 DOI: https://doij.org/10.10000/IJLMH.1110162

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 3

2025

Comprehensive Exploration of the Legal Aspects surrounding Gift-Giving by Foreigners in India

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Abstract

Gratuitous transfers had played a significant role in the Indian societies since time immemorial. Varied legal systems of the world recognize the concept of gift as a mode of transfer. In all the legal systems of the world, gift is considered as a gratuitous transaction which does not require any legally enforceable obligations. Gift is not be confused with Barter system which prevailed in earlier societies, as it involved the exchange of goods and services in lieu with other goods and services, mainly at the time of monetary crisis. Under all these systems four basic elements are required for the valid disposition of gift, which are gratuitousness, subjective elements, inter vivos transfer and the gift object. Foreign gifts are generally seen as prestigious or valuable, reflecting the global connections of the recipient. Foreign gifts particularly in the form of cash or high value goods can impact local economies. They may lead to increased spending in certain sectors, such as luxury goods or real estate. Ensuring compliance with tax regulations is essential for proper functioning of the economy. Gifts can potentially contribute to the black money problem in India through misuse and regulatory loopholes. This paper is a humble attempt to analyze the legal, cultural and economic aspects of gift giving by foreigners in India; to understand the implications of foreign gifts on taxation and compliance; to access the social perceptions and practices surrounding foreign gifts in Indian society and to explore the regulatory framework governing gifts and its effectiveness.

I. Introduction and Historical Background

Our lives are beautiful gifts from God, and how we live them out is our prayer of indebtedness for such a gift. Just as we give gifts to those we love and they receive them and open them, God has given to mankind this gift of eternal life by creating human beings.[2] The thing given brings return in this life and in the other like water, wells and springs given away are insurance against thirst; the clothes, the gold, the sandals for protection against the burning

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[2] God Gave Greatest Gift To Mankind, <http://www.dailyworld.com/story/opinion/2016/12/22/god-gave-greatest-gift-mankind/95759878/> accessed 15/08/2024.

 [ISSN 2581-5369]

earth, land gives crops, rents and taxes, minerals and cattle and a gift made of all these things enriches both donor and recipient with the same produce.[3] Gift is not to be confused with Barter system which prevailed in early societies, as it involved the exchange of goods and services in lieu with other goods and services, mainly at the time of monetary crisis. As gift is given out of love and affection, it does not require any monetary favors in return. Institution of Gift is one of those processes that have undeniable role in the dynamics of an interpersonal relationship. Gifts can be seen materialistic objects or experiential benefits, as an expression of love or simply an obligation, or reciprocal exchange. Tradition of presenting Gift in India can be dated back to the Mahabharata epic which describes the following five motives of gift giving: duty, self-interest, fear, love and pity; that specifies when, to whom, by whom, and how the gifts should be offered.[4] Gift giving occupies a significant place in all types of interpersonal relationships and the role of gifts in fostering and maintaining these social connections is well established. It is seen that the process of Gift giving itself is influenced by the nature of relationship in which gift giving occurs. The concept of gift can also be studied from the perspectives of various disciplines like economics, sociology, anthropology and psychology. It is defined as the transfer of certain existing movable or immovable property made at one's own free will without any kind of monetary or pecuniary consideration, by one person, called the donor to another, called the donee and accepted by or on behalf of the donee. This voluntary nature of transfer of real or personal property made out of love and affection without any kind of return in lieu distinguishes the institution of gift from sale. A gift has aptly been described as a gratuity and an act of generosity and stress has been laid on the fact that if there is any consideration then transaction ceases to be gift.[5] The concept of Gift is not new to India, as it was prevalent in the form of Danadharma (religious gifts) in the preliterate societies. The institution of gift can be traced back to Vedic period and Jataka stories where offerings were served in the form ghee, water, grains etc without any form of consideration. Basically a gift is the transfer of something without consideration. Despite the concept of expectation of reciprocity, a gift is known to be free. Any person who is the legal owner of a property can alone make a gift of his property. Thus gift is diametrically opposed to the presence of any consideration or compensation. There are different notions relating to institution of gift. It is structured by customary norms, before becoming a legal institution. From the point of view of the *quid pro quo* (without consideration) that defines it, to giving

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[3] Marcel Mauss, *The Gift-Forms and Functions of Exchange in Archiac* Socities (W. W Norton and Company Inc, Newyork).

[4] Richard Hyland, *Gifts – A Study in Comparitive Law* (Oxford University Press, New York, 2009).

[5] *Sonia Bhatia v State Of U.P.*,AIR1981 SC 1274(1279);see also *Fateh Ali PLR and others v M.A Aleem and other.* 2003 (6) Ald611; *Gurdial Singh and another v. State of Punjab and others* 2009 P&H HC

something away for nothing, is an inexplicable event. Then there is an everyday notion of gift. In daily usage, various transactions are spoken of as gifts. These include the presents given to close relatives and friends on special occasions like marriage,birthdays and anniversaries; transfers within the family to reduce taxes or as an advancement of inheritance; surprises between spouses; awards made to employees upon retirement; incentives given to productive members of sales force and good customers and donations to charity. And finally comes the legal notion of gift. The legal conceptions of the gift though vary from one legal system to another. It chiefly focuses on those gratuitous transactions subject to the private law that from the point of view of exchange and the marketplace, provide grounds for concern. These generally include larger gifts made between family members or given to charitable institutions. Different approaches to the institution of gift have been discussed which basically revolves around societal and individualistic aspects. As Marcel Mauss has rightly quoted in his book Gift: A Study in Comparative Law "*gift giving is about the other; it involves self-sacrifice; it is dedicated to pursuit of altruistic goals. Yet it is also about self – promotion, fame, and advancement. Gifts help create and maintain friendships and love affairs, gifts are cherished symbols of affection, but they may also produce ruthless competition and provide a means to humiliate the opponent*."[6] In gift giving, the relationship between individual act and social practice becomes inexplicably complex. So to explore this riddle of the gift,it is necessary to investigate how individual agency operates within societal norms.

