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Analysis of Recent Compounding Orders

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FEMA Focus is a new feature where the authors will cover important changes in FEMA with brief analysis. This first one covers important compounding orders with a short analysis.

An analysis of some interesting compounding orders passed by Reserve Bank of India in April and May 2018 and uploaded on the website¹ are given below.

Foreign Direct Investment (FDI) compounding orders

A. Shri Harsha Chigurupati

Date of order: 13th April 2018

Regulation: FEMA 20/2000 Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (FEMA 20)

Issue: Transfer of shares of an Indian company from NRI to another foreign company which was not permissible under earlier FDI Regulations

Facts

- The applicant, an NRI, held 9999 shares of Chigurupati Technologies Private Limited, an Indian Company (ICO). Shares of ICO were allotted to the applicant, as a promoter and Director when he was resident in India. Applicant since then became NRI.
- Applicant transferred shares to non-resident company (FCO) without prior approval of Reserve Bank of India.
- ICO submitted application for post facto approval for the above transfer of shares which was subsequently granted by RBI.

1 <https://www.rbi.org.in/scripts/Compoundingorders.aspx>

- Details of transaction are tabulated below:

Sr No	Date of transfer of shares	Number of shares	Amount	Date of post-facto RBI approval	Period of contravention
1	07.12.2015	9999	99,990	02.11.2017	1 year 10 months 26 days

Regulatory provisions:

- Regulation 3 read with Regulation 9(2)(ii) of FEMA 20 as then applicable, permitted transfer of shares from non-resident Indian to another non-resident Indian only, and not to a non-resident company.

Contravention:

- Shares were transferred by NRI to non-resident company without prior approval of RBI

Compounding penalty:

Compounding penalty of Rs. 19,198 was levied.

Comments:

- FEMA 20/2000 is now superseded by FEMA 20(R)/2000 vide notification dated 7th November 2017.
- Regulation 10(2) now permits transfer of shares held by NRI to any other person resident outside India subject to satisfaction of sectoral limits and approval regime of FDI.

B. S. Zhaveri Pharmakem Private Limited

Date of Order: 7th May 2018

Regulation: FEMA 20/2000 and FEMA 10/2000 Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2000 (FEMA 10/2000)

Issue: Receipt of FDI in EEFC account

Facts

- Applicant received share application money of Rs 5,42,85,000 in its Exchange Earner's Foreign Currency Account ('EEFC') Account on 19th December 2012 in foreign currency from non-resident shareholders towards FDI.
- The said money was parked in EEFC Account till 26th December 2012 and subsequently was utilised for making import payments / foreign currency expenses

- In addition, there was delay in reporting to RBI as well as in filing Form FCGPR.

Regulatory Provisions:

- Erstwhile paragraph 9(1) of Schedule 1 to FEMA 20/2000 requires reporting of consideration and filing of Form FC-GPR within 30 days.

- Para 4 of FEMA 10/2000 - provides permissible debits / credits in Opening, holding and maintaining an EEFC Account.

- FDI is not a permissible credit in an EEFC Account.

Contravention

- Receipt of share capital amount in EEFC Account amounting to Rs. 5,42,85,000 and Period of contravention is 8 days approximately

- Delay in reporting the receipt of consideration towards issue of shares for Rs. 9,44,55,900 and period of delay is one month

- Delay in filing of Form FC-GPR beyond statutory time line of 30 days for Rs. 9,73,28,065 and period of delay is one month to five months

Compounding penalty

Compounding penalty of Rs. 3,48,717 was levied.

Comments:

- The regulation governing EEFC Account has not been changed and hence, it is not permissible to accept share capital amount in EEFC Account.

C. Principal PNB Asset Management Co Pvt Limited

Date of Order: 16th April, 2018

Regulation: FEMA 20/RB-2000

Issue: Downstream investment by foreign owned Indian company in non-permissible FDI sector

Facts

- Applicant is an Asset Management Company and registered under SEBI (Mutual Fund) Regulations, 1996.
- Applicant is a joint venture between Principal Financial Group (Mauritius) Limited (PFGM) and Punjab National Bank (PNB).
- Applicant made downstream investment in MF Utilities India Private Limited (MFU) under the Automatic Route. MFU was promoted by Mutual Fund Industry under the aegis of Association of Mutual Funds of India as a cooperative model with all participating AMCs becoming equal shareholders in MFU.
- MFU was initially incorporated to develop and own a trade reporting cum aggregating software for mutual funds and distributors.
- Later MFU sought registration as Cat-II Registrar to an Issue under SEBI (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 which is classified as 'Other Financial Services' under FEMA.
- Registrar services do not fall under the list of activities permitted under the Automatic Route as per FEMA 20/2000 and accordingly required prior approval.

