance Commission (CVC) in India***
- 8. Narcotics Control Bureau (NCB) in India***
- 9. Research & Analysis Wing (R&AW) in India***
- 10. Economic Offence Wing (EOW) in India***
- 11. Intelligence Bureau (IB) in India***
- 12. Director General of Income Tax Criminal Investigation (DGITCI) in India***
- 13. National Company Law Tribunal (NCLT) in India***
- 14. Security Exchange Board of India (SEBI) in India***
- 15. Prevention of Corruption (PC) Act, 1988 in India***

16. *Foreign Assets Investigation Unit (FAIU) in India*
17. *Book on International Financial Services Center (IFSC) in India (Book with 290 pages)*
18. *Replacement of Indian Penal Code (IPC) Criminal Procedure (CP) & Evidence Act (EA) in India*
19. *Undisclosed Foreign Income & Asset (UFIA)-Black Money Act, 2015*
20. *Statutory provisions for General Anti Avoidance Rule (GAAR) in India*
21. *Reserve Bank of India (RBI) Act, 1934*
22. *Foreign Exchange Management Act (FEMA) 1999 in India*
23. *Benami Transactions (Prohibition) Amendment Act, 2016 in India*
24. *Advance Pricing Agreements (APAs) in India*
25. *Annual Performance Report (APR) for Investments outside India*
26. *Foreign Trade Agreements (FTAs) executed by India*
27. *Statutory Obligations for Companies Operating in India*
28. *Significant Beneficial Owners (SBO) in India*
29. *Significant Economic Presence (SEP) in India*
30. *Place of Effective Management (POEM) in India*
31. *Liberalized Remittance Scheme (LRS) for residents of India*
32. *Foreign Liability and Asset (FLA) return in India*
33. *FATCA agreement with USA*
34. *Double Taxation Avoidance Agreement (DTAA) with USA*
35. *Foreign Tax Credit (FTC) in India*
36. *Corporate Frauds (CFs) in India*
37. *Export of Goods and Services under FEMA, 1999 in India*
38. *Imports of Goods and Services under FEMA, 1999 in India*
39. *External Commercial Borrowings (ECBs) in India*
40. *Overseas Direct Investments (ODIs) under FEMA, 1999 in India*
41. *Acquisition of Immovable Properties by Non-residents under FEMA, 1999 in India*
42. *Compounding of Contraventions under FEMA, 1999 in India*
43. *Foreign Branch Office (BO) + Liaison Office (LO) + Project Office (PO) under FEMA, 1999 in India*
44. *Annual Information Statement (AIS) in India*
45. *Investments by Non-Residents (NRIs) in India*
46. *Guidance for Doing Business in United States of America (USA)*
47. *Corporate Tax (CT) Law in UAE*
48. *Acquisition & Transfer for Immovable Properties by Non-Residents (NRs) in India*
49. *Foreign Company's Registration in India*
50. *Auditor Checks and Reporting for Indian Companies in India*
51. *Companies Auditor Report Order (CARO) 2020 in India*
52. *Tax Audit Report (TAR) + Accounting Standard (ASs) in India*
53. *World Trade Organisation (WTO) & Benefits for India*
54. *Deposits by Corporate in India*
55. *Expatriates + Foreign Citizens in India*
56. *Book on Foreign Investments (FIs) by Non-Residents of India (Non-RoI) (Book with 346 pages)*