II. NATURE OF GIFT

Various jurists like Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Kant, Marx in their writings have extensively discussed the concept of 'Property'. Most of them consider property as an outcome of possession. Further the concept of possession leads to transfer. Property, in its widest sense, includes a person's legal right of whatever description. In the narrower sense property includes only his proprietary rights as opposed to his personal rights. One view holds that it includes nothing more than the corporeal rights that is to say the right of ownership in a material object.[7] In India transfer of property is dealt by the Transfer of Property Act, 1882. Various modes of transfer are mentioned in the Act which includes transfer by sale, mortgage, lease, lien, gift. Out of all the modes, Gift is considered to be unique in nature. The uniqueness attributes its characteristics, its gratuitous nature, love and affection. Depending upon the nature they are classified as *lifetime gifts* where the intention to deliver to the donee is during the lifetime of donor, *death bed gifts* or future gifts where delivery is expected after

[6] *Richard* (n3) 9.
[7] *Maharashtra State of Coop Bank Ltd v Provident Fund Commissioner*,(2009) 10 SCC 137.

the death of the donor, *onerous gifts* which imposes an obligation upon the donee to accept the burden as well and lastly the gifts *of religious* nature. Gratuitous transfers had played a very important role in all societies and it finds a prominent place in every legal system of the world. The law relating to Gift governs the enforceability and legal consequences of certain gratuitous transactions. The institution of gift and western law has been in conflict from the very beginning. Since the first legislation, the *lex Cincia* of the Roman Republic, jurists have seen in gift giving a danger to family and society.[8] Etymologically the word gift has been derived from the word 'giefu' which is related to the Old Norse, something given, talent; akin to old English *giefan to give.*[9] Bride price, marriage gift, dowry and all other marriage nuptials are considered to be the old associates of the institution of gift. In French, gift is known as *Cadeau,* the Roman version is Dona and Munera, where the munus was a more specific category; donum the more general category included the vast range of giving and more specifically designated the spontaneous gift designed to begin a new relationship.[10] Gift giving is a word of frequent occurrence in the Rigveda, especially in the *Dana Stutis.*[11] The gifts given to the gods in the Vedic sacrifice had relation to the organically perceived universe, which was, as the *Upaniṣad* says, "all food" (*Taittirīya Upaniṣad* 2.2), It appeared to the Vedic sacrificer that if the universe were to have the strength to keep running, certain foods had to be immolated on the Vedic fire altar. [12] One of the charcterstics of Brahamana is his right to receive gifts, while it is an obligation on the other castes to present the gift. The gift of daughter (kanya danam) was a form of marriage, because in it the girl was given away by her father or brother. In the year 1661 the present financial capital of India Bombay (Mumbai) was given in dowry by King John IV of Portugal when his daughter Catherine of Braganza married Charles II of England of British East India Company. Marcel Mauss's short work *Essai Sur Le Don,* originally in French language which was translated into English as The Gift, has inspired much of the modern thinking about gift giving. In his essay, Mauss suggested that institutions such as gift exchange and potlatch which existed in primitive and archaic socities were a total social phenomena since they involve several social institutions namely, religion, law, morality, politics, the family, economics and aesthetics. A gift is not principally the transfer of an object from one individual to another. It's more important role is

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[8] In the evaluation of legal acts (*Rechtsgeschaffe)* the total freedom of individual will should be considered the rule .Roman law instituted exceptions to the rule only in those rare cases that seemed to present a particular danger that the freedom might be abused. Example include … limitations on gift giving and its complete prohibition between spouses, since precisely in the case of gift, cool selfness than it can be in other transactions. Savigny(1841)5 note d.

[9] Origin and Etymology of Gift,< https://www.merriam-webster.com/> accessed on 25/08/2024.

[10] *Marcel*(n2)

[11] Rigveda is the first Veda, the other three Vedas are Yajurveda,Samaveda and the Atharva Veda.

[12] Ohnuma, Reiko, *The Gift of the Body and Gift of Dharma, History of Religions,* 37: 323-359,1998

to create and maintain long term relationships among social groups. As suggested by Mauss in his book gift giving does not function as a series of discrete transactions instead each transfer create a debt, which in turn must be reciprocated. It involves three activities to give, to receive, and to reciprocate. As mentioned earlier also the institution of gift is distinguished from the concept of exchange on the basis of the idea of reciprocation. In gift reciprocation or repaying takes place over time and as a result parties cultivate a life- long relationship. Whereas under exchange there is immediate reciprocation and it does not require any kind of a continuing bond between the parties. The Apex Court has also time and again discussed the nature of gratuitous transfers in the form gifts, donations and charity. The Supreme Court in *ET Commissioner v. PVG Raju*[13] stated that when a person who is the owner of a thing, voluntarily transfers the title and possession of the same from himself to another, without any consideration, it is gift. So one can say that a gift is not principally the transfer of an object from one individual to another, rather its role is to create and maintain long term relationships amongst social groups. For example, the extraordinary culture of gift giving amongst Japanese seems to have its origin in ritual devoted to group solidarity.[14] Transaction of gift is of such a nature that it does not function as a series of discrete transactions; instead each transfer creates a debt, which in turn must be reciprocated. This concept of reciprocation takes place over the time and is not immediate, creates a continuing bond makes it different from the transfer by exchange. Thus giving of gift promotes both dominion and solidarity.