- Applicant applied for post facto approval to Govt. Approval was granted subject to Applicant approaching RBI for compounding indirect foreign investment in MFU by Applicant without prior Govt. approval.

Regulatory Provisions:

- Erstwhile FEMA 20/2000² did not cover Registrar services as "Other Financial Services".

Contravention

- Downstream investment by foreign owned Indian company was not allowed under the Automatic Route in violation of FEMA 20/2000-RB.

2 Para 2(1) of Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 read with Sl.No.F.8 of Annexure B to Schedule 1.

Compounding penalty

Compounding penalty of Rs.53,000 was levied.

Comments:

Applicant made downstream investment in MFU on 30th April, 2014. Business Activity of MFU as on 30th April, 2014 was to develop and maintain trade-reporting cum aggregating software for mutual funds and distributors. Downstream investment in this sector was permissible under the automatic route of FEMA and hence no Govt approval was required at the time of downstream investment into MFU.

Later, on 29th December, 2014, MFU sought registration as Cat – II Registrar to an Issue under SEBI (Registrars to an Issue and Share Transfer Agents) Regulations, 1993.

Investment / Downstream Investment under this business activity was not permitted under the automatic route.

Thus, even though at the time of downstream investment by Applicant, no Government approval was required, a change in business activity of MFU (in a sector falling under the Approval Route) post the downstream investment called for Government Approval as well as compounding.

To sum up, once an FDI investment / downstream investment is made in an Indian Company under the automatic route, any change in business activity by the Indian Company into a sector which falls under the approval route requires Government Approval.

Overseas Direct Investment (ODI) compounding orders

D. J K Enviro-Tech Limited

Date of Order: 9th May, 2018

Regulation: FEMA 120/2004 – Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (FEMA 120/2004)

Issue: Transfer of shares of foreign WOS before completion of 1 year

Facts

- Applicant acquired equity in an overseas company, Habras International (Singapore) Pte Ltd, based out of Singapore by making remittance of USD 1000 on 26th February 2016.

- Subsequently, on 10th June 2016, remittance of USD 25,000 was made towards equity of Singapore company.

- Applicant sold its shares in Singapore company to its holding company based in India, i.e. J K Paper Limited on 6th February 2017.

- Hence, shares of foreign company were transferred before period of 1 year from date of its incorporation.

Regulatory provisions:

- Regulation 16(1)(v) of FEMA 120/2004 requires that shares of overseas entity to can be sold only after expiry of 1 year from date of initial investment under the automatic route

Contravention:

- Transfer of shares of foreign company before completion of 1 year since the date of original investment.

- The period of contravention is being taken as around 9 months (less than one year) - from the date of disinvestment till the date of submission of compounding application

Compounding penalty:

- Compounding penalty of Rs. 58,768 was levied.

Comments:

- Indian entities need to take care in divesting their stake in overseas companies before expiry of one year as the same is not covered under the Automatic Route of existing FEMA regulations.

E. Dynemic Products Limited

Date of Order: 18th May, 2018

Regulation: FEMA 120/2004

Issue: Investment in foreign WOS through cash, disinvestment without obtaining valuation report and disinvestment proceeds received in cash & physical asset

Facts

- Applicant set up a WOS in USA under the ODI route by making remittance and UIN was accordingly allotted.
- Subsequently, Applicant purchased foreign currency of USD 4,500 and handed it over to employee based in USA as share capital of WOS.
- The above amount was used as pre-incorporation expenses of WOS and were treated as loan given by Applicant to its WOS.
- Subsequently, WOS was liquidated resulting into major write off of loan and equity investment of WOS.
- Disinvestment was undertaken without obtaining valuation report and disinvestment proceeds were received in the form of cash and physical asset (laptop).