External Commercial Borrowings (ECBs) in India

1. Introduction on the ECBs

- (i) ECBs are permitted as 'commercial' loans for 'commercial' purposes as to be received by the eligible Indian borrowers from the recognized non-resident lenders in accordance to updated guidelines as issued by the RBI from time-to-time.
- (ii) ECBs are permitted in 'any' convertible foreign currency and also in Indian Rupee(both)
- (iii) **ECBs are permitted in the followings modes as :-**
 - (a) Bank loans
 - (b) Floating or fixed rates • Notes • Bonds • Non-Convertible Debentures (NCDs).
 - (c) Trade Credits (TCs) for the minimum period of 3 years
 - (d) Foreign Currency Convertible bonds (FCCBs)
 - (e) Foreign Currency Exchangeable bonds (FCEBs)
 - (f) Long Term Financial Lease
- (iv) ECBs are permitted under the automatic and approval route (both)
- (v) ECBs are also permitted from the foreign equity holder in Indian company where
 - (a) 'Directly' holding minimum 25% equity capital in Indian borrowing company
 - (b) 'Indirectly' holding minimum 51% equity capital in Indian borrowing company
- (vi) **ECBs are 'not' permitted in real estate activities like :**
 - (a) Buying, selling & renting of commercial and residential properties
 - (b) Working as agent for buying, selling & renting
- (vii) However ECBs are permitted in construction /development of industrial parks, townships and SEZ
- (viii) **Limit and Leverage for the ECBs under Automatic route**
 - (a) Maximum ECBs are permitted up to USD 750 million 'per' financial years 'per' eligible borrowers under 'automatic' route.
 - (b) Maximum ECBs liability - equity share ratio is permitted up to 7:1 under 'automatic' route. Ratio is 'not' required where existing plus proposed (both) ECBs are 'not' exceeding USD 5 million
 - (c) However exceeding beyond these maximum limits under the Para (a) and (b) are permitted under 'approval' route

2. Eligible Borrowers:

- (i) Definition of the eligible Indian borrowers is to include 'all' type of entities where FDIs are permitted in India under the automatic and approval route (both) for borrowing the ECBs in foreign currency denominated and INR denominated (both).
- (ii) And also to includes the followings entities 'additionally' for foreign currency denominated and INR denominated (both).

- (a) Port Trusts
- (b) Units in SEZ
- (c) SIDBI
- (d) EXIM Bank
- (e) 'Registered' entities those are engaged in micro-finance activities like
 - (ea) Registered as not for profit companies
 - (eb) Registered as societies, trusts, cooperatives and non-government organizations (NGOs).

3. **Recognized Lenders**

- (i) Recognized Lenders should be the residents of Financial Action Task Force (FATF) complaint member's countries/territories or resident of International Organization of Securities Commissions (IOSCO) compliant member's countries/territories only.
- (ii) Multilateral and Regional Financial Institutions where India is member country
- (iii) Individuals where they are foreign equity holders in Indian borrowing company
- (iv) Foreign branch/subsidiary 'Outside' India of an Indian bank

4. **Minimum Average Maturity Period (MAMP)**

- (i) MAMP is 'specifically' permitted for minimum period of **1** year where ECBs are to be received by the manufacturing companies up to USD 50 million 'per' financial year only.
- (ii) (a) MAMP is 'generally' permitted for minimum period of **3** years where ECBs are to be received for 'non' specific purpose by Indian borrowing companies.
(b) Hence MAMP is permitted for minimum period of 1, 5, 7 or 10 years for 'specific' purpose by Indian borrowing companies as mentioned under the Para 4(i), (iii) to (v)
- (iii) MAMP is 'specifically' permitted for minimum period of **5** years where ECBs are to be received from foreign equity holder of Indian borrowing company and also are to be utilized for 'specific' purposes like :
 - (a) Working capital
 - (b) General Corporate
 - (c) Repayment of rupee loans
- (iv) MAMP is 'specifically' permitted for minimum period of **7** years where ECBs are to be received for repayment of INR loan as availed for capital expenditures.
- (v) MAMP is 'specifically' permitted for minimum period of **10** years where ECBs are to be received for
 - (a) Working capital
 - (b) General corporate purposes
 - (c) Repayment of INR loan for 'non' capital expenditures purpose
- (vi) ECBs are 'not' permitted from foreign branches or subsidiaries of the Indian banks where MAMP is **5, 7 or 10** years

5. Maximum All-in-cost / 'other' cost , Hedging Provisions and Legal Compliances

(i) Maximum All-in-cost / 'other' cost for the ECBs

- (a) Maximum All-in-cost is permitted @ LIBOR (Bench mark rate) Plus 450 bps (4.5%) per annum
- (b) Maximum prepayment charge or penal interest for default or breach of contract is permitted @2% per annum over and above maximum all-in-cost as abovementioned

(ii) Hedging Provisions for the Borrowers

- (a) Minimum mandatory hedging is required @70% of principal plus interest (both) of the ECBs where MAMP is less than 5 years.
- (b) Minimum hedging tenor is required for 1 year thereafter to be rollover till expiry of the ECBs.