III. Meaning and definition of gift

A study of Gift law must begin by attempting to define the concept of gift. In the affluent literature offered by gift laws of the world, one of the few commonalities which are very striking and confusing is that it is very hard to find a systematic definition of the term Gift. In continental languages, the legal term for gift actually designates *Gift Giving* and is generally derived from the verb making a gift: *donare- donatio; shenken- schenkung; darovat- darovani.*[15] The English usually well- heeled in vocabulary has two words to signify the gift object- gift and present but no convenient noun to name the act of giving a gift.[16] Instead of definition, some codes specify the requirements for executing a valid gift, defining the gift not

[13] AIR 1976 SC 140

[14] In traditional Japanese society gifts of food or drink, such as rice or sake, were offered to gods and other supernatural beings. The gods returned the gifts so that human beings might share the food and receive divine power. As a result, commensalism became an essential characteristic of Japanese social groups, and sharing of community power became anchored in an extremely ritualized practice of giving and reciprocating gifts. Befu, harumi, *Gift Giving in a Modernizing Japan,* Monumenta Nipponica 23:445-456,1968

[15] For the Indo European origins of the words related to gift and giving, see Beneveniste 53-83. In Germanic languages, the word gift may mean both *gift* and *poison.* For the assimilation of the two ideas, see Mauss(1977)

[16] Savigny (1841) 4.

by essential elements but rather in terms of the formalities required for its execution. To begin with, it may be necessary to harp on the concept of gift as envisaged in various legal dictionaries and books, followed by different codes of the world. To start with, **Black's Law Dictionary** defines gift "a voluntary transfer of personal property without consideration. A parting by owner with property without pecuniary consideration. A voluntary conveyance of land, or transfer of goods, from one person to another made gratuitously, and not upon any consideration of blood or money".[17] A similar definition has been given in **Webster's New International Dictionary**, where the author defines gift thus: "something that is voluntarily transferred by one person to another without compensation; a voluntary transfer of real or personal property without any consideration or without a valuable consideration distinguished from sale."[18] A "Gift" is voluntary transfer of property without compensation or any consideration. A gift means a voluntary transfer of property from one person to another without consideration or compensation."[19] Thus, according to Lord Halsbury's statement in *Kulasekaraperumal v. Pathakutty Thalevanar and othrs*[20] the essential distinction between a gift and a grant is that whereas a gift is absolutely gratuitous, grant is based on some consideration or equivalent. Similarly, it is clearly stated that a gift is a transfer without consideration and in this connection while defining the nature character of a gift the author states as follows: "a gift is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefore or any piece of property which is voluntarily transferred by one person to another without compensation or consideration. A gift is a gratuity, and an act of generosity, and not only does not require a consideration but there can be none; if there is a consideration for the transaction it is not a gift".[21] Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise.[22] A gift inter vivo may be defined shortly as the transfer of any property from one person to another gratuitously while donor is alive and not in expectation of death.[23] About the concept of Gift Lord Eshar, M.R made an observation in *Cochrane's Case* [24] that actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition

[17] *Black's Law Dictionary* Third edition
[18] *Webster's Third New International Dictionary*
[19] Volume 18 of the *Words and Phrases* (Permanent Edition)
[20] AIR 1961 Mad 405
[21] Corpus Juris Secundum Vol 38.
[22] Mulla, Dinashah Fardungi, *Mulla on The Transfer of Property Act*,1882.
[23] *Hallsburry's Laws of England*, Volume XVIII .
[24] (1890) 25 OBD 57

 [ISSN 2581-5369]

itself. It is one of the facts which constitute the proposition that a gift has been made, it is not a piece of evidence to prove the existence of the proposition; it is a necessary part of proposition, and, as such, is one of the facts to be proved by evidence. **The Oxford's Dictionary** simply defines gift as a thing given willingly to someone without payement. "A voluntary and gratuitous transfer of property, real or personal,heritable moveable, made with the intention of transferring ownership from the owner to the donee. The instrument of transfer is determined by the nature of the property i.e. a chattel can be transferred by mere delivery; unregistered land in England and Wales requires a deed; registered land requires an executed land transfer plus registration[25] . Gift is the transfer of certain existing moveable or immovable property made voluntarily without consideration, by one person, called the donar, to another, called donee and accepted by or on behalf of the donee.[26] The term gift is also defined under the Gift Tax Act, 1958 which is now repealed as "transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth.[27] Having considered various definitions of the expression 'gift' following characteristics can be ruled out: Firstly the transfer is gratuitous ie absence of consideration or quid pro quo or from the fact that the donor acted without being obligated to do so. Secondly certain subjective factors are present, usually the donative intent or parties agreement about gratuitous transfer. Thirdly the transaction takes place inter vivos which distinguishes it from other transfers like transfer by will. Lastly the object of transfer should involve property rights rather than any other services.

Legal systems vary widely in the types of restrictions they place on gift giving and individual on whom they are imposed. Gift capacity can be broadly studied under two heads namely:

- Give
- Recieve

Capacity to give

In simple words the capacity to give means, who can make gift? This can broadly be studied under various headings namely; Minors, Adult Incompetents, Civil Death, Married woman, Marital property, Government entities, Business Associations and Gift from body.

Capacity to Receive

The next category regarding capacity is who all can receive the gift. Many legal systems limit

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[25] *Collins Dictionary of Law*, WJ Stewart, 2006 .

[26] The Transfer of Property Act,1882 s 122.

[27] Section 2(xii). For the definition in the current Dutch Civil Code, see art. 7:175 par I, <http:// www.dutchcivillaw.com/ >civilcode book 022.htm accessed on 25/08/2024

the ability of persons to receive gift. There are three principal concerns in the receiving capacity; firstly capacity to receive is denied to individuals or entities that do not exist, or are not determinable, at the moment the gift is made, secondly, capacity is denied to implement protective or penal policies, and lastly gifts are prohibited within specified relationships.[28]

IV. Customary law relating to gifts

In most early societies, the form of transfer of property was simple. Any person owning property could transfer it by handing over its possession to the transferee. In early societies, the disposition of property by wills or other writings were practically unknown. It is not certain as to exactly when the practice of executing formal transfers in writing through the instrumentality of wills and other instruments came into existence in India. It appears that the settlement officers started recording in the village *riwaz- i – ams* that disposition of property could be made by wills.[29] The Punjab customary law visualizes gifts mostly to relations, and they are ordinary made on account of the services rendered to the donor or on account of donee's association in the management or cultivation of land.[30] The customary concept of gift is that it is made for the benefit of the done and his descendants, and therefore in the event of the failure of the line of the donee the property would revert back to the donor or to his heirs. In other words, since customary law views gifts as settlement for the benefit of the donee and his descendants it is natural corollary to hold that on the failure of the donee's line, the gifted property will revert back to donor or his descendants.[31] There is another aspect of the matter, too. Ancestral property under customary law is an inalienable property, and on the death of the proprietor it goes to the reversioners who are entitled to succeed to it. Alienation of it is recognized in exceptional cases. The customary law does not favor gratuitous transfers, and gifts are allowed in exceptional cases. Since gift is made on account of personal relationship or personal services rendered by the donee, the property reverts back on the death of the done or on the failure of his line.[32] Thus when a proprietor appoints an heir or a *khana – damad* or makes gift of the ancestral property to a relative, he does so with a tender feeling to benefit the direct descendants of the appointed heir, the *khana damad* or the done and not in order to

