

CHAPTER 2

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

Question 1

Explain the meaning of the term “Current Account Transaction” and the right of a citizen to obtain Foreign Exchange under the Foreign Exchange Management Act, 1999. (May, 2001)

Answer

The term “current account transaction” is defined in Section 2(j) of Foreign Exchange Management Act, 1999. It means a transaction other than a capital account transaction and includes:

- (i) payments due in connection with foreign trade in the ordinary course of business.
- (ii) payments due as interest on loans and as net income from investments.
- (iii) remittances for living expenses of parents, spouse and children residing abroad and
- (iv) expenses in connection with foreign travel education and medical care of parents, spouse and children.

According to Section 5 of FEMA, 1999 any citizen may sell or draw foreign exchange to or from an authorised person if such sale or drawl is a current account transaction. Provided that the Central Government may in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

Further, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction subject to the provisions of section 6(2).

Question 2

Mr. X, an Indian national has failed to realise and repatriate foreign exchange worth more than Rs.2 crores. Mr. X having realised that he had committed a contravention of the provisions of the Foreign Exchange Management Act, 1999, desires to compound the said offence. Advise Mr. X. (November, 2001)

Answer

Because of his failure to realise and repatriate foreign exchange, Mr. X has contravened the provisions of section 8 of FEMA and he is liable to the penalties leviable under Section 13, followed by adjudication proceedings. Section 15 of FEMA permits the offending party to

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compound the contravention within 180 days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank of India as may be authorised in this behalf by the Central Government in such manner as may be prescribed. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Where a contravention has been compounded, no proceeding can continue or be initiated against the person in respect of the contravention so compounded.

Question 3

Mr. G., an Indian national desires to obtain Foreign Exchange on current account transactions for the following purposes:

- (i) Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company.
- (ii) Remittance of hiring charges of transponder.
- (iii) Remittance for use of trade mark in India.

Advise G whether he can obtain Foreign Exchange and, if so, under what conditions?

(November, 2001)

Answer

Under Section 5 of Foreign Exchange Management Act, 1999, certain rules have been framed for drawal of foreign exchange on current account. According to the said rules, drawal of foreign exchange for certain transactions is prohibited. In respect of certain transactions drawal of foreign exchange is permissible with the prior approval of Central Government. In respect of some of the transaction, prior permission of RBI is sufficient for drawal of foreign exchange.

- (i) In respect of item No.1 i.e. Payment of Commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited.
- (ii) Drawal of foreign exchange for remittance of hiring charges of transponder, can be made with the prior approval of the Central Government.
- (iii) So far as remittance for use of Trade Mark in India is concerned, the necessary foreign exchange can be obtained with the prior permission of the Reserve Bank of India.

In the case of (ii) & (iii) above, approval of concerned authority is not required if the payment is made out of funds held in Resident Foreign Currency (RFC) Account or Exchange Earner's Foreign Currency (EEFC) Account of the remitter. Further foreign Exchange can be drawn only from an authorised person.

Question 4

- (a) According to Foreign Exchange Management Act, 1999, a person resident in India shall take all reasonable steps to repatriate to India any amount of foreign exchange earned and accrued to him. What is meant by the expression 'Repatriate to India'? State the

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cases where foreign exchange can be held or need not be repatriated to India by a resident in India.

- (b) Explain the meaning of the term “Adjudicating Authority” under the Foreign Exchange Management Act, 1999, the powers available with the said authority to pass orders imposing penalty and enforce the same in relation to violation of any provision of FEMA by Mr. Dubious, a resident in India.
- (c) (i) How will you determine whether a particular business unit like a factory or office is a ‘person resident in India’ under Foreign Exchange Management Act, 1999?
- (ii) ‘Printex Computer’ is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under FEMA, 1999 of printer units in Pune and that of Dubai branch? (May, 2002)

Answer

- (a) The word “repatriate to India” is defined in section 2(y) of the FEMA, Act 1999. ‘Repatriate to India’ means the realized foreign exchange should be sold to an authorised person in India in exchange for rupees. It also includes the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank and includes use of the realised amount for discharge of a debts or liability denominated in foreign exchange.

Exemption from holding/repatriation.

Section 4 of the FEMA, 1999 prohibits holding of foreign exchange by a resident in India. Section 8 requires that foreign exchange earned by a resident in India is realised and repatriated to India.

However, in the following cases, the foreign exchange can be held or need not be repatriated to India:-

1. Possession of foreign currency – possession of foreign currency or foreign coins upto limit prescribed by RBI is permitted (section 9(a))
2. Foreign currency account – Foreign currency account can be held and operated by such persons and within such limits as specified by RBI (Section 9(b))
3. Foreign currency acquired before July 1947 – Foreign exchange acquired or received before 8th July 1947 or income arising or accruing thereon can be held outside India (section 9(c))
4. Gift or inheritance – If such foreign exchange is acquired as a gift or inheritance, that exchange and income arising therefrom can be held as foreign exchange in India or held abroad and need not be repatriated (Section 9(d)).
5. Foreign exchange acquired abroad – Foreign exchange acquired from employment, business, trade, vocation, services honorarium, gifts, inheritance, or any other

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legitimate means can be held as foreign exchange in India or it need not be repatriated to India subject to limits specified by RBI (Section 9(e))

6. Any other receipts specified by RBI (Section 9(f))

(b) Adjudicating authority

According to Section 2(a) of FEMA, 1999, 'Adjudicating Authority' means an officer authorised under section 16(i)

Power of adjudicating authority: Persons committing an offence under FEMA are liable to penalty. An adjudicating authority appointed by the Central Government under FEMA can impose any penalty for violation of any provision of FEMA or contravention of any rule, regulation, directions or orders issued under the powers conferred by the Act. Their jurisdiction will be prescribed by the Central Government (section 16(1) & (2)). The Adjudicating Authority can hold inquiry only on receiving a complaint from an authorised officer (Section 16(3)).