(iii) Legal Compliances for the Borrowers

- (a) Borrowers are required to compliance the RBI's guidelines as applicable for the ECBs in India otherwise liable for the penalties.
- (b) Borrowers are required to submit an 'one time' report regarding signing of loan agreement with the lender for obtaining Loan Registration Number (LRN) within 7 days of signing it to the RBI in form 'ECB'.
- (c) Borrowers are required to submit 'monthly' return regarding actual ECBs transactions in form 'ECB-2' to the AD Category- I bank within 7 days from closed of the month.

6. Not Permitted (Negative End-uses) ECBs for the Investments in :-

- (a) Real estate activities
- (b) Capital market
- (c) Equity shares of the 'other' companies
- (d) Working capital purpose 'except' from the
 - (da) Foreign equity holders of the Indian borrowing company
 - (db) or where MAMP is 10 years
- (e) General corporate purposes 'except' from the
 - (ea) Foreign equity holders of the Indian borrowing company
 - (eb) or where MAMP is 10 years
- (f) Repayment of Rupee loans 'except' from the
 - (fa) Foreign equity holders of the Indian borrowing company
 - (fb) or where MAMP is 7 years and loan was availed for capital expenditures
 - (fc) or where MAMP is 10 years and loan was availed for 'non' capital expenditures
- (g) On-lending activities 'except' where ECBs are to be received by the NBFCs

7. Delegated Powers by the RBI to AD Category-I Bank for the ECBs

(i) Change in the AD Category-I Bank

- Now AD Category-I bank is permitted to change the existing AD Category-I Bank after obtaining a NOC from the existing AD Category-I bank

(ii) Cancellation of the LRN

- Ad Category-I Bank is permitted to approach to the DSIM-RBI for cancellation of the LRN where ECBs are fully paid and also 'all' monthly ECB-2 returns have already been submitted to the DSIM-RBI.

(iii) Refinancing of the Existing ECBs

- (a) AD Category-I bank is permitted to allow for refinancing against the existing ECBs where new ECBs is having 'all-in-cost' lower than the existing ECBs and also existing borrower of ECBs is still eligible borrower at the time of fresh ECBs
- (b) AD Category-I bank is 'generally' permitted to allow for refinancing of the ECBs to the 'AAA rated corporates' and for Maharatna or Navratna public sector undertakings (PSUs) only

(iv) Conversion of the ECBs into Equity Shares

- (a) Ad Category-I bank is permitted to allow to convert the ECBs into equity shares where activity of borrowing entity is covered under the 'automatic' route for the FDIs or permitted under 'Govt. approval' route for the FDIs and also Govt approval has already been obtained for such conversion of the ECBs.
- (b) Conversion is permitted with the lender's consent and without any 'additional' cost and also conversion should not be contravened the 'sector cap' for the FDIs if any applicable.
- (c) 'Pricing' guidelines for the valuation of the equity shares are to be obeyed in conversion from ECBs to the equity shares.
- (d) Borrower of the ECBs is required to inform to the RBI for partial or full conversion into equity shares in form FC-GPR for the FDIs and also in form ECB-2 for the ECBs.
- (e) Applicable prudential guidelines for the ECBs are to be compliance by the borrower.
- (f) Borrower is required to inform to 'other' lenders also if any conversion from the ECBs to equity shares.
- (g) Prevailing 'exchange' rate of the foreign currency and 'fair' value of equity shares are to be worked out as on date of conversion from ECBs to the equity shares.

(v) Security for Raising of the ECBs

- AD Category-I bank is permitted to allow creation or cancellation of charge on the immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantee in favor of overseas lender or security trustee to secure the ECBs after satisfaction of the following conditions :-
 - (a) Underlying ECBs should be in accordance to the ECBs guidelines.
 - (b) NOC is 'already' obtained from the existing lender where refinancing of the ECBs is desired.

(c) Loan agreement should have security clause to create or cancel charge in favor of lender on the assets.