Regulatory provisions & contravention:

Regulatory Provisions	Nature of contravention	Time period
Regulation 6(3) of FEMA 120	Investing in WOS by way of traveller's cheque and cash	More than 11 years

Regulation 6(2)(vi) of FEMA 120	Investment in WOS without filing Form ODI	11 years 1 month and 10 years and 10 month
Regulation 16 of FEMA 120	Receipt of cash and physical asset as disinvestment proceeds	More than 8 years
Regulation 16(1)(iii) of FEMA 120	Disinvestment of WOS without obtaining valuation report	8 years 1 month

Compounding penalty:

- In view of relatively small amount and other *bonafides* of transaction, compounding was permitted. Compounding penalty of Rs. 2.07,772 was levied.

Comments:

- Indian companies to ensure that all ODI investment as well as disinvestment proceeds are routed through banking channels and not through cash.
- In the instant case, in view of small amount and other bonafides compounding application was permitted by RBI.

F. Kodiak Networks India Private Limited

Date of Order: 13th April, 2018

Regulation: FEMA 120/2004

Issue: Non-filing of annual return by Indian Company in relation to ESOPs allotted by the foreign parent company to employees of Indian company

Facts

- Applicant, an Indian company is a wholly owned subsidiary of Kodiak Networks Inc, USA.
- Kodiak Networks Inc, USA had formulated "Kodiak Networks Inc; 2003 Indian Employee stock option Plan (ESOP)".

- Pursuant to the Plan, ten employees including directors of the applicant company were granted stock options between 2005 and 2006.

- However, the applicant company did not file any annual return as per Regulation 22(2)(ii) of FEMA 120/ RB-2004.

- The applicant company has filed/ reported the annual return for the year 2005 and 2006 contained the ESOP transactions in the online OID portal through AD Bank 21st August, 2017.

- The total amount of contravention is USD 6184.36 (INR 2,73,787.80) and the period of contravention includes eleven year eight months approximately.

Regulatory Provisions:

- Regulation 22(2)(ii) of FEMA 120 /2004 requires Indian company to file annual return pertaining to ESOP transactions of overseas company allotted to employees of Indian Company.

Contravention:

- Non-filing of annual return pertaining to ESOP allotted by foreign parent company to employees of Indian company.

Compounding penalty:

Compounding penalty of Rs.21,667 was levied.

Comments:

- All Indian companies, which are direct or indirect subsidiaries of multi-national group to ensure that ESOPs allotted to their employees by foreign holding companies are reported to RBI by filing Annual Return every year as per existing FEMA regulations.

G. RJ Corp Limited

Date of Order: 24th April, 2018

Regulation: FEMA 120/2004

Issue: Disinvestment of stake in overseas JV when receivables were still outstanding

Facts

- The Applicant, an Indian company made an outward remittance of AUD 4,150,100 (to the overseas JV in Australia viz South Yarra Landholdings Pty. Ltd., under the automatic route during the period 2011-2013. Out of the aforesaid remittance, AUD 100 was towards equity and balance AUD 41,50,000 was given as loan. In addition, Applicant also provided guarantee of AUD 75,00,000 resulting in overall financial commitment of AUD 11,650,100.

- Interest of AUD 602,885 was due to be received by Applicant on 30th June 2015. Said was received during the period from 20th October, 2015 to 13th April, 2016.

- Whilst part of the interest was outstanding, applicant disinvested its stake in the JV on 30th October, 2015 to a foreign party for AUD 460,000.

Regulatory Provisions:

- Regulation 15(ii) of FEMA 120/2004 - Receipt of all dues from overseas JV within 60 days.

- Regulation 16(1)(iv) of FEMA 120/2004 – Disinvestment in overseas JV can only be made when no dues are outstanding from overseas JV or WOS.

Contravention

- Non-receipt of dues receivable from foreign entity within 60 days -Amount of contravention: Rs. 2,96,63,434 and period of contravention ranges from 3 months to 6 months approximately.

- Disinvestment undertaken even when dues from the JV or WOS were outstanding. Amount of contravention: Rs. 2,12,38,200 and period of contravention is six months approximately.