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[28] "The question is whether a gift to a donee who is uncertain is valid. This is a capacity question only in a broad an non-technical sense. The discussion is included here following the universal practice of those legal systems in which the issue arises." Gifts Richard Hyland.
[29] Paras Diwan, *Customary Law of Punjab and Haryana,* Publication Bureau, Punjab University, Chandigarh 3rd edition, 1990
[30] William Henry Rattingan and Henry Adolphus, *A Digest of Civil law For Punjab,* Gale,Making of Modern Law: Foreign Comparitiveand International Law Lahore: Civil and Military Gazatte, 1600-1926
[31] *Taro v Darshan Singh* AIR 1960 Punj 145
[32] B R Shangari, *Supreme Court Encyclopedia On Transfer Of Property Act,* Supreme Law, New Delhi, 1972

benefit the family of the appointed heir.[33]

V. Regulatory framework

The Cultural aspects include the gift giving traditions, which is often associated with cultural practices during festivals, weddings, and other celebrations. Foreign gifts may be viewd through the lens of these traditions. Further the act of giving gift is symbolic of relationships and social status often necessitating reciprocation. Foreign gifts are generally seen as prestigious or valuable, reflecting the global connections of the recipient. However, there may also be suspicion regarding the motives behind foreign gifts, especially in contexts where corruption or bribery is prevalent. The cultural norms can sometimes conflict with legal definitions, leading to gray areas in understanding whether a gift is a legitimate gesture or an attempt at bribery. Foreign gifts, particularly in the form of cash or high value goods can impact local economies. They may lead to increased spending in certain sectors, such as luxury goods or real estate. The taxation of foreign gifts contributes to government revenue. Ensuring compliance with tax regulations is essential for the proper functioning of the economy. Gifts from foreign entities may also be part of business negotiations and international relations. Understanding the legal and cultural contexts is crucial for maintaining ethical standards. It is very essential to analyse the legal framework including the Indian laws, regulations pertaining to gift giving by foreigners, taxation rules, foreign exchange regulations and Anti-corruption laws that influence gift giving practices in India.

A. The Foreign Exchange Management Act, 1999 and The Gift

In view of the major changes introduced in the Indian Economy and the liberalization of industrial and trade policies, consistent with fast changes in international and trade relations, the Foreign exchange Regulation Act, 1973 was enacted. It had become necessary to create a better and more conducive climate for increasing of inflow of foreign investment and capital in the country to acerlate industrial growth and promotion of trade, especially exports. The Act of 1973 of FERA was enacted with special restrictions which were introduced with regard to foreign investments and activities of individuals and concern of India having non-resident interest. The main objective was conserving India's foreign exchange resources by preventing the outflow of Indian currency and regulating the dealings in foreign exchange and securities. The Act came into existence with the following objectives.[34]

- To regulate the foreign payments.

[33] Rustomji, *Treaties on Customary Law in the State of Punjab,* Allahabad Publishing House,1949
[34] The Foreign Exchange Management Act, 1999 s 3.

- Regulation of Foreign Capital in India, can be done if the law is more transparent in its application. With this objective rules had been laid down where in specific areas, special permission of Reserve Bank of India and Government of India is required.
- For a strong and developed foreign exchange market, employment business and investment of Non-Residents should be regulated.

Several amendments were enacted as part of the ongoing process of economic liberalization relating to foreign investments and foreign trade. The main obstacle was that the Act could not conserve and properly utilize the foreign exchange resources of country as a result of which the black market in foreign exchange flourished. It gave rise to a new economic lexicon "Hawala Transactions".[35] There was a need of substantial modification in the present Act, and therefore in the year 1999 there was a transition from FERA, 1973 to FEMA, 1999 (Foreign Exchange Management Act). The new Act was passed by the both houses of Parliament and received the assent of Parliament on 29th December, 1999. The Act provides for regulation and amendment of Foreign exchange. Section 3 specifically prohibits the dealing in foreign exchange without general or special permission of the Reserve Bank of India.[36] Further section 4, specially provides that no person resident in India shall acquire, hold, own or posses or transfer any foreign exchange, foreign security or any immovable property situated outside India, except otherwise provided in the Act.

B. FEMA Regulations governing the Gift

It is pertinent to note here that besides the Income Tax Act 1961, the provisions of the Foreign exchange Management Act (FEMA) 1999, also governs the cross-border gifts like the ones involving Non-Resident Indians (NRI) or persons of Indian Origin (IO). As per FEMA, NRI (Non-Resident India) is defined as a person resident outside India, who is either a citizen of India or is a person of Indian origin.[37] The NRI's may have interest in the following assests

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[35] C.S.R Sridhar, Fema Reddy, Reckoner with Commentary, Bloomsbury Publishing PLC, Vol. I

[36] *Ibid* (33)

[37] Foreign Exchange Management Act, 1999 sec 2 (v) defines "person resident in India" means– (i) a person residing in India for more than 182 days during the course of the proceeding financial year but does not include–
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(A) a person who has gone out of India or who stays outside India, in either case—
(a) for or an taking up employment outside India, or
(b) for carrying on outside India a business or vocation outside India, or
(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for on uncertain period;
(B) a person who has come to or stays in India, in either case, otherwise than —
(a) for or on taking up employment in India, or
(b) for carrying on in India a business or vocation in India; or
(c) for any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period.

which they generally receives either through gifts or through inheritance; money/liquid funds; Immovable property, Jewellery, valuable paintings and other goods, shares in companies that are registered in India and Interest in Limited Liability Partnership (LLP's). Following are the rules governing the acceptance of the above mentioned assets received by NIR's under the FEMA, 1999 Act—

1. Money/Liquid Funds—

Under the FEMA, the NRI can accept gift of money/liquid funds under the Liberalized Remittance Scheme[38], upto a limit of USD 25000/- in a financial year.[39] To receive gift in the above said manner, the donor and recipient don't have to be necessarily a close relative. But the gift would be taxable under the provisions of IT Act, 1961, if it exceeds INR 50,000/- the made of gift can be through a cheque or even by net banking where the resident Individual can send the money to his NRO account in India. The major accounts that can be opened are—[40]

- NRE Account (Non-Resident (External) Rupee Account scheme.
- Foreign currency (Non-Resident) Account (Banks) Scheme (FCNR (B) Account).
- NRO Account (Non-Resident Ordinary Rupee Account Scheme.

