



KATALYST
ADVISORS

Deferred vs. Contingent Consideration



FEMA Permissibility and
Taxation

Swipe →



01

THE QUESTION

Can You Defer Payment in a Cross-Border Deal?

In cross-border share acquisitions, structuring payment terms is critical. FEMA NDI Rules govern what is permissible.

Two concepts. One is about "when". The other is about "if".

Upfront structuring of form of consideration required from a FEMA and Tax Perspective

"When" vs. "If"

the fundamental distinction between deferred and contingent consideration under FEMA



02

DEFERRED CONSIDERATION

Fixed Amount. Deferred Payment.

The consideration is fixed. Only the timing of payment is deferred. It is a question of "when", not "if".

Permissible under FEMA NDI Rules: payable within 18 months of the SPA, capped at 25% of total consideration.

Applies equally to inbound and outbound transfers between residents and non-residents.

18 Months | 25%

maximum deferral period and cap on deferred portion under FEMA NDI Rules



03

CONTINGENT CONSIDERATION

Variable Amount. Uncertain Payment.

The consideration is not fixed. It depends on achievement of pre-agreed milestones. It is a question of both "if" and "when".

For inbound transactions, contingent consideration is not permissible. *However, payment through escrow permitted subject to caps mentioned earlier*

The regulatory concern: uncertain outflows from India on transfer of shares to a non-resident.

Not Permitted

for inbound transactions under FEMA due to uncertainty in payment obligation unless through escrow



04

TAX: DEFERRED CONSIDERATION

Taxed Upfront. Even If Not Yet Received.

Since the consideration is determined on Day Zero, the entire amount accrues at the point of transfer.

Capital gains tax is payable on the full consideration, including the deferred portion, in the year of transfer.

Taxes to be paid on entire consideration even if not received → therefore, Cash flow mismatch

Day Zero

capital gains tax accrues on the entire consideration including the deferred portion, irrespective of receipt



05

TAX: CONTINGENT CONSIDERATION

Not Taxed Upfront. But Then What?

Earnout depends on future milestones. It cannot accrue in the year of transfer. Only upfront consideration is taxed.

The open question: when the earnout is received, is it capital gains (lower rate) or income from other sources (higher rate)?

No transfer of shares occurs in the year of receipt. Current law does not resolve this.

Unresolved

whether earnout receipts are taxed as capital gains or as income from other sources at marginal rates





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The Takeaway

Two forms of consideration. Two regulatory outcomes. Two tax treatments.

	Deferred	Contingent
Amount	Fixed	Variable
Question	"When"	"If" and "When"
FEMA	Permitted (18m / 25%)	Not Permitted Unless through escrow
Tax	Upfront on full amount	Upfront on Actual Receipt; earnout unclear