Compounding penalty

Compounding penalty of Rs.3,54,508 was levied.

- Appropriate care needs to be taken by Indian entities prior to divesting their stake in overseas companies to ensure that there are no receivables outstanding from such companies prior to their divestment.

H. Jindal Futures Private Limited

Date of Order: 24th April, 2018

Regulation: FEMA 120/2004

Issue: ODI in International Financial Service Centre (IFSC), GIFT City, without filing of Form ODI

- The Applicant, an Indian company was incorporated on 28th March 2012. It is engaged in carrying on the business of brokers in shares, stocks, debentures, currency futures, bonds etc.- On 15th December, 2016, the applicant set-up a wholly owned subsidiary (WOS), namely Jindal IFSC Private Limited, in International Finances Services Centre (IFSC), GIFT City, Gujarat.

- On 18.01.2017, the Applicant transferred USD 1,60,000 (INR 1,08,74,400) to the WOS, without submitting the Form ODI- Part I within the designated time period.

- Applicant did not, earn net profit during the preceding three financial years from the financial services activities.

- The post-facto approval was granted and UIN was allotted on 04.10.2017.

Regulatory Provisions:

- Regulation 6(2)(vi) of FEMA 120/2004 –ODI can only be undertaken by filing Form ODI.

- Regulation 7(i) of FEMA120/2004– ODI by companies engaged in financial services can be made only if Indian party has earned net profit during preceding three financial years from said financial service activities.

Contravention:

- Applicant made ODI without filing Form ODI.

- Applicant made ODI investments in financial services sector even though it incurred losses in past three financial years.

- The amount of contravention is Rs. 1,08,74,400 (i.e. value of investment in WOS) and the period of contravention is ten months approximately.

Compounding penalty

Compounding penalty of Rs.2,08,744 was levied.

Comments:

- GIFT SEZ in Gandhinagar, Gujarat has been designated as International Financial Services Centre.

- Under the FEMA 339/2015-RB - Foreign Exchange Management (International Financial Service Centre) Regulations, 2015 dated 2nd March 2015, any financial institution or branch of financial institution set up in IFSC would be treated as person resident outside India. Financial institution set up in IFSC can conduct business in foreign currency with resident and non-residents.

- Since, regulations consider financial institution set up in IFSC as person resident outside India, provisions of ODI regulations needs to be complied with. Accordingly, care needs to be taken by Indian companies setting up establishment in IFSC to comply with ODI regulations.

I. Sumanth Ramanujam

Date of Order: 17th May, 2018

Regulation: FEMA 120/2004

Issue: Investment in an overseas company under LRS route by an individual

Facts

- Applicant an Indian resident individual remitted following amount to an overseas joint venture company, Vikasa Pte Ltd based in Singapore under the LRS route.

Purpose of remittance	Date	Amount (in SGD)	Amount (in INR)	No. of equity shares	Scheme of remittance	Date of receipt of share certificate
Share capital of overseas company	19 th Oct 2007	116,800	Rs.31,59,440	116,800	LRS route	26 th Nov 2007

- The overseas JV company was an investment holding company and not operating company.

- Further, above investments were reported to RBI only on 5th October 2017.

- Applicant's father had also made remittances to above overseas JV and subsequently, gifted his 116,800 shares to Applicant.

- Applicant subsequently, sold his entire shareholding (including shares received as gift from his father) to another Indian company without obtaining either UIN or prior approval of RBI.
- The divestment of shares was reported to RBI only on 18th December 2017. There was also delay in filing of Form APR.

Regulatory Provisions:

- Regulation 5(1) of FEMA 120/2004 - ODI under LRS was not permitted in 2007 and was permitted only after introduction of Regulation 20A with effect from 5th August 2013.
- Regulation 3 of FEMA120/2004– Transfer of overseas JV's shares to Indian company where holding of shares per se was not permissible.
- Para A (6) of Schedule V read with Regulation 20A of FEMA 120/2004 – Overseas JV only has to be an operating entity.
- Para D (1) of Schedule V read with Regulation 20A of FEMA 120/2004 – Filing of Form ODI for all overseas investments
- Para D (4) of Schedule V read with Regulation 20A of FEMA 120/2004– Disinvestment of stake to be reported in Form ODI.
- Regulation 15(iii) of FEMA 120/2004 – Non-filing of Annual Performance Report.