They have to follow principles of natural justice by giving opportunity to Mr. Dubious of making representation. The adjudicating authority should endeavor to dispose off the complaint within one year (Section 16(6))

The adjudicating authority can impose penalty upto thrice the sum involved in such contravention where the amount is quantifiable. If the amount is not quantifiable, penalty upto Rs. 2 lakhs can be imposed. If contravention is of continuing nature, further penalty upto Rs 5,000 per day during which the default continues can be imposed [Section 13(i)].

The Adjudicating Authority adjudicating the contravention can also order confiscation of any currency, security or any other money or property in respect of which the contravention has taken place. He can also direct that foreign exchange holdings of any person committing the contravention shall be brought back to India or retained outside as per directions (Section 13(2)).

Enforcement of orders of adjudicating authority.

Person on whom penalty is imposed is required to make payment within 90 days of receipt of notice. If such payment is not made, he is liable to civil imprisonment (Section 14(i)). Such civil imprisonment can be upto 6 months, if demand is for less than Rs. 1 crore. If demand exceeds Rs. 1 crore, civil imprisonment can be upto 3 years. If he pays the amount, he shall be released. Order for arrest and detention cannot be made unless a show cause notice is issued to the defaulter. However, arrest can be made without show cause notice, if adjudicating authority is satisfied (a) that the defaulter has dishonestly transferred, concealed or removed his property or he is refusing or neglecting to pay even if he has means to pay [Section 14(2) (b)] and (b) he is likely to abscond the local limits [Section 14(3)].

If a person to whom show cause notice is issued does not appear before Adjudicating authority, warrant of arrest can be issued [Section 14 (4)].

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(c) (i) Person resident in India

Section 2 of FEMA, 1999 defines the term "person resident in India". According to Section 2 (iii), all business units in India will be "resident in India" even though these units are owned or controlled by a person resident outside India.

Similarly all business units outside India will be 'resident in India' provided the business units are either owned or controlled by a person resident in India [Section 2(v) (iv)]. It is necessary to determine the residential status of the person who owns or controls the business unit.

- (ii) Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)] Section 2 (u) defines 'person' under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by Print unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

Question 5

- (a) Mr. Ram had resided in India during the Financial Year 1999-2000 for less than 183 days. He again came to India on 1st May, 2000 for Higher studies and business and stayed upto 15th July, 2001. State under the Foreign Exchange Management Act, 1999.
- (i) If Mr. Ram can be considered 'person Resident in India' during the Financial year 2000-2001 and
- (ii) Is citizenship relevant for determining such a status?
- (b) Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw Foreign Exchange. Specify.
- (i) Can Mr. Ramesh draw any Foreign Exchange for his journey?
- (ii) What are the purposes for which Foreign Exchange drawal is not allowed for Current Account Transaction? (November, 2002)

Answer

- (a) (i) No. Mr. Ram cannot be considered 'Person resident in India' during the financial year 2000-2001 notwithstanding the purpose or duration of his stay in India during

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2000-2001. An individual has to be present in India for more than 182 days in the preceding financial year. Mr. Ram does not satisfy this condition for the financial year 2000-2001.

- (ii) No. Citizenship is no more relevant for determining the status.
- (b) (i) No. According to the rules, drawl of foreign exchange is not allowed for travel to Nepal or Bhutan.
- (ii) Following are the transactions (current account) for which drawl of foreign exchange is prohibited.
 1. Remittance of interest income on funds held in Nonresident Special Rupee (NRSR) Account Scheme.
 2. Transactions with a person resident in Nepal or Bhutan (unless specifically exempted by RBI by general/special order).
 3. Remittance out of lottery winnings.
 4. Remittance of income from racing/ riding etc. or any other hobby.
 5. Remittance for purchase of lottery tickets, banned/ prescribed magazines, football, pools etc.
 6. Payment of commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries aboard of Indian Companies.
 7. Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
 8. Payment of commission on export under Rupee State Credit Route.
 9. Payment related to 'Call Back Services' of telephones.

Question 6

- (a) Examine whether the following branches can be considered as a 'Person resident in India' under Foreign Exchange Management Act, 1999:
 - (i) ABC Limited, a company incorporated in India established a branch at London on 1st January, 2003.
 - (ii) M/s XYZ, a foreign company, established a branch at New Delhi on 1st January, 2003. The branch at New Delhi controls a branch at Colombo.
- (b) Mr. Ramesh is an exporter of goods and services. Explain briefly his duties under Foreign Exchange Management Act, 1999 with regard to the following:
 - (i) Furnishing of information relating to such exports.
 - (ii) Realisation and repatriation of foreign exchange on such exports. (May, 2003)

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Answer

(a) Person resident in India (Foreign Exchange Management Act, 1999):

- (i) Any person or body corporate registered or incorporated body in India is a resident in India [section 2(v)(ii)]. 'Person' includes a company [section 2(u)]. An office, branches or agency outside India owned or controlled by a person resident in India is a person resident in India. [Section 2(v)(iv)].

In view of the above provisions in FEMA, 1999 London branch established by ABC Ltd, a company incorporated in India, is a 'person resident in India' under the Act from the date of establishment i.e. 1st January, 2003.