2. Receipt of Immovable property as gifts/by way of Inheritance by an NRI

If the property is located in India, the gift of same can be transferred to NR'I provided the immovable property should not be agricultural land, farm house or the plantation property. This gift of immovable property is allowed to the NRI who is not a relative[41] also, but with the condition that receipt of gift would be taxable in the hands of recipient under the provisions of IT, Act 1961. Here 'transfer' includes sale, purchase, exchange, mortgage, pledge, gift loan or

(ii) any person or body corporate registered or incorporated in India
(iii) an office, branch or agency outside India owned or controlled by a person resident in India
(iv) an office, branch or agency in India owned or controlled by a person resident outside India.
See also sec 2 (w) — "person resident outside India" means a person who is not resident in India.
Further Person of Indian origin (PIO) will also include (Overseas Citizen of India) within 7(A) of citizenship Act, 1955.

[38] All about the Liberalized Remittance Scheme (LRS) published by Taxmann in Blog, FEMA and Banking available at https://www.taxmann.com/post/blog/5368/ all-about-the-liberalized-remittance-scheme-lrs (accessed on June 6, 2021).

[39] Para A of RBI DED Master Directions No. 7/2015-16 dated 1-1-2016 gives details of the LRS scheme as follows "Under the Liberalized Remittance Scheme, Authorized dealers may freely allow remittances by resident individuals upto USD 2,50,000/- per Financial year (April-March) for any permitted current or capital account transaction or a combination of both. The scheme is not available to corporate, partnership firms, HUF, Trusts etc. The Scheme started with LRS limit of USD 25,000/- on 04-02-2004. It has been revised from time to time, and present limit w.e.f. 26/05/2015 is USD 2,50,000/- per financial year per resident individual".

[40] *Taxmann's FEMA+FDI*, Ready Reacknor Taxmans Publications Private Limited, New Delhi, 15th edition, 2021.

[41] Definition of Relative in FEMA, 1999 is same as given under The Companies Act, 2013 including "Spouse, Father, Mother, Son, Wife, Daughter Daughter's husband, brother/sister of Individual".

any other from of transfer of right, title, possession or lien.[42] The sale proceeds of such property can be taken outside India from the respective NRO account with the rider that amount should not exceed the permissible limit of USD 1,00,000/- per finicial year.

3. Receipt of Shares in Companies that are registered in India as gifts or Inheritance

The securities[43] held in a company which is registered in India may be gifted by a resident individual to a NRI subject to prior approval from the RBI. (Reserve Bank of India). The RBI lays down the following conditions.[44]

- Gift should not exceed the paid up capital of Indian company which is 5%.
- The Indian Company has set up a certain sectoral cap which should not be breached.
- Donor and Recipient should be recipient within the ambit of section 2(77), of the Companies Act, 2013.[45]
- The value of security transferred should not exceed the Rupee equivalent of USD 50,000/- by the donor to any person residing outside India as gift during the financial year.

Further the RBI rules out that securities amongst relatives are exempted from taxes but in case it is being transferred to the Non-Relatives, it would be taxable.

4. In regard to transfer of an interest in LLP from resident Indian to NRI there is no provision under the FDI policy. But if specifically permitted, gift of an interest in LLP to NRI can be made.

Therefore the sole objective of the enactment of the FEMA, 1999 was to promote the orderly development and maintenance of foreign exchange market in India.[46]

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[42] FEMA, 1999 sec 2 (Ze).

[43] The FEMA, 1999 sec 2 (za) defines "security" as "shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates Act, 1959 applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes other instruments which may be notified by the Reserve Bank as security for the purposes of this Act."

[44] Reserve Bank of India, available at https://m.rbi.org.in//home.aspx (accessed on July, 15th, 2021).

[45] Companies Act 2013

[46] For the further clarification on the topic see – "The Foreign exchange Management (Non-Debt Instruments) Rules, 2019 (FDJ Rules) and the Foreign exchange Mangement (Mode of Payment) and Reporting of Non-debt instruments) Regualtions 2019, which superceds the Foreign exchange Mangement (Transfer of Issue of Secruity by a person Resident outside India), Regulations 2017 (TISPRO) which contions the provisions of transfer of security of an Indian company. The FDI Rules, allow transfer of shares of an Indian company to or from a Non-Resident in the form of gift, as gift is considered as one of the modes of transfer of security, which is subject to following restrictions–

C. Reporting Requirements under FEMA Regulations

The Reserve Bank of India, has recently given new directions in regard to filling up of the form named (FCTRS) in case of transfer of shares of an Indian company from a resident to a Non-Resident and vice-versa.[47] (FCTRs) stands for Foreign Currency Transfer of shares. The main objective behind filling up of this form is to integrate the reporting structures of various types of foreign investments in India. Further these forms are to be filed within 60 days from the date of transfer of shares by way of gift. The burden of filling up of the FCTRS, within a required time frame lies upon the donor and donee resident in India and it can also be submitted through FIRM's portal.[48]