Contravention

Regulation	Nature of contravention	Time period	Amount (in INR)
Regulation 5(1) of FEMA 120	Investing in overseas JV by an individual under LRS route was not permitted till 5 th August 2013	5 years and 10 months	31,59,440
Regulation 3 of FEMA 120	Transfer of shares of overseas JV to Indian company when earlier holding of shares was per se not permissible	Approx 1 year	20,57,19,358
Para A(6) of Schedule V read with Regulation 20A	Overseas JV was an investing company which is not permissible	3 years and 8 months	31,59,440
Para D(1) of Schedule V read with Regulation 20A	Non-filing of Form ODI for investing in overseas JV	4 years and 2 months	31,59,440

Para D(4) of Schedule V read with Regulation 20A	Divestment stake not reported by filing Form ODI	8 months	20,57,19,358
Regulation 15(iii) of FEMA 120	Non-filing of Form APR	9 years	Not applicable

Compounding penalty

Based on above facts of the case, RBI used an interesting formula to determine compounding penalty. RBI computed proportionate gain to neutralise undue gains derived by applicant from date of investment (19th October 2007) upto the date from investment in shares under LRS route was permissible (5th August 2013). Said proportionate gain was levied as penalty. Following formula was adopted by RBI.

(A) Gain assuming 30% CAGR

Sr No	Particulars	Amount (in INR)
a)	Assuming 30% CAGR from date of investment upto 5 th August 2013 (I)	1,45,84,779
b)	Cost of investment in shares on 19 Oct 2007 (II)	(31,59,440)
c)	Gain on investment assuming 30% CAGR (III) = (I) – (II)	1,14,25,339

(B) Actual gains earned by Applicant

Sr No	Particulars	Amount (in INR)
a)	Sale proceeds received from Indian company upon divestment of shares of overseas JV in March 2017 (IV)	20,57,19,358
b)	Less: Cost of investment in shares on 19 th Oct 2007 (V)	(31,59,440)

Sr No	Particulars	Amount (in INR)
c)	Actual gain on investment in overseas JV for the period 19 th Oct 2007 to March 2017 (VI) = (IV) – (V)	20,25,59,918
d)	Proportionate gain for period from 19 th Oct 2007 to 5 th Aug 2013 (VII) = (VI) x 2117 days / 3449 days	12,43,31,501

(C) Computation of compounding penalty

Sr No	Particulars	Amount (in INR)
e)	Actual proportionate gain for period 19 th Oct 2007 to 5 th Aug 2013 (VII)	12,43,31,501
f)	Less: Gain on investment assuming 30% CAGR (III)	(1,14,25,339)
g)	Undue gains earned by Applicant (VIII) = (VII) – (III)	11,29,06,162
h)	Add: Penalty as per computation matrix	14,09,946
i)	Total Compounding Penalty levied by RBI	11,43,16,108

Accordingly, RBI for the purpose of neutralising impact of this undue gain levied compounding penalty of Rs.11,43,16,108.

Comments

- Investment in shares under LRS was not permitted in 2007 and was permitted only after introduction of Regulation 20A with effect from 5th August 2013. Accordingly, investment in shares prior to 5th August 2013 amounts to contravention of LRS regulations.

- In the instant case, out of total gains of Rs. 20,25,59,918 accrued to the individual on account of his investment in overseas company, RBI levied compounding penalty of Rs. 11,43,16,108. Thus, approximately 56% of gains earned by individual was recovered by RBI by way of levying compounding penalty as investment was not in accordance in FEMA regulations existing at the relevant point of time when investment was made. In computing compounding fees, RBI has not considered quantum of income tax which is likely to be paid by Applicant.

- Interestingly, in facts of the case, shares divested by Applicant consists of two parts (i) ODI investment of Rs. 31,59,440 made by Applicant himself (ii) ODI investment of similar amount received by Applicant as gift from his father. RBI while considering 30% CAGR on investment made by Applicant has considered cost of Rs. 31,59,440 as basis and not considered cost of investment made by father which was gifted to Applicant.