- (ii) According to Section 2(v)(iii) of FEMA, 1999 an office, branch or agency in India owned or controlled by a person resident outside India is a person resident in India'. Only a body corporate registered or incorporated in India is a 'person resident in India'. According to section 2(w), 'person resident outside India' means a person who is not resident in India. Hence M/s XYZ, foreign company is a 'resident outside India'. But the branch at New Delhi owned by M/s XYZ is a 'resident in India' within the meaning of section 2(v) (iii) from the date of establishment i.e. 1st January, 2003. The branch at Colombo controlled by the branch at New Delhi referred to in the question is a person 'resident in India' within the meaning of section 2(v)(iii) read with section 2(v)(iv).

(b) Duty of every exporter of goods and services under FEMA, 1999:

- (i) **Furnishing of Information:-** Every exporter of goods is required to furnish to RBI or other prescribed authority a declaration containing true and correct material particulars, including the amount representing full export value. If full exportable value is not ascertainable at the time of export due to prevailing market conditions, the exporter shall indicate the amount he expects to receive on sale of goods in a market outside India. The exporter of goods shall also furnish to RBI such other information as may be required by RBI for the purpose of ensuring realization of export proceeds by such exporter [section 7(i)].

RBI can direct any exporter to comply with prescribed requirements to ensure that full export value of the goods or such reduced value of the goods as RBI determines, is received without delay [section 7(2)]. Every exporter of services shall furnish to RBI or other prescribed authority a declaration containing true and correct material particulars in relation to payment of such services [section 7(3)].

- (ii) **Realisation and repatriation of foreign exchange:** Where any amount of foreign exchange is due or has accrued to any resident in India, such person shall take all reasonable steps to realize and repatriate to India the foreign exchange within such period and in such manner as may be specified by RBI (section 8). Mr. Ramesh as an exporter of goods and services must comply with the requirements of section 7 and 8 of FEMA, 1999 and also with the requirements under Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.

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Question 7

Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2002. Mr. Ram purchased a flat at New Delhi for Rs.15 lakhs in September, 2003. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2003 for Rs.15 lakhs. Mr. Gopal's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram.

Examine with reference to the provisions of Foreign Exchange Management Act, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible. (November, 2003)

Answer

Capital account transactions

Section 2(e) of Foreign Exchange Management Act, 1999 states that 'capital account transactions' means (a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India (b) a transaction which alters assets or liabilities in India of persons resident outside India and includes transactions referred to in Section 6(3). According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

Purchase of immovable property by Mr. Ram in India is a capital account transaction. It has also been specifically provided in Section 6(3)(i) as a capital account transaction.

Guarantee will be considered as a capital account transaction in the following cases:

- (1) Guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India.
- (2) Guarantee in respect of any liability, debt or other obligation incurred by a person resident outside India.

In this case, Mr. Ram, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India. Hence, it would appear that guarantee by Mr. Ram cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

All capital account transactions are prohibited unless specifically permitted. RBI is empowered to issue regulations in this regard [Section 6(3)]. Permissible capital account transactions by persons resident outside India are given in Schedule II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. According to the said regulations both the purchase of immovable property by Mr. Ram and guarantee by Mr. Ram are permissible.

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Question 8

- (a) Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:
- (i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
 - (ii) US Dollar 1,00,000 for sending a cultural troupe on a tour of U.S.A.
 - (iii) US Dollar 50,000 for meeting the expenses of his business tour to Europe.
- Advise him whether he can get Foreign Exchange and if so, under what conditions?
- (b) Explain the restrictions, if any, under Foreign Exchange Management Act, 1999 in respect of the following issue and transfer of shares:
- (i) Issue of Equity Shares of Rs.1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non-repatriation basis. The shares are issued by M/s ABC Knitwear Limited to finance the modernization of its plant.
 - (ii) A Non-resident Indian, who is holding Equity shares in M/s DEF Textiles Limited, proposes to sell some shares to another Non-resident Indian for a consideration of Rs.50 lakhs and also transfer shares of face value of Rs.25 lakhs to a person resident in India by way of Gift.
- (May, 2004)

Answer

- (a) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.
- (i) In respect of item No.(i), i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Sane can not withdraw Foreign Exchange for this purpose.
 - (ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.
 - (iii) The type of payment as envisaged in Item No.(iii) is covered under third Schedule to the Foreign Exchange Management (Current Account Transactions)

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised

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Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

- (b) Issue of equity shares to NRIs and transfer of shares by NRIs are capital account transactions.

RBI may in consultation with the Central Government specify any class or classes of transactions which are permissible (Section 6(2)(a)).

According to Regulation 3(1) of the Foreign Exchange Management (Permissible capital Account Transactions) Regulations, 2000 issued by RBI Investment in India by a person resident outside India is a permissible capital account transactions (Schedule II).

Further RBI is empowered under Section 6(3)(b) to prohibit, restrict or regulate, by regulations, transfer or issue of any security by a person resident outside India. In exercise of these powers RBI issued Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations 2000.

According to Regulation 5(3)(ii) of the said regulations a NRI may purchase shares of an Indian Company which is not engaged in Print Media Sector on non-repatriation basis without any limit (para 2 of Schedule 4). The shares may be issued by the company either by public issue or private placement. The only condition is that the amount of consideration for purchase of shares shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO/NRSR/N&NR account maintained with an authorized dealer or as the case may be with an authorised bank in India (Para 3 of Schedule 4).

Transfer of shares of an Indian Company by a person resident outside India.