The acceptance of foreign gifts in India has several implications regarding taxation and compliance, which are crucial for recipients to understand. Under the Income Tax Act, 1961, gifts received by individuals are considered taxable income if their value exceeds 50,000/ in a financial year. The entire amount of the gift is subject to income tax, not just the amount above the exemption threshold. However gifts from specified relatives are exempted from tax, regardless of amount. Certain occasions such as weddings,may also qualify for exemptions, provided proper documentation is maintained. For the assessment recipients must declare foregn gifts in their income tax returns, failure of which can lead to penalities . Tax authorities may require documentation to verify the nature and source of the gift. Further compliance with the Foreign Exchange Management Act is necessary when accepting gifts from foreign sources. Large gifts may require prior approval from the Reserve Bank of India and must adhere to guidelines on permissible transactions. Proper documentation is essential to substantiate the legitimacy of the gift which includes gift deeds for gift of immovable property, records verifying the source of funds or items received. Foreign gifts may play a role in business negotiations; however, it is crucial to differentiate between legitimate gifts and potential bribes. Understanding the legal implications can prevent misunderstanding and potential legal issues. Proper compliance fosters positive international relations and trust between parties, while noncompliance may lead to scrutiny and strained relations.

(i) Transfer by way of gift by Non-Resident (not being NRI OR OCI) to another Non-Resident only on the condition that a prior government approval is required where the company is under government approval route.

(ii) Transfer by way of gift from Non-Resident to Resident is permitted only when it is done in compliance and adheraence to the documentation and reporting requirements as specified by the Reserve Bank from time to time. On the hand, the Non-residents who are holding shares an a Non-Repatriable basis are not covered by the above restriction.

[47] Master Circular on Foreign Investment In India <https://www.rbi.org.in/commonman/Upload/English/Notification/PDFs/22MCFDI90701_F.pdf> accessed on 30/08/2014

[48] T.R Ramamurthy, *Bharat's Guide to FEMA*, 5th edition, Bharat Law House, New Delhi.

VI. THE INTERPLAY BETWEEN GIFTS AND BRIBES

It is important to note that line between gift giving and bribery can sometimes be blurry and interpretation may vary based on the cultural, legal and contextual factors. Businesses and individuals should be aware of the legal and ethical standards in their respective jurisdictions and industries to ensure compliance and avoid engaging in corrupt practices. The primary purpose of bribery is to obtain an unfair / undue advantage often in a business / governmental context. It is considered illegal. It often undermines the fairness and integrity of decision making processes, erodes public trusts and is generally associated with criminal offences.it often involves an expectation of reciprocity, where the person offering the bribe expects the recipient to act in a certain way in return. Thus bribe involves offering, receiving /soliciting something of value with the intent to influence the actions / decisions of individual in a position of auithority. Whereas the primary purpose of gift giving is to express good will, appreciation, celebration and is not intended to influence a decision or action. Gift giving is generally legal, provided it is transparent, voluntary and not intended to unduly influence the recipient. In gift giving there may or may not be an expectation of reciprocity but any reciprocation is typically unrelated to specific actions or decisions. Therfore it can be said that gift involves the voluntary transfer of something of value without expectation of receiving anything in return. In other words, legitimate gift giving is transparent with no attempt to conceal the exchange . bribery on the other hand often involves covert/ secretive transactions. Legal framework of a jurisdiction may define the boundaries between bribery and gift giving, specifying acceptable practices and setting thresholds for what is considered a permissible gift.

VII. GIFTS AND ANTI -BRIBERY LAWS

In India particularly during festive season, giving and accepting gifts is a common practice. As explained in detail in the first chapter a gift is something given which has value in the eyes of law, without given expecting anything in return. On the other hand when the same thing is given in the hope of influence or benefit it will not be a gift but, it will turn out to be a bribe. Bribes always come with same strings attached to it, whereas gifts are given out of love and affection without any expectations of getting something in return. Social bonds are strengthened when individuals exchange gifts. Rather a reciprocity of love and affection is created, provided the same is coming from private resources. When the same thing comes from an organization or is a government resource, then chances are more of it to be a 'bribe'. A normal gift exchange involves giving and accepting of valuables amongst the family members, relatives and friends or community resources. When exchange of something which belongs to an organizations occurs, the normal gift exchange becomes a bribe, unless there are clear guidelines and transparency. Generally, a company's image is enhanced, and long-term relationships are developed by giving and accepting of gifts.[49]

Moreover a total denial of corporate gift exchange is considered as an insult in many countries. Just like gift giving between relatives, friends or acquaintances spends symbolic messages creates goodwill, develops social bonds and reduces the risks and uncertainties, the exchange of bureaucratic gifts also functions on the same principles.[50] Therefore factors responsible for demarcating a line between gift and a bribe are transparency and an assessment of whether there is an expected and distorted quid pro quo for something like a cup of coffee, a meal, or a pen or some larger gift.

The Companies in India however have become more vigilant that these kinds of exchanges could be construed as a bribe to influence the policy makers and to gain undue-competitive advantage. Section 123 of the Representation of People's Act, 1951 defines certain kinds of corrupt practices, and bribery is one that.

"Bribery— is one of the corrupt practice, which means any gift, offer/promise by a candidate/his agent/ by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object directly or indirectly of inducing—

(a) A person to stand/not to stand as, or (to withdraw/not to withdraw) from being a candidate at an election, or

(b) An elector to vote/ refrain from voting at an election, or as a reward to—

  (i) A person for having so stood or not stood for or for (having withdrawn or not having withdrawn) his candidate; or

  (ii) An elector for having voted/ refrained from voting."[51]

Specific guidelines are laid out, certain limits are set, occasions of giving and accepting are being earmarked in case of typical gift policy. While offering or receiving gifts the nature of documentation required and the processes followed are also covered under the said policy. For instance the threshold value of gifts in Indian companies ranges between Rs. 1000/- to Rs.

[49] Arunthanes, W; Tansuhaj, P. & Lemak, D.J (1994) *Cross-Cultural business gift giving.* International Marketing Review, 11, 44-55.

[50] Gordon, K.; & Miyake, M. (2001) *Business approaches to combating bribery*,A study of codes of conduct, Journal of Business ethics, 34, 161-173.

[51] The Representation of People Act, 1951 s 123(1) (A).