- In addition to above, separate compounding penalty was levied in hands of father³ and mother⁴ of Applicant. In case of father, since shares were gifted to Applicant and were not subject matter of sale by father, cost of investment in shares Rs. 31,59,440 was taken as base and amount of Rs. 3,25,239 was levied as compounding penalty. However, shares held by mother of applicant was subject matter of sale and consideration of Rs 10,28,59,679 was received. On identical reasoning and calculations, compounding penalty of Rs 4,97,59,485 was levied in hands of mother.

³ CA No 4593/2017; In Re R. Ramanujam

⁴ CA No 4594/2017; In Re Prema Ramanujam

ECB related compounding orders

J. Surbana International Consultants (India) Private Limited (SICPL)

Date of Order: 25th April, 2018

Regulation: FEMA3/2000-RB dated 3rd May, 2000 – Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations 2000 (FEMA 3/2000)

Issue: Outstanding payable to group companies deemed to be ECB & ECB drawn by an ineligible borrower

Facts

- The Applicant, an Indian company is engaged in the business of providing architectural design, master planning and project consultancy services to various clients in India. It is a wholly owned subsidiary of Cesma International Pte Ltd, Singapore (Cesma Singapore).

- During the course of rendering the services, the overseas group entities incurred expenditure amounting to SGD 64,27,869 (Rs.31,96,08,020) primarily on account of travel expenses, hotel expenses, consultancy services etc., on behalf of SICPL which were cross charged to SICPL on cost to cost basis.
- SICPL could not pay the above dues to the overseas group companies due to financial hardships and liquidity concerns and these dues remained outstanding for a period exceeding three years.
- Hence, above outstanding dues were deemed to be ECB.
- RBI granted approval for conversion of outstanding payables to the overseas group entities into equity subject to the applicant obtaining lender's consent, complying with the extant FDI policy / FEMA regulations specified therein and opting for compounding of above contraventions.
- The applicant also availed an interest free ECB amounting to SGD 500,000 (Rs.1,37,21,200) on 15th March, 2005 for modernisation/expansion of its existing unit from its holding company i.e. Cesma Singapore. Loan registration number (LRN) was issued by RBI on 31st May 2005. However, funds amounting to SGD 170,000 (Rs.43,73,265) were drawn prior to obtaining LRN number.

Regulatory Provisions:

- Paragraph 1(i), 1(iii), 1(iv), 1(xi), 1(xii) of schedule – I to FEMA3/2000

Contravention

Regulation Reference	Nature of contravention	Amount	Time period of contravention
Paragraph 1(i) of Schedule – I to FEMA3/2000	Applicant engaged in consultancy services was not permitted to undertake ECB under automatic route and accordingly is not eligible borrower.	SGD 69,27,869 (Rs.33,33,29,220)	From 2 years to 9 years
Paragraph 1(iii) of Schedule – I to FEMA3/2000	Overseas group entities, to whom expenditure payable was outstanding for more than 3 years were not eligible lenders for ECB.	SGD 64,27,869 (Rs.31,96,08,020)	From 2 years to 9 years
Paragraph 1(iv) of Schedule – I to FEMA3/2000	Reimbursement of expenses to group companies is not permitted end use for ECB under the Automatic Route.	SGD 64,27,869 (Rs.31,96,08,020)	From 2 years to 9 years
Paragraph 1(xi) of Schedule – I to FEMA3/2000	ECB had been drawn down before after obtaining Loan Registration Number (LRN) from RBI.	SGD 65,97,869 (Rs.32,39,81,285)	From 2 years to 9 years

Paragraph 1(xii) of Schedule – I to FEMA3/2000	No reporting procedures were followed in respect of ECB availed.	SGD 65,97,869 (Rs.32,39,81,285)	From 2 years to 9 years
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Compounding penalty

Based on above facts of the case, compounding penalty of Rs. 24,55,213 was levied on the Applicant for above mentioned contravention.

Comments:

- Indian entities engaged in sectors which prohibits raising of ECB needs to be careful in dealing with group companies.

- In instant case, dues outstanding to group companies beyond a period of 3 years were categorised as deemed ECB inviting compounding consequences.