Regulation 9(2)(ii) of Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 permits NRI to transfer by way of sale the shares held by him to another NRI. Further according to Regulation 9(2)(iii) a person resident outside India may transfer any security held by him, to a person resident in India by way of gift. There are no restrictions in this regard.

Hence the proposed sale of shares to NRI and transfer to a persons resident in India by way of gift are permissible under FEMA.

Indian company can issue the above shares and record in its books the above transfer (Regulation 4).

Question 9

- (a) (i) Tomco Ltd., a vehicles manufacturing company in India has received an order from a transport company in Italy for supply of 100 Trucks on lease. You are required to state, how the said Tomco Ltd. can accept such an order.
- (ii) Forex Dealers Ltd. is an Authorised Person within the meaning of Foreign Exchange Management Act, 1999. Reserve Bank of India issued certain directions to the said

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Authorised Person to file certain returns, which it failed to file. You are required to state the penal provisions to which the said Authorised Person has exposed itself.

(November, 2004)

- (b) (i) Mr. Sekhar resided for a period of 150 days in India during the Financial year 2003-2004 and thereafter went abroad. He came back to India on 1st April, 2004 as an employee of a business organization. What would be his residential status during the financial year 2004-2005?
- (ii) Mr. Atul, an Indian National desires to obtain Foreign Exchange for the following purposes:
 - (a) Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.
 - (b) US Dollar 10,000 for remitting as commission to his agent in U.S.A. for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. Atul by way of foreign currency inward remittance amounting to US Dollar 1,00,000.

Advise him, if he can get the Foreign Exchange and under what conditions.

(November, 2004)

Answer

- (a) (i) "Export," means the taking out of India to a place outside India any goods (Section 2(1) of Foreign Exchange Management Act, 1999). Hence sending 100 trucks on lease to Italy is an 'export' within the meaning of Section 2(1).

Under provisions of section 7 of the Foreign Exchange Management Act, 1999 rules have been made governing export of goods and services. Regulation 14-A of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 prescribes that no person shall, except with prior permission of the Reserve Bank of India, take or send out by land, sea or air any goods from India to any place outside India on lease or hire or under any arrangement or in any other manner other than sale or disposal of such goods.

Based on the above provisions, it can be concluded that if the company, namely, Tomco Ltd. wants to accept the order for despatching 100 trucks to Italy on lease, it has to take prior permission of the Reserve Bank of India.

- (ii) Section 11(3) of the Foreign Exchange Management Act, 1999 stated that where any Authorised person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person a penalty which may extend to ten thousand rupees and in the case of continuing contraventions with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

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Since as per the facts given in the question, the Authorised person, namely, Forex Dealers Ltd., has failed to file the returns as directed by the Reserve Bank of India. According to the above provisions, it has exposed itself to a penalty which may extend to ten thousand rupees and in the case of continuing contraventions in the nature of failure to file the returns, with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

- (b) (i) According to the provisions of section 2(v) of the Foreign Exchange Management Act, 1999, a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of more than 182 days during the preceding financial year. In the given case, Mr. Sekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2003-2004. Hence he cannot be considered as a "Person Resident in India" during the financial year 2004-2005 irrespective of the purpose or duration of his stay.
- (ii) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, drawal of Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions prior permission of Reserve Bank of India is required.

In respect of item (a), i.e. remittance to Nepal, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Atul cannot withdraw Foreign Exchange for this purpose.

The type of payment as envisaged in item (b) is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for withdrawing foreign Exchange exceeding 5% (five percent) of the inward remittance as commission to agent abroad for sale of commercial plot in India Mr. Atul will require the prior permission of the Reserve Bank of India.

Current Account Transactions have been liberalized by RBI, Foreign Exchange Department with effect from 24.02.2004 vide A.P. (DIR Series) Circular No.76 dated 24.02.2004. Now authorized persons (authorized dealers) are authorized to allow freely such remittances ((i.e.) commission to agents abroad for sale of commercial plots) up to USD 25000 or 5 per cent of inward remittance per transaction, whichever is higher. As the amount to be remitted is only USD 10,000, authorized person (authorized dealer) may be approached for permission.

Question 10

- (i) MKP Limited, an Indian company having its Registered Office at Mumbai, India established a branch at New York U.S.A. on 1st April, 2004.

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- (ii) WIP Ltd., a company incorporated and registered in London established a branch at Chandigarh in India on 1st April, 2004.
- (iii) WIP Ltd.'s Singapore branch which is controlled by its Chandigarh branch (May 2005)

Answer

- (i) As per provisions of section 2(v)(ii) of the Foreign Exchange Management Act, 1999 (FEMA) any person or body corporate registered or incorporated in India is a "Person resident in India". As per section 2(v) of the said Act the term "person" includes a company. Section 2(v)(iv) of the said Act states that an office, branch or agency outside India owned or controlled by a person resident in India is a "Person resident in India".

In the light of the above provisions of FEMA, the residential status of the New York branch of MKP Ltd is that of a "Person resident in India" from the date of its establishment since it is owned by a person, i.e., a company, resident in India.

- (ii) As per provisions of section 2(v)(iii) of the Foreign Exchange Management Act, 1999 (FEMA) an office, branch or agency in India owned or controlled by a person resident outside India is a "Person resident in India". Section 2(w) of the said Act states that a person who is not resident in India is a "Person resident outside India".

On application of the above provisions of FEMA, it can be concluded that WIP Ltd. is a "Person resident outside India" and since it owns a branch in Chandigarh, India, the residential status of the said Chandigarh branch is that of a "Person resident in India" from the date of its establishment.