5000/-.[52] The rules/laws containing the giving and receiving of gifts are not directly under the ambit of the Companies Act, 2013 and the Securities Exchange Board of India, however both the laws directs the companies to have an internal mechanism which identifies and controls any kind of misconduct or unethical practices like improper gifts. Rather there should be whistle blower mechanism which must report all cases of illegal transfers. The most relevant piece of legislation concerning illegal gifts is the Prevention of Corruption Act, 1988— which lays down certain guidelines for public servants and also states that onus of disclosing obligation lies upon the public servant[53] to whom gifts are given. Therefore a gift should have no business roles except that of marking and enhancing relations or promoting the givers of the company. A brief overview of the laws dealing with bribery and their enforcement regimes has been discussed below—

(1) **The Prevention of Corruption Act, 1988** as already discussed in detail about the need of the Prevention of corruption Act, 1988, it was solely enacted with an objective to criminalize the receipt of any under advantage[54] received by a public servant or any other person concerned.

In relation to foreign gifts, **Foreign Contribution Regulation Act, 2010** prohibits the acceptance of hospitality[55], contributions from foreign source[56] by government servants except with the permission of central government.

(2) **Prevention of Money Laundering Act, 2002 (PMLA)**

This Act came into existence to prevent money-laundering[57], which in lay man's language

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[52] Taxmann's Direct Taxes Law Lexicon; Taxmann Publications Pvt. Ltd., 2015th edition.
[53] The Prevention of Corruption Act, 1988 s 2(c)
[54] The Prevention of corruption (Amendment) Act, 2018; sec 2 (d) "Undue advantage means any gratification whatever, other than legal remuneration for the purpose of this clause—

(a) The word 'gratification' is not limited to pecuniary gratification or gratifications estimable in money;
(b) The expression 'legal remuneration' is not restricted to remuneration paid to a public servant, but includes all remuneration which he is permitted by the Government or the organization, which he serves, to receive."

[55] Foreign Contributions (Regulations) Act, 2010 see sec 2(i) foreign hospitality means any offer not being a purely causal one, made in cash/kind by a foreign source for providing a person with casts of travel to any foreign country/territory or with free boarding/ledging, transport or medical treatment.
[56] Id; sec 2(j) 'foreign source' includes–

(i) The government of any foreign country/territory and any agency of such governments;
(ii) Any international agency, not being the United Nations or any of its specialized agencies the World Bank, International Monetary Fund, or such other agency as the Central Government may, by notification, specify in this behalf;
(iii) Foreign company;
(iv) A corporation, not being foreign company incorporated in a foreign country or territory.

[57] Prevention of money Laundering Act, 2002; see sec 3 — "offence of money laundering-whosever directly or indirectly attempts to include or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering".

 [ISSN 2581-5369]

implies prevention of the so called legitimate money earned through illegal and criminal activities by investing in Movable and Immovable property. It further requires all the banks, finical institutions, inter-mediaries (like brokers and money changers) to report any kind of suspicious transaction in terms when it exceeds a specified limit. Records should be maintained of transactions and details like (know your customer) (KYC). If the offence of money laundering is committed then rigorous imprisonment of not less than 3 years which may extend upto years along with five of 5 Lakhs may be awarded.[58]

(3) **Black Money (Undisclosed) Foreign Income and Assets) and imposition of Tax Act, 2015**

The Act came with the objective to target the undisclosed Income and Assets, which have been potentially derived through unlawful means like corruption, black marketing; hoarding and further smashed offshore by resident Indians. Any under closed Income/assets held by the persons resident in India is levied with penal tax rates and further penalizes those individuals which do not disclose their foreign income/assets/ or willfully evade tax but not furnishing requisite returns etc.

(4) **Benami Transactions (Prohibition) Amendment Act, 2016**

In the year, 1988 a need was felt to have certain set of Rules and Regulations which would account for; tax avoidance, Black money, money derived from corruption and other means, properties held in factious names etc. Against this backdrop, Benami Transactions (Prohibition) Act 1988 was enacted with nine sections containing various provisions in regard to Benami transactions. In order to curb Black money, the Government amended the previous Act as The Benami Transaction (Prohibition) Amendment Act, 2016.

The new Act widened the scope of the word 'Benami'. It came into the force with the objective of prohibiting benami transactions and providing for provisions confiscating benami properties and for matters connected therewith and incidental thereto.

Sec 2(8)[59] of the said Act, defines 'benami property' as a property which is the subject matter of benami transaction including the proceeds arising out of such property. Further section 2(9)[60] of the Act definies a 'benami transactions' as such a transferred or an arrangement, where property is transferred to a person and the consideration is paid by another person and the benefits arising out of the property are enjoyed by the person who has paid consideration. Benami transactions also includes; any transaction carried out in a factious name, where

[58] Prevention of Money Laundering Act, 2002 s 4.
[59] Benami Transactions (Prohibition) Amendment Act, 2016.
[60] *Ibid*.

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owner of the property is not aware of the transaction and where person providing the consideration is not traceable or is factious.

The section carves out certain exceptions by widening the scope of definition, i.e. if the property is held by the following persons, then, it would not amount to benami transaction—

(i) When property is held by the Karta of the family, for the benefit of other members of the family, where the consideration is paid out of the known sources of Hindu Undivided family.

(ii) A person standing in a fiduciary capacity for the benefit of other members of family; for eg trustee, executor, partner, director of a company etc.

(iii) Person holding property in the name of the spouse, children and again where consideration is paid out of known sources of Individual.

(iv) In the name of brother, sister lineal ascendant/descendant, where the name of brother/sister is held as joint– owners in any document.

In *Dr. KM Shah* v. *The Astt. Commissioner of Gift Tax*[61], the question before the hon'ble court of Ahmedabad was that 'whether gifting of property to near and dear ones could come under the definition of 'benami-transaction'. By placing reliance on previous judgements the court was of the view "that Benami Transaction Prohibition (Amendment) Act, 2016 excludes certain properties to be termed as benami transactions such as; *CIT* v. *R. Ponnammal* held by an individual in the name of spouse or child of such individual, and where the consideration is paid out of the known sources. Therefore such a transaction would to come under the purview of benami transitions.