Compounding orders on other ancillary regulations

K. Arvind Singh Mewar

Date of Order: 6th April, 2018

Regulation: FEMA3/2000-RB dated 3rd May, 2000 – Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations 2000 (FEMA 3/2000)

FEMA 9/2000-RB dated 3rd May, 2000 - Foreign Exchange Management (Realisation, Repatriation

and Surrender of Foreign Exchange) Regulations, 2000 (FEMA 9/2000)

FEMA10/2000-RB dated 3rd May, 2000 – (Foreign Currency Accounts by a person resident in India) Regulations, 2000 (FEMA 10/2000)

Issue: Opening of foreign currency account by an individual in violation of regulations, giving loan from

foreign currency account and non repatriation of income from foreign currency account

Facts

- The Applicant, an Indian resident individual during his visit to UK opened bank accounts with HSBC, UK and had undertaken following transactions (table on next page):

- RBI while advising the applicant of the above contraventions, granted post facto approval subject to the applicant applying for compounding of the above contraventions, repayment of the balance amount of loan extended to the overseas company and repatriation of the balances in the foreign currency accounts that are in excess of the funds sent as outward remittances under the LRS.

- The repayment towards balance amount of loan amounting to GBP 86,563.80 was received by the applicant on 18th January, 2018 as certified by the Chartered Accountant.

Account No.	Mode of transferring funds	Date of opening	Amount in foreign currency	Amount (in INR)
22615576 (parent account)	Cash deposit	9 th July, 2008	GBP 5000	Rs.4,25,100
22615584	Transfer from parent account	9 th July, 2008	Not mentioned in order	Not mentioned in order
84648942	Transfer from parent account	3 rd August, 2011	Not mentioned in order	Not mentioned in order
All above three bank accounts	Transfer from India under LRS route	November 2008 to October 2014	GBP 154,500	Rs.1,33,91,218.85
Parent account	Giving loan to non-resident company registered in UK by way of incurring expenses on behalf of UK company	29 th May, 2013 to 30 th June, 2017	GBP 76,563.80	Rs.72,49,355.72
Parent account	Giving loan to non-resident company registered in UK	28 th November, 2015 to 9 th February, 2017	GBP 80,000	Rs.76,49,117
Parent account	Repayment of loan by UK company	FY 2016-17	GBP 70,000	Rs.63,53,324
All above three bank accounts	Deposit of fees as senior advisor on JCB Indian Advisory Council	FY 2010 to FY 2018	USD 800,000	Rs.4,62,75,732
All above three bank accounts	Remittance to India	January 2018	USD 200,000	Rs.1,31,48,730.40

Regulatory Provisions:

- Regulation 5(1) of FEMA3/2000 read with FEMA 120/2004– Loan by resident individual in foreign currency is not allowed.

- Regulation 3 of FEMA 9/2000– Foreign currency due to person resident in India has to be repatriated to India as soon as possible.

- Regulation 7(6) of FEMA10/2000- A person resident in India who has gone abroad for studies or who is on a visit to a foreign country may open, hold and maintain a Foreign Currency Account with a bank outside India during his stay outside India, provided that on his return to India, the balance in the account is repatriated to India.

Contravention

Regulation Reference	Nature of contravention	Amount	Time period of contravention
Regulation 5(1) of FEMA 3/2000	An individual is not eligible to give loan in foreign currency	GBP 156,563.80 (Rs.1,48,98,472,72)	Four years eight months
Regulation 3 of FEMA 9/2000	An Indian resident to whom any amount of foreign exchange is due or has accrued shall take all reasonable steps to realise and repatriate to India such foreign exchange	USD 600,000 (Rs.3,31,27,001.60)	Two years to seven years
Regulation 7(6) of FEMA 10/2000	A person resident in India which has opened a foreign currency account while on visit or stay outside India has to repatriate funds immediately on his return to India	GBP 5000 (Rs.4,25,100)	Nine years seven months

Compounding penalty

Compounding penalty of Rs.1,54,289 was levied for contravention relating to provision of loan in foreign currency.

Further, compounding penalty of Rs. 3,32,777 was levied for contravention relating to opening of foreign currency account and non-repatriation of balance foreign exchange in India.

Comments:

- Extreme care needs to be taken in relation to foreign bank account opened and maintained by Indian resident individual.

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