- (iii) As per provisions of section 2(v)(iv) of the Foreign Exchange Management Act, 1999 (FEMA) an office, branch or agency outside India owned or controlled by a person resident in India is a "Person resident in India". Here, the Singapore branch of WIP Ltd. is controlled by its Chandigarh branch which is a "Person resident in India". Therefore, the residential status of the Singapore branch of WIP Ltd. shall be that of a "Person resident in India".

Question 11

Mr. F, an Indian National desires to obtain foreign exchange for the following purposes:

- (i) Payment of US \$10,000 as commission on exports under Rupee State Credit Route.
- (ii) US \$ 30,000 for a business trip to U.K.
- (iii) Remittance of US \$ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.

Advise him, if he can get the Foreign Exchange and under what condition (May 2005)

Answer

Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per

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these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required:

- (i) In respect of item No. (i), i.e., payment of commission on exports under Rupee State Credit Route, such payment is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000.
- (ii) Foreign Exchange for business trip upto US\$ 25,000 can be obtained by any person. If a person wants to exceed this limit, then prior permission of Reserve Bank of India is required as per Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. In respect of item (ii), since the amount involved is more than US \$ 25,000, Mr. F can obtain the foreign exchange after getting the permission of Reserve Bank of India.
- (iii) The type of payment as envisaged in item No.(iii) is covered under Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for remitting of prize money exceeding US\$ 1,00,000 for sports activity abroad other than International, National or State level body will require the prior permission of the Central Government. (Ministry of Human Resource Development – Department of Youth Affairs and Sports). Since the amount involved in item No. (iii) of the question is more than US\$ 1,00,000 and Mr. F is not an International, National or State level body, he has to obtain the permission of the Central Government before remitting the prize money of US\$ 2,00,000.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

Question 12

- (a) Explain the meaning of “Capital Account Transaction” under the Foreign Exchange Management Act, 1999. State whether there are any restrictions in respect of the following transactions:
 - (i) Drawal of Foreign Exchange for payments due on account of amortisation of loans in ordinary course of business.
 - (ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.
- (b) TKM Exporters of New Delhi are engaged in Export Business. It made certain exports, but failed to realize and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999 (FEMA). Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeals. You are required to advise on the matter. (November 2005)

The Foreign Exchange Management Act, 1999

Answer

- (a) As per provisions of section 2(e) of the Foreign Exchange Management Act, 1999 (FEMA) "Capital Account Transaction" means a transaction which alters (a) the assets and liabilities, including the contingent liabilities, outside India of persons resident in India or (b) the assets and liabilities in India of persons resident outside India.

It also includes the following as stated in section 6(3) of FEMA:

- (i) Transfer or issue of any foreign security by a person resident in India.
- (ii) Transfer or issue of any security by a person resident outside India.
- (iii) Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India.
- (iv) Any borrowing or lending in foreign exchange in whatever form or by whatever name called.
- (v) Any borrowing or lending in India rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India.
- (vi) Deposits between persons resident in India and persons resident outside India.
- (vii) Export, import or holding of currency or currency notes.
- (viii) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India.
- (ix) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.
- (x) Giving a guarantee or surety in respect of any debt, obligation or other liability incurred (a) by a person resident in India and owed to a person resident outside India or (b) by a person resident outside India.

- (i) Amortisation of Loans:

Under provisions of FEMA, 1999 subject to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 as amended by Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2004 all capital account transactions are prohibited unless permitted by proviso to section 6(2) of FEMA. The proviso specifically permits drawal of foreign exchange for payments due on account of amortisation of loans in ordinary course of business. Hence, there is no restriction in FEMA in this regard.

- (ii) Purchase of Shares of Company engaged in Plantation activities:

According to Section 6(2) of FEMA, 1999 the Reserve Bank of India is empowered to specify in consultation with the Central Government, the classes of capital account transactions which are permissible and the limits upto which the foreign exchange shall be admissible for such transactions. Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 completely prohibits

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certain capital account transactions. One such transaction is foreign investment in India in any company, firm or proprietary concern engaged in or proposed to be engaged in agriculture or plantation activities. Hence, purchase by a person resident outside India of shares of a company in India engaged in plantation activities is not permissible.

- (b) Sections 17 and 19 of FEMA, 1999 provide for appeals against orders of Adjudicating Authority. If Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for Foreign Exchange. However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

Appeal to Special Director (Appeals)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under Section 17 within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there were sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass his order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange under section 19 of FEMA within 45 days from the date on which the copy of the order made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the appellant has to deposit the amount of such penalty with the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass a reasoned order.

It may be noted that the Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

Question 13

- (a) State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:
- (i) X, a Film Star, wants to perform alongwith associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.

The Foreign Exchange Management Act, 1999

- (ii) F International Ltd. has purchased the trade mark from a Foreign Company to establish retail business chain in India as a joint venture at a consolidated price of US dollars 500,000 which is to be paid in Foreign currency of that country.
 - (iii) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?
 - (iv) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.
- (b) A French Manufacturing Company desirous of setting up its branch office at Pune, seeks your advice on the objects for which the company may be allowed to set up the desired branch office. Advise the company about the procedure as required under the Foreign Exchange Management Act, 1999 to be followed in this regards (May 2006)