Therefore property bought with the gifted money is not considered as benami property, provided the gift can't be revoked and the property is not held or the immediate or future benefit of the person who gave the consideration.[62] Further if the family arrangement is voluntary in nature, is not induced by fraud undue-influence, bona-fide in nature it would not amount to 'benami-transaction' even if not registered.

The said Act, empowers the authorities to attach property provisionally, which implies a prohibition on the transfer, conversion and disposition of the property. If finally the property

[61] (2004) 83 TTJ Ahd 721; see also *CIT* v. *R. Ponnammal* (1987) 164 ITR 706 (Mad); *Maturi Pullaiah* v. *Maturi Narasimham* AIR 1966 SC 1836; *Kala* v. *Dy. Director of Consolidation* AIR 1976 SC 807; *Arvind Chandulal* v. *CIT* (1982) 140 ITR 241.
[62] *Mithilesh Kumar and Anr* v. *Prem Behari Khare* (1989) 177 ITR 97 (SC).

is adjudicated as a benami transaction then it can also be confiscated by the authorities.[63]

Thus the implications of foreign gifts on taxation and compliance in India are significant. Recipients must be aware of their tax liabilities, maintain proper documentation, and adherence to regulatory requirements to avoid legal complications. A clear understanding of these aspects can help individuals and businesses navigate the complexities of receiving foreign gifts responsibly and ethically.

While there is no explicit limit on the amount one can receive from a foreign gift, transactions of significant value may attract regulatory scrutiny and require adherence to specific reporting requirements. Foreign gifts can potentially contribute to the black money problem in India through misuse and regulatory loopholes. Addressing this issue requires a combination of stricter enforcement, regulatory reform, and increased public awareness. Effective monitoring and compliance mechanism are essential to prevent the introduction of unaccounted funds into the economy.

Investigations uncovered that money was being channeled through gifts and donations to cover up and launder bribes and illicit funds in the following scams: Delhi Liquor Scam (2002), Satyam Scam (2009) it involved the Company’s founder Ramalinga Raju, gifts and foreign investments were scrutinized as a part of the financial fraud invetigations and the nature of these gifts raised concerns about the ethical standards in corporate governance and transparency;2G Spectrum Scam (2008), Common Wealth Games Scam (2010), AgustaWestland Chopper Scam (2013) this case involved the purchase of helicopters for VIP transportation, allegations surfaced that kickbacks were paid to Indian Officials as part of the deal, including lavish gifts and it raised questions about corruption in defence procurement and led to investigations by Indian Authorities, and Nirav Modi Scam (2018) . The scams included various financial maneuvers to conceal and launder money, including the use of gifts and charitable donations to observe the trial of illicit funds. Bribes were reportedly rooted through various channels, including gifts and donations and political figures and officials to disguise the origins of the illicit funds. Lavasa, a planned hill city project in Maharashtra, involved significant foreign investment and gift transactions. Foreign investors made substantial contributions to the development of the city, which included gifting plots of land to Indian partners.[64] The deal raised questions about land acquisition laws and the legitimacy of these gifts. Investigations revealed issues regarding compliance with Indian regulations,

[63] The Benami Prohibition (Amendment) Act, 2016 ss 24-29.

[64] Lavasa Corporation Limited< https://www.sebi.gov.in/sebi_data/attachdocs/1404296879493.pdf> accessed on 10/09/2024

highlighting the fine line between legitimate gifts and potential bribery. Various foreign NGO's provide gifts in the form of funding to Indian charitable organizations. Organizations like Gates Foundation have donated significant sums for healthcare and education.[65] These gifts often require compliance with the Foreign Contribution (Regulation) Act, 2010. Also the multinational corporations operating in India often engage in gifting practices during business dealings. Gifts ranging from expensive items to corporate hospitality during meetings are common. Personal relationships between foreigners and Indian nationals often involve gift giving. Foreign diplomats or expatriates living in India may give traditional Indian items to local friends or colleagues as gestures of goodwill. These gifts can strengthen interpersonal relationship but may also raise questions about cultural sensitivity and expectations of reciprocity. Legal implications can raise if the gifts exceed tax exemption limits, leading to potential reporting requirements. Indian weddings often see significant contributions from foreign relatives. Gifts from family members living abroad can include cash, jewelry and property. These case studies highlight the multifaceted nature of gift giving by foreigners in India. They demonstrate the need for awareness of legal implications, cultural practices, and economic impacts, ensuring that both givers and recipients navigate these complexities responsibly.

VIII. Conclusion

Gift giving is an essential aspect of social life in India, influenced by cultural practices This can impact how legal principles are interpreted and applied. The expectation of reciprocity of gifts can lead to social and sometimes legal obligations. Failure to reciprocate can strain relationships and lead to disputes. Understanding the legal aspects of Gift giving India by foreigners requires navigation of various statutes and regulations, from property laws to tax obligations. Both givers and recipients should be aware of their rights and responsibilities to ensure compliance prevent potential disputes. Foreign gifts can be misused to introduce unaccounted money into the legal economy. This can happen through inflated valuation, individuals may inflate the value of gifts to bypass the tax obligation or to launder money. Creating fake documentation to show gifts that never occurred, thereby introducing black money as legitimate income. Tracing the origin of foreign gifts can be challenging, complicating as the existing regulatory framework have loopholes. Monitoring of small and informal gifts from abroad are not stringent, which allows for the introduction of the illicit funds. By promoting awareness about legal implications of receiving foreign gifts individuals

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[65] Bill and Melinda Gates Foundation https://www.gatesfoundation.org/our-work/places/india accessed on 10/09/2024

can be helped and unintentional violations can be avoided. The government should acct in a more strict manner, to tighten the regulations surrounding foreign contributions, especially with the implementation of FCR Act,2010 to ensure transparency in foreign funding. Increased scrutiny of large foreign gifts, especially those involving high value assets could help mitigate the risks of black money integration. A uniform Gift Code should be implemented in India which shall cover all the regulatory framework relating gift giving and recipients must ensure compliance with reporting requirements and maintain proper documentation to avoid legal complications.

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