

**APPELLATE TRIBUNAL, FOREIGN EXCHANGE MANAGEMENT ACT AT NEW
DELHI**

Date of Decision:- 21.12.2018

MP-115/DLI/2018(Exem)
MP-104/DLI/2018(Misc)
FPA-FE-10/DLI/2018

M/s. L.G. Electronics India Pvt. Ltd. & Anr. ... Appellant

Versus

The Joint Director
Directorate of Enforcement, Delhi ... Respondent

Advocates/Authorized Representatives who appeared

For the appellant : Shri R.K. Handoo, Advocate
Shri Gaurav Verma, Advocate
Shri Mohit Das, Advocate

For the respondent : Shri Pankaj Yadav
Legal Consultant

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JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

FPA-FE-10/DLI/2018

1. The above-mentioned appeal has been filed u/s 19 of the Foreign Exchange Management Act, 1999 ('FEMA') against Adjudication Order No. ADJ/02/FEMA/DZ/2017/JD(SM) dated 29/12/2017 for contravention of Section 10(5), 10(6) & Section 42(1) & (2) of FEMA, 1999 r/w Regulation 6(1) of Foreign Exchange Management (Realization, Repatriation & Surrender of Foreign Exchange) Regulation, 2000. A Show Cause Notice bearing No. T-4/02/FEMA/DLZO/BE/2016 dated 09/09/2016 was issued to the Appellants.

2. The Adjudicating Authority has imposed a penalty of Rs. 30.00 lakhs on the Company and Rs. 10 lakhs on the Managing Director vide the impugned order.

3. The brief facts are that after investigations, a Show Cause Notice was issued against the Appellant Company and its Managing Director for alleged violation of Section 10 (5) and 10 (6) of FEMA, 1999, r/w Regulation 6 (1) of the Foreign Exchange Management (Realisation, Repatriation, and Surrender of Foreign Exchange) Regulations, 2000 alleging that the Appellant Company has failed to submit (Bill of entry) documentary evidence for import of goods in respect of the advance remittance of US \$433661.76 through HSBC Bank. In terms of Section 42 of FEMA, 1999, the Managing Director of the Company was arraigned as a noticee.

4. The RBI gave information to Enforcement Directorate, by communication dated 08/08/2002 that certain Bill of Entries have not been submitted in respect of remittances made through Citi Bank and State Bank of India for period prior to 08.02.2002, however, it was contented by the Company that it had produced documents for such remittances, as would be evident from Para 2.3 and 2.4 and 2.5 of the Show Cause Notice.

5. It was submitted that in respect to the remittance of US \$ 433661.76 clarification was sought from the M/s. L.G. Electronics Pvt. Ltd. and they have replied that they have made a request to the RBI through HSBC Bank vide letter dated 12/01/2016 for exemption from submitting import documents. To check veracity of company's claim made to RBI, a letter dated 04/04/2016 was written to RBI. In reply, RBI, vide its letter forwarded a letter copy of No Objection dated 15/04/2016 issued to HSBC Bank.

6. With regard to the Show Cause Notice in respect of the remittance of US\$433661.76, after exchanging correspondence, the RBI has granted no objection to the bankers, HSBC Bank by communication dated 15/04/2016 intimating that the RBI has no objection and advised the Authorised Dealer not to insist for Bill of Entry against the advance remittance of US\$433661.76 made by the Appellant Company.

7. The said factual position is not denied by the respondent and despite the ex-post facto exemption/permission granted by Reserve Bank of India, as aforesaid, the complaint was preferred under FEMA, 1999 before the Adjudicating Authority for alleged non-submission of Bill of Entry in respect of the said advance remittance of US\$433661.76.

8. It is submitted by the respondent that the appellants relied upon the selected portion of the RBI letter dated 15/04/2016 and the Appellants cannot be allowed to read selectively as the RBI uses the word “without prejudice” and that thus has not clearly raised no objection to the action to be taken by the enforcement authorities under FEMA. It is stated that RBI has no objection with the investigation conducted by the ED otherwise RBI in its letter ought to have objected the ED’s investigation and also even direct the ED to close the SCN.

“After receiving the RBI letter dated 15/04/2016, ED wrote a letter to Sh. Vikas Jaiswal(Asst. General Manager, RBI) vide F. No. T-3/FEMA/BE-1861/DZ/2002 dated 27/04/2016 for clarifying the content of letter dated 15/04/2016. In response to ED’s letter, RBI vide letter dated 13/05/2016 clarified that the RBI does not debar the Directorate of Enforcement from carrying on with the investigation already initiated against them.”