Answer

- (a) Approval to the following transactions under FEMA, 1999:
- (i) Foreign Exchange drawals for cultural tours require prior permission/approval of the Government of India irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the Government of India.
 - (ii) In this case prior permission/approval of RBI is required for purchasing trade mark from a foreign company where purchase consideration is to be paid in foreign currency. Therefore, F International Ltd. needs prior permission of RBI.
 - (iii) Remittance in foreign exchange for medical treatment abroad requires prior permission/approval of RBI when the expenditure in foreign currency exceeds the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment. Therefore, R can draw foreign exchange up to the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment and prior permission/approval of RBI is required.
 - (iv) Release of foreign exchange for education abroad is permitted up to US\$ 1,00,000 on self declaration basis. Therefore, L can draw foreign exchange on self declaration basis for pursuing a course in fashion design in Paris.
- (b) Setting up a branch office at Pune by a French company – Objects and the procedure under the FEMA, 1999:
- Since setting up a branch office by a foreign company in India involves foreign exchange, permission of RBI is required. Following are the objects for which RBI permits companies engaged in manufacturing and trading activities abroad to set up Branch Office in India:
1. To represent the parent company/other foreign companies in various matters in India e.g. acting as buying/selling agents in India.
 2. To conduct research work in the area in which the parent company is engaged.

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3. To undertake export and import trading activities.
4. To promote possible technical and financial collaborations between the Indian companies and overseas companies.
5. Rendering professional or consultancy services.
6. Rendering services in information technology and development of software in India.
7. Rendering technical support to the products supplied by the partner/group companies.

Steps / procedure:

1. Foreign company can set up Branch Offices in India after obtaining approval from RBI.
2. The office can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office abroad.
3. Permission to set up such office is initially granted for a period of 3 years and this may be extended from time to time by the Regional Office in whose jurisdiction the office is set up.
4. The representative office will have to file an annual activity certificate etc. from a Chartered Accountant to the concerned Regional Office of the RBI.
5. Application is required to be made in Form FNC-1.

Question 14

Mr. Loma, an Indian National desires to obtain foreign exchange for the following purposes:

- (a) Payment to be made for securing insurance for health from a company abroad.
- (b) Payment of commission on exports under Rupee State Credit Route.
- (c) Gift remittance exceeding US Dollars 10,000.

Advise him whether he can get foreign exchange and if so, under what condition?

(November 2006)

Answer

Under provision of Section 5 of FEMA 1999, certain Rules have been made for drawl of foreign exchange for current account transactions. As per these rules, foreign exchange for some of the current account transaction is prohibited. As regards some other current account transaction foreign exchange can be drawn with prior permission of the Central Government while in case of some other current account transaction, the prior permission of Reserve Bank of India is required.

1. The payment required to be made for securing insurance for health from a company abroad as referred in item 1 can be made after obtaining permission from Central

The Foreign Exchange Management Act, 1999

Government of India, as prescribed in Second Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. Hence Mr. LOMA can draw foreign exchange after obtaining such permission.

2. As regards item no. 2 i.e., the payment of commission on export under Rupee State Credit Route, such payment is prohibited as referred in First Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. Hence Mr. LOMA cannot withdraw for the said purpose.
3. The item referred here is covered by Third Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. As per this schedule, gift remittance exceeding USD 5,000 per beneficiary per annum requires permission of RBI. Since the amount involved here is more than USD 5000, Mr. LOMA can draw foreign exchange after permission from RBI.

In all the cases, where remittance of foreign exchange is allowed either by general or specific permission, the remitter has to obtain the foreign exchange from an authorized person as defined in Section 2(c) read with section 10 of FEMA, 1999.

Question 15

Mrs. Kamala, a resident in India is likely to inherit an immovable property in U.S.A. from her father, who is a resident outside India. Advise Mrs. Kamla about the restrictions, if any, in this regard under the Foreign Exchange Management Act, 1999 explaining the relevant provisions of the Act. Will your answer be different, if she is likely to inherit foreign securities?

(November 2006)

Answer

- (i) As per section 15 of Competition Act 2002 any act or proceeding of the Commission shall not be invalidated merely on the ground of:
 - (a) any vacancy in, or any defect in the constitution of the Commission; or
 - (b) any defect in the appointment of a person acting as a Chairperson or as a member; or
 - (c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Here in this case Mr. ZPM should have professional qualification of not less than 15 years as per section 8 of the Act but this disqualification will not invalidate the proceeding of the Commission.

- (ii) Section 2(i) of Competition Act, 2002 defines 'goods' as follows:
'Goods' means goods as defined the Sale of Goods Act, 1930 and includes –
 - (a) products manufactured, processed or mined;
 - (b) debentures, stock and shares after allotment

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- (c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Hence, debentures and shares can be considered as 'goods' within the meaning of section 2(i) of Competition Act, 2002 only after allotment and not before allotment.

Question 16

- (i) Tomco Ltd. A vehicles manufacturing company situate at Pune, Maharastra has received an order from a transport company in Italy for supply of 100 Trucks on lease. You are required to state, how the said Tomco Ltd. can accept such an order.
- (ii) Forex Dealers Ltd. Is an Authorised Person within the meaning of Foreign Exchange Management Act, 1999. Reserve Bank of India issued certain directions to the said Authorised person to file certain returns which it failed to file. You are required to state the penal provisions to which the said Authorised Person has exposed itself.

(May 2007)

Answer

- (i) Under provisions of section 7 of the Foreign Exchange Management Act, 1999 certain rules have been made governing export of goods and services. Regulation 14-A of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 prescribes that no person shall, except with prior permission of the Reserve Bank of India, take or send out by land, sea or air any goods from India to any place outside India on lease or hire or under any arrangement or in any other manner other than sale or disposal of such goods.

Accordingly if Tomco Ltd. wants to accept the order for dispatching 100 trucks to Italy on lease, it has to take prior permission of the Reserve Bank of India.

