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Some Case Studies in FEMA

Case Study 2:
Facts of the case

- XYZ is a software Export Company in India. It has taken a loan from its holding company, in the Netherlands, in FY 2023-2024, without complying with the requirements & procedures of the Automatic Route of the ECB Regulations.
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Case Study 2:
Facts of the case…..contd…

- This is obviously a contravention, which I have advised XYZ to admit and approach RBI for getting the contravention compounded.
- In the same FY, XYZ's branch in USA has also taken a loan in the Netherlands Company.
- Are there any FEMA implications in this second loan as well?

The Governing Regulations

- The first thing to determine is if the amount is a loan or an advance for export.

- Borrowing & Lending between a PRII & a PROI are governed by

  the FEMA (B & L) Regulations, 2018 vide Notification

  FEMA (3R) /2018-RB dated 17-12-2018 [G.S.R. 1213 (E)

  dated 17-12-2018]

- Issued in exercise of the Powers conferred by clauses(a) (d) & (e) of sub-section (3) of S.6 and sub-section (2) of S.47 of

The Governing Regulations….contd…

- S.6(3) of FEMA was omitted by Finance Act,2015 wef 15-10-2019. However, S.47(3), wef 15-10-2019 provides that all Regulations & Master Directions issued by RBI prior to the omission of S.6(3) shall continue to be valid until amended or rescinded by GOI.

- The Governing Regulations….contd…

- For the guidance of the authorised persons & other stakeholders to implement/comply with, the Regulation, RBI has u/s 11 of FEMA, issued an FED Master Direction No.5/2018-19 dated 26-03-2019, updated from time to time, in relation to External Commercial Borrowings, Trade Credits & Structured Obligations

The Governing Regulations…contd….

- Exports of Goods & Services are governed by FEM (Export of Goods & Services) Regulations 2015, vide Notification FEMA 23 (R)/ 2015-RB daed 12 Jan 2016[G.S.R. 19(E) dated 12-01-2016, issued by RBI in exercise of power conferred by clause (a) of sub –section (1), sub –section (3) of section 7, read with sub-section (2) of section 47 of FEMA.

The Governing Regulations….contd…

- Within the contours of the Regulations, RBI has u/s 11, issued FED Master Direction No.16/2015-16 dated 01-01-2016,updated from time to time, in relation to Export of Goods & Services.

The Governing Regulations….contd…

- If the amount received from the Netherlands is a loan, FEMA 3(R) will apply.
- If it is an advance against exports,

FEMA 23 (R) will come into play. This determination has to be made from the factual background.

Is it an Advance against Exports?

- The only argument supporting the stand that it is an advance against export is :
- The purpose of the “ Inward Remittance” as ‘per the beneficiary 'on the FIRC is :
- “Advance for Software Consultancy Implementation”

Or Is it a Loan ?

- a. Communications between XYZ & the holding company make no mention of any intended exports:
- b. there have been no actual exports;
- c. Even now the intent is to repay the amount;
- d. Multiple e-mails explaining “urgent need” for funds to meet commitments.

Logical conclusion

The only logical conclusion is that it is a loan to which FEMA 3(R) applies.

But it has been taken without the ECB Compliances.

Hence it is a contravention which needs to be compounded.

Q 2. Are there any FEMA implications in the second loan ?

The Question is :

Since the funds were not received in India, nor repaid from India, does FEMA apply at all ?

Answer lies in :

- S.1(2) & 1(3) of FEMA: Extent & Application of the Act
- S.2(v) of FEMA: Defn. of PRII

Explanation

- The US branch itself was opened without prior permission of RBI under the Export Regulations, but that issue is not germane to the present discussion.

Conclusion

- FEMA 3(R) applies also to the loan taken by the US branch, hence that will also need to be offered for compounding.