9. It is submitted by the respondent that as alleged by the appellants (took all reasonable steps to repatriate it), the foreign exchange is merely an eye wash as it is clear from the adjudication order itself that the Appellants had paid the advance amount in October 2008 to their regular supplier of computer monitor screen. The shipment was expected in November 2008, however, due to financial crisis, the vendor could not fulfil its commitment and also did not refund the advance amount. Also the vendor was declared bankrupt and as such the advance amount could not be recovered from the vendor. It is also found that the Appellants failed to respond to the query regarding filing of any claim before the competent court during the course of bankruptcy proceedings,

thereby leading to formation of a belief that no such claim was filed by the Appellants.”

10. Lastly, it is stated on behalf of respondent that since the Appellants failed to respond to the query regarding filing of any claim before the competent court during the course of bankruptcy proceedings, thereby leading to formation of a belief that no such claim was filed by the Appellants. It is alleged that the Civil Judgment dated 29/03/2012 of the competent court in China ordering bankruptcy of the Chinese vendor shows that the vendor had suffered huge losses in a row from 2006 to 2008 and stopped production entirely in October 2008 i.e. the same month when the advance amount was paid by the Appellants to the vendor. It has been further mentioned in the said judgment that the vendor resumed part of the production from February to April 2009. Having failed to apply any due diligence and then having failed to recover its advance or procure supplies against the advance when the production resumed for three months, it cannot be said that the Appellants acted in a bona-fide manner.

11. The adjudicating authority rejected the contention raised by the company regarding receipt of material worth US \$ 58,746.24 in respect of remittance US \$ 433661.76 in Jan.2009 for the reason that the supporting documents provided by the company i.e. Invoice no. LPDSG091IL dated 14/01/2009 who stated that the said supplies are with the reference to a separate contract LPD081204 dated 28/11/2008 and are for a different product i.e. 6318L15015H and at a different price i.e. US \$ 29.14 per piece.

12. There is no denial that the Appellant Company was making regular imports from 2006 onwards from the said foreign company and the impugned amount is just 1.4% of the total imports made from the said exporter and 0.05% of the total imports for the year 2008.

13. It was contended by the appellant before the Adjudicating Authority that the foreign company, after remittance in advance of the amount which had been done in the usual course of business as before since 2006, the foreign company went bankrupt and bankruptcy proceedings had been initiated for which unfortunately no notice thereof was given to the Appellant Company for lodging the claim for which only time of one month was available, as a result, it was a total business loss of the Company.

14. The relevant provisions of the applicable law of the People's Republic of China for bankruptcy proceedings are filed which was available at page 94-98 of the Appeal that awareness of the appellant was necessary by way of ratio which was given. It appears when these were brought to the notice of Reserve Bank of India, the Reserve Bank of India after its satisfaction, granted ex-post facto permission for not insisting on the production of the Bill of Entry to the Authorised Dealer, who are supposed to collect the Bill of Entry in terms of the Custom Regulations.

15. There is no force in the finding of the Adjudicating Authority to conclude that the ex post facto exemption granted by the Reserve Bank of India without prejudice to the action by Enforcement Directorate empowers it to declare contravention and impose penalty. Needless to submit that the contravention under FEMA are subject to permission of Reserve Bank of India.

16. The counsel for the appellant argued that once the said permission and exemption by Reserve Bank of India is granted, later on it cannot be prohibited and there shall not be a contravention.

17. The counsel argued that ex-post facto permission granted by Reserve Bank of India wipes out the contravention and the purpose of writing "without

prejudice to the action that may be taken by the Enforcement Authorities under FEMA 1999” is only to refrain from entering the jurisdiction of Enforcement Directorate and would be directing and indicating authority which is not the domain of RBI.

18. This Tribunal, the judgment of the Division Bench of Foreign Exchange Regulations Appellate Board in appeal no. 98 to 110 of 1998, wherein this issue has been squarely dealt with and is completely covering the case of the Appellant Company.

19. Similar view is taken in the judgment of the Hon’ble Delhi High Court in the case of *Continental Construction Co. Ltd* versus *Special Director* reported in 2016 (1) JCC 690.

20. Section 10 (5) of FEMA relates to obligations of an Authorised Dealer/Authorised Person who release the foreign exchange to the customer and provides that the Authorised Person would seek before undertaking transaction a declaration and further information from the customer to satisfy authorized person that transaction is not designed for contravention, etc. In case the Authorised Dealer is not satisfied, or entertains suspicion on the transaction, the Authorised Dealer would refrain from undertaking the transaction. It is apparent that Section 10 (5) of FEMA applies before the Authorised Dealer undertakes the transaction for the customer. In the instant case, the admitted case of the Department is that the transaction has taken place as per law and regulations through the Authorised Dealer viz., HSBC Bank.