- (ii) In accordance with the provisions of the Foreign Exchange Management Act, 1999 as contained in section 11(3), stated that where any authorized person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person a penalty which may extend to ten thousand rupees and in the case of continuing contraventions with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Since as per the facts given in the question, the Authorized person, namely, Forex Dealers Ltd., has failed to file the return as directed by the Reserve Bank of India, according to the above provisions it has exposed itself to a penalty which may extend to Rs. 10,000 and in the case of continuing contraventions in the nature of failure to file the return, with an additional penalty which may extend to Rs. 2,000 for every day during which such contravention continues.

The Foreign Exchange Management Act, 1999

Question 17

- (i) Mr. Sekhar resided in India for a period of 150 days in India during the financial year 2006-07 and thereafter went abroad. He came back to India on 1st April, 2007 as an employee of a business organization. What would be his residential status during the financial year 2007-2008?
- (ii) Mr. Atul, an Indian National desires to obtain foreign exchange for the following purposes:
 - (a) Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.
 - (b) US Dollar 10,000 for remitting as commission to his agent in USA for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. Atul by way of foreign currency inward remittance amounting to US Dollar 1,00,000.

Advise him, if he can get the Foreign Exchange and under what conditions. (May 2007)

Answer

- (i) In accordance with the provisions of Section 2(v) of the Foreign Exchange Management Act, 1999, as contained in section 2(v) a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of more than 182 days during the preceding financial year. In the given case, Mr. Sekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2006-2007. Hence he cannot be considered as a "Person Resident in India" during the financial year 2007-2008 irrespective of the purpose or duration of his stay.
- (ii) In accordance with the provisions the Foreign Exchange Management Act, 1999 as contained in Section 5, certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, drawal Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current account transactions, Foreign Exchange can be drawn with prior permission of the Central government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.
 - (a) In respect of item (a), i.e., remittance to Nepal, such remittance is prohibited and the same is included in First Schedule to be Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Atul cannot withdraw Foreign Exchange for this purpose.
 - (b) The type of payment as envisaged in item (b) is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules 2000 and for withdrawing foreign Exchange exceeding 5% (five percent) of the inward remittance as commission to agent abroad for sale of commercial plot in India, Mr. Atul will require the prior permission of the Reserve Bank of India.

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Question 18

Examine with reference to the provisions of the Foreign Exchange Management Act, 1999, the residential status of the branches mentioned below:

- (i) NNM Ltd. an Indian Company having its registered office at Mumbai, India established a branch at New York USA on 1st April, 2005.
- (ii) DDI Ltd. a company incorporated and registered in London established a branch at Kanpur in India on 1st April 2005.
- (iii) DDI Ltd. has a branch office at Singapore which is controlled by its Kanpur branch.

(November 2007)

Answer

As per Section 2(u) of the Foreign Exchange Management Act, 1999, 'person' includes the following:

- A Company
- Any agency, office or branch owned by a 'person'

Section 2(v) defines a 'person resident in India' as to include:

Any person or body corporate registered or incorporated in India

An office, branch or agency in India owned or controlled by a person resident outside India

An office, branch or agency in India owned or controlled by a person resident in India.

Considering the provisions of the two section, the residential status is as follows:

NNM Ltd. as well as the New York branch of NNM Ltd. is a 'person'. Therefore, the residential status under FEMA shall be determined for each of them separately.

NNM Ltd. is incorporated in India. Therefore, it is a 'person resident in India'.

NNM Ltd. (a person resident in India) has established a branch outside India. Therefore, the New York branch of NNM Ltd. falls under the clause 'an office', branch or agency outside India owned or controlled by a person resident in India and so the New York branch is a 'person resident in India'.

- (a) DDI Ltd. (a foreign company) does not fall under any of the clauses of the definition of a 'person resident in India'. Therefore, DDI Ltd. is a 'person resident outside India'.
- (b) The Kanpur branch of DDI Ltd. is a person resident in India' since it falls under the clause 'an office, branch or agency in India owned or controlled by a person resident outside India'.

(111) the Singapore branch of DDI Ltd., though not owned, is controlled by the Kanpur branch. The Singapore branch is a 'person resident in India' since it falls under the clause 'an office, branch or agency outside India owned or controlled by a person resident in India.

The Foreign Exchange Management Act, 1999

Question 19

Explain the meaning of “Capital Account Transactions” under the Foreign Exchange Management Act, 1999. State its categories and also examine whether the following transactions are permissible or not under the above act as Capital Account transactions:

- (i) Investment by person resident in India in Foreign Securities.
- (ii) Foreign currency loans raised in India and abroad by a person resident in India.
- (iii) Export, import and holding of currency / currency notes.
- (iv) Investment in a Nidhi Company. (November 2007)

Answer

Meaning of Capital Account Transaction

It means a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of a person resident outside India, and includes transactions referred to in sub-section (3) of Section 6 of FEMA Act, 1999.

The Reserve Bank of India has formed Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The provisions of these regulations are as under

Categories of Capital Account Transactions:

As per these regulations, capital account transactions may be classified under the following heads.

- (1) Permissible capital account transaction of persons resident in India (schedule I)
- (2) Permissible Capital transactions of persons resident outside India (schedule II).
- (3) Prohibited capital account transactions.

A person resident in India may enter into any of the following capital account transactions provided the regulations specified by the Reserve Bank of India in respect of such capital account transactions are complied with.

In view of the above provisions: among five capital account transaction of question first three i.e. (i), (ii) and (iii) are permissible capital account transactions and rest two i.e., (iv) and v are prohibited capital transactions.