8. Late Submission Fee (LSF) for delay in the Reporting

• All ECBs borrowers are permitted to get regularize the followings delays by payment of the LSF.

- (a) Delay in reporting against drawdown of ECBs proceeds before obtaining Loan Registration Number (LRN)
- (b) Delay in filing of the Form ECB-2 as monthly returns
- (c) Penalty for delay in filing of the Form ECB-2/Form ECB is Rs. 50,000 and Rs. 1,00,000 'per' year where delay in filing is 'not' exceeding 3 years and exceeding 3 years respectively
- (d) 'Non' payment of LSF is treated as FEMA contravention and required compounding
- (e) Delay in filing of ECB and ECB-2 will 'separately' treated reporting contraventions and liable for LSF 'or' compounding

9. Guidelines for Lending and Borrowing Banks

• Lending and borrowing by Indian banks through their branches/subsidiaries 'outside' India are required to obey the prudential guidelines as issued by the Department of Banking Regulation of the Reserve Bank of India.

10. Special Eligible Borrower for the ECBs

(i) For Resolution Applicants under Corporate Insolvency Resolution Process (CIRP)

- (a) Now Resolution Applicants under CIRP are also permitted as 'eligible' borrowers to receive the ECBs from the 'recognized' lenders for resolution under CIRP for repayment of the domestic rupees loans, other liabilities or creditors etc.
- (b) These ECBs are permitted under 'approval' route only
- (c) These borrowers are 'not' permitted to receive ECBs from the branches or subsidiaries of Indian bank as located 'Outside' India

(ii) For Startups

- (a) An entity recognized as startup by the central Govt. is permitted to receive the ECBs.
- (b) MAMP is required for a minimum period of 3 years
- (c) Foreign branches/ subsidies 'outside' India of Indian banks are not permitted to give ECBs to the Startups
- (d) ECBs are permitted up to USD 3 million per financial year
- (e) ECBs are permitted 'without' any restriction on all-in-cost
- (f) ECBs are permitted 'without' any restriction on End-uses
- (g) ECBs are permitted 'without' any restriction on Securities as to be provided
- (h) ECBs are permitted 'without' any restriction on Conversion into equity shares

(iii) For Borrowers under Investigations/ Adjudication/Appeal under FEMA, 1999

- (a) ECBs are permitted 'without' any restriction on borrowings
- (b) However borrower is required to inform AD Category –I bank/RBI

(iv) **For Oil Marketing Companies (OMCs)**

- (a) MAMP is required for a minimum period of 3 years
- (b) ECBs are permitted for working capital purposes
- (c) ECBs are permitted under automatic route
- (d) ECBs are permitted 'without' hedging's

11. Conclusion on the ECBs

- (i) ECBs are permitted as 'commercial' loans for 'commercial' purposes as to be received by the 'eligible' Indian borrowers from the 'recognized' non-resident lenders.
- (ii) ECBs are permitted in 'any' convertible foreign currency and also in Indian Rupee(both)
- (iii) ECBs are permitted under the automatic and approval route (both)
- (iv) Maximum All-in-cost is permitted @ LIBOR (Bench mark rate) Plus 450 bps (4.5%) per annum
- (v) Minimum mandatory hedging is required @70% of principal plus interest (both) of the ECBs where MAMP is less than 5 years.
- (vi) Borrowers are required to compliance the RBI's guidelines as applicable for the ECBs in India otherwise liable for the penal provisions
- (vii) An entity recognized as startup by the central Govt. is permitted to raise the ECBs.

• **Disclaimer**

The entire contents of this document have been prepared on the basis of relevant provisions and as per the information as available at the time of the preparation. Although care has been taken to ensure the accuracy, completeness and reliability of the information provided, I assume no responsibility therefore. Users of this information are expected to refer to the relevant existing provisions of applicable Laws. The user of the information agrees that the information is not a professional advice and is subject to change without notice. I assume no responsibility for the consequences of use of such information. **In Any Event I Shall Not Be Liable For Any Direct, Indirect, Special or Incidental Damage Resulting From, Arising Out of or In Connection With the Use of the Information**