21. The banker in fact has recommended to RBI for exemption/non-insisting for the submission of Bill of Entries against the advance remittance of the impugned amount made by the Noticee Company.

22. It is not disputed by the respondent that as per law, HSBC is designated as authorised person category-II. The transaction has already taken place only after authorized person is satisfied and a declaration has already been obtained for advance remittance at the time of making the remittances. The submission of Bill of Entry is a later event on receipt of the goods from abroad on import and release of imported goods for home exemption under Customs Act. Therefore, Section 10 (5) has no application. Similarly, Section 10 (6) of FEMA is as a consequence of Section 10 (5), *interalia*, providing that where the person has made a declaration before the Authorised Dealer for acquiring the foreign exchange for a particular purpose in terms of Section 10 (5), it is incumbent upon the person acquiring the foreign exchange, that the foreign exchange acquired will be used for the purpose for which the declaration has been made.

23. It is admitted by the respondent that the Company has used the foreign exchange for the declared purpose in terms of section 10 (5) by assuming that non-receipt of the goods would mean use of foreign exchange for a wrong purpose. Once the foreign exchange has been used by the Appellant Company for the declared purpose and if said purpose is not achieved it would not lead to the inference of not using the foreign exchange for the purpose for which it was acquired.

24. Invoking of Regulation 6 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 is without any substance as the same applies to Resident Person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration to the Authorised Dealer in terms of Section 10 (5) of the Act and does not use it for the said purpose and is enjoined to surrender such foreign exchange or unused portion thereof back to the Authorised Dealer within 60 days. In the Show Cause Notice, the provisions of the law have also been engrafted .

25. The Respondents has relied upon the judgment of Hon'ble Supreme Court in the case of the Chairman, SEBI versus Shriram Mutual Fund reported in 2006 (5) SCC 361. This judgment has no application, inasmuch as, it relates to imposition of penalty, if there is a contravention of the statute. The existence of a contravention is a precondition for imposition of penalty. In the instant case it is humbly submitted that since there is no scope of even alleging a contravention, the judgment has no application and in any case the judgment does not answer the rationale of the two judgments and the exemption granted by RBI, as aforesaid.

26. The Counsel for the respondent has referred Section 11 of FEMA contending that the exemption granted by RBI is basically seeking compliance are not otherwise. The submission has no substance as for alleged compliance of filing of Bill of Entry, RBI had granted exemption, hence there was no scope of compliance. Even more, reading of Section 11 FERA, 1999 in the manner is correct. In fact, it is an enabling section empowering RBI to issue directions to the Bankers/Authorised Persons for the purpose of securing compliance of the provisions of FEMA. The said section goes in consonance with the judgment of the Hon'ble Supreme Court in the case of LIC versus Escorts, *AIR 1980 SC 1370* wherein the Hon'ble Supreme Court has held that Reserve Bank of India is the Custodian General of the foreign exchange of the country and what is permitted/exempted by RBI cannot be questioned, by any person and directions are given by RBI in terms of section 11 of FEMA in consonance with the said law laid down by Hon'ble Supreme Court.

27. The respondent admittedly not denied the fact that the vendor was declared bankrupt who has also not issued the 60 days notice to the appellant about it, otherwise the appellant would have approached to recover the amount as of law. Even if the contention of the respondent is accepted, the respondent

ED is not able to get any additional/independent evidence against the appellant apart which was already available with RBI.

28. Even otherwise, it is asserted by the respondent that inquiries were made with the Company to find out the person incharge and responsible during the relevant period and the Company vide communication dated 14/10/2014 informed that Mr. S. Jain (Head of Finance) was the person incharge during the impugned period, who had already left the Company. The said Mr. S. Jain has not been arraigned in the show cause noticee and instead the Managing Director, who is appointed on 27/08/2015 as Managing Director of the Company, a citizen of South Korea was arraigned in vicarious liability in terms of Section 42 of FEMA. The Form DIRE-12 for appointment of the Appellant No. 2 as Managing Director. The present Managing Director became Managing Director on 27/08/2015 and was not the person in-charge of and responsible to for the conduct of the business of the Company, which was duly informed to the Respondents during the course of investigation but the Respondent chosen to arraign the new Managing Director with vicarious liability. Therefore, the notice and the penalty imposed on the Managing Director is without any valid reason.

29. In view of the above, the allegations against the Company and the order passed against the Company is liable to be set aside. Once Company is not liable, as aforesaid, there is no scope of imposition of penalty on the Managing Director as the precondition for imposition of penalty in vicarious liability is, if the company is found guilty. The appeal is allowed.

30. No costs

(Justice Manmohan Singh)
Chairman

New Delhi,
21st December, 2018
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