Question 20

TKM Exporter of New Delhi are engaged in Export Business. It made certain exports but failed to realise and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999 (FEMA). Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeals. You are required to advise on the matter. (May 2008)

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Answer

Sections 17 and 19 of Foreign Exchange Management Act 1999 provide for appeals against orders of Adjudicating Authority. If the Adjudicating Authority is Assistant Director of Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for foreign Exchange. However, the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

Appeal to Special Director (Appeals)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under Section 17 of the said act within 45 days from the date on which the copy of the order made by the Adjudication Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there were sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass his order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange under Section 19 of Foreign Exchange Management Act, 1999 within 45 days from the date on which the copy of the order made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the appellant has to deposit the amount of such penalty with the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass a reasoned order.

It may be noted that the Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

Question 21

Mr. Kale, an Indian National desires to obtain foreign exchange for the following purposes:

- (i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
- (ii) US Dollar 100,000 for sending a tour of a cultural group to USA.
- (iii) US Dollar 50,000 for meeting the expenses of his business tour to Europe.

Advise him, if he can get the Foreign Exchange and under what conditions. (May 2008)

The Foreign Exchange Management Act, 1999

Answer

Under provisions of Section 5 of the Foreign Exchange Management Act, 1999 certain rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central government or Reserve Bank of India.

- (i) Remittance out of lottery winnings, is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Kale cannot withdraw Foreign Exchange for this purpose.
- (ii) Foreign Exchange or meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Kale can withdraw the Foreign Exchange after obtaining such permission.
- (iii) The type of payment as envisaged is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for withdrawing foreign Exchange exceeding US Dollar 25,000 for a business tour irrespective of period of stay Mr. Kale will require the prior permission of the Reserve Bank of India.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with Section 10 of the Foreign Exchange Management Act, 1999.

Question 22

Mr. Guilt an Indian National realizes that a penalty may be imposed upon him for violation of the provisions of the Foreign Exchange Management Act, 1999. He therefore desires to compound his offences. Advise Mr. Guilt about the process and procedure of compounding of the offence. (November 2008)

Answer

Sections 15 of Foreign Exchange Management Act, 1999 (FEMA) authorizes the Reserve Bank of India and Enforcement Directorate to compound contravention on an application made by any person who has committed contravention. The process and procedure of compounding is as under:

- An application for compounding of a contravention under the FEMA may be submitted to the compounding authority either on being advised of a contravention or either through a memorandum or suo moto on being made or becoming aware of the contravention. The application should be as per format in the Foreign Exchange (Compounding proceeding) Rules.

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- Application for compounding in prescribed form together with a copy of the memorandum wherever applicable with the prescribed fee has to be submitted with relevant facts and supporting documents to the compounding authority.
- The compounding authority may call for any information/record or any other documents relevant to the compounding proceedings.
- Where additional information/documents are called for, such information shall be submitted within thirty days or such additional period as may be given by the compounding authority from the date of the said letter. In case the contravener fails to submit additional information/document called for within the specified period, the application for compounding will be liable for rejection.
- On receipt of the application for compounding, the proceeding would be concluded and the order issued by the compounding authority within 180 days from the date of the receipt of the application for compounding.
- The sum for which contravention has been compounded shall be paid within 15 days from the date of order of compounding.
- The payment towards application fee and the sum for which contravention has been compounded shall be paid by demand draft in favour of compounding authority.

Thus Mr. Guilt will have to follow the above procedure for compounding his offences.

Question 23

Mr. Amit, a citizen of India, left India for employment in Australia on 1st June, 2007. Mr. Amit purchased a flat at New Delhi for Rs.15 lakhs in September, 2008. His brother, Mr. Sumit employed in New Delhi, also purchased a flat in the same building in September, 2008 for Rs. 15 lakhs. Mr. Sumit's flat was financed by a loan from a housing finance company and the loan was guaranteed by Mr. Amit. Examine with reference to the provisions of Foreign Exchange Management Act, 1999, whether purchase of flat and guarantee by Mr. Amit are capital account transactions and whether these transactions are permissible.

(November 2008)

Answer

A "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India. It also includes following transactions referred to in sub-section (3) of Section 6 of Foreign Exchange Management Act 1999:

- (a) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
- (b) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred-

Thus purchase of flat at New Delhi and giving of guarantee would be considered as capital account transactions.

The Foreign Exchange Management Act, 1999

A capital account transaction is not permissible, unless otherwise provided in the Act, Rules or Regulations made there under, or with the general or special permission of Reserve Bank of India.

In the case referred, Mr. Amit left India for employment in Australia on 1st June 2007. Therefore, he becomes a person resident outside India from June 2007.

The purchase of flat by Mr. Amit is a capital account transaction. This is permissible in accordance with the regulation framed in this behalf i.e. The Foreign Exchange Management (Acquisition And Transfer Of Immovable Property In India) Regulation, 2000. The Foreign Exchange Management (Acquisition and Transfer of Immovable property In India) Regulation, 2000 imposes restrictions on a person resident outside India from acquiring immovable property in India provided he fulfills both the following conditions:

- (a) the person resident outside India is citizen of India and
- (b) the immovable property acquired in India is not agricultural/plantation or farmhouse.

Therefore the purchase of flat by Mr. Amit is permissible under FEMA.

Guarantee involves a long term commitment which alters the assets and liabilities of a person and therefore it is considered as a "capital account transaction" and thus restricted under FEMA. Accordingly Mr. Amit can give a guarantee to the housing finance company in respect of purchase of flat by Mr. Sumit with the permission of Reserve Bank of India.

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NOTE

[illegible]