

Penalties and Compounding of offences under FEMA

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PENALTIES



- Section 13 of the FEMA

imposes penalties in case of any of the following three types of contraventions / violations

- Contravention of the Act
 - Contravention of Rules, Regulations, Notifications, Directions, Orders issued under the Act
 - Contravention of any of the conditions of RBI Authorization
- The penalties under the Act can be levied only upon adjudication.

MONETARY CEILING ON PENALTY

(a) When sum involved in the contravention is quantifiable:

- The monetary ceiling on penalty is three times of the sum involved in the contravention.

(b) When sum involved in the contravention is not quantifiable:

- The monetary ceiling on penalty is Rs. 2 Lakhs only.
- Over and above the aforesaid penalty, in both the aforesaid situations i.e. (a) & (b), a recurring penalty of Rs. 5,000 per day can also be levied during the

APPLICABILITY

- Unlike FERA, under the FEMA regulations, the levy of penalty has no relevance with the nationality or residential status of the person involved in the contravention.
- There is no specified time limit for imposition of the penalty. Though section 16(6) of the Act provides for a period of one year, but it is merely recommendatory in nature and not mandatory.
- When the applicable penalty has been paid by the concerned offender, no prosecution can be initiated against such person. But if penalty is not paid, the prosecution against such



Compounding

- The term “Compounding” is not defined under the Act. However, is very well interpreted under various other laws including the Companies Act, 1956 and Criminal Procedure Code. The term **compounding** basically means a kind of settlement between the person being prosecuted, on one side and the prosecutor, on the other side, who in turn agrees to withdraw the prosecution or proceedings or agrees not to initiate such prosecution or proceedings upon making the payment of an agreed monetary penalty by the accused.



COMPETENT AUTHORITIES FOR COMPOUNDING

- (i) Reserve Bank of India for all the contraventions except one related to Hawala transactions**

- (ii) Directorate of Enforcement for contraventions related to Hawala Transactions**

Compounding Procedure

- Specified in the Foreign Exchange (Compounding Proceedings) Rules, 2000.
- Application by the accused to the competent authority with complete facts in the prescribed form along with the prescribed fee.
- An application for compounding can be made only once in a period of three years.
- Application can be made either on being advised of a contravention under FEMA by RBI /AD or *suo motto* on being made or becoming aware of the contravention.

Compounding Procedure

- Authority may call for any information, records or any other documents
- Authority to pass an order of compounding after giving an **opportunity of being heard** to all the concerned persons, within 180 days.
- The sum for which the contravention is compounded as specified in the order of the compounding authority shall be paid by Demand Draft in favour of the compounding authority within 15 days otherwise the applicant shall be deemed never to have made any application for compounding

Compounding Procedure

- Application for compounding any contravention may be filed with the compounding authority including those which are under adjudication process and have not been disposed off. No contravention would be compounded which have been finally adjudicated and disposed off by the adjudicating authority.
- Cases of contravention having a money laundering national and security concern involving serious infringement of the regulatory field work including cases where application for compounding has not been filed within the stipulated period in the Memorandum issued by the Reserve Bank of India may be referred to the Directorate of Enforcement

Drafting the petition

- While applying for compounding, one is admitting the default of compliance of the applicable regulation.
- The petition for compounding has to be submitted in Form prescribed
- Form expects submission of factual data. One should submit complete facts and give them clearly and unambiguously
- To list out each of the several defaults specifically, so that an order for compounding can be passed specifying each default individually

Listing of defaults – an

• A ltd receives share application monies on 1st October, 2009. The intimation to Reserve Bank of India about receipt of funds was sent on 1st December, 2009. The allotment of shares against the same was completed on 15th May, 2010, and the excess share application monies refunded on 25th May, 2010, while form FC – GPR was filed on 1st July, 2010.

• In this case, the defaults are:

1. Delay in reporting receipt of funds;
2. Delay in allotment of shares;
3. Delay refunding excess share application monies;

List all defaults

- In case any default is not included in the compounding petition, but comes to light before the adjudication of the petition, the same may be taken up by submitting an addendum, which may be admitted by the Compounding Authority.
- To be on the safer side, one should examine each aspect right since inception, to the extent possible, rather than face surprises at a later date. At times, clients come to consultants for making a specific application. However, the consultant should examine the matter in great detail before submitting the application; else the client may feel that while one matter has been compounded, it has opened a hornet's nest for others.

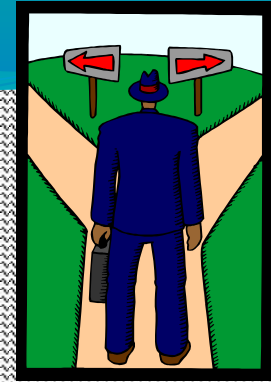
Compounding Order

- Every order shall specify the provisions of the Act or of the rules, directions, requisitions or orders made thereunder in respect of which contravention has taken place along with details of the alleged contravention and shall be dated and signed by the Compounding Authority under his seal.
- To be disposed of on merits, upon consideration of the records and submissions and at the absolute discretion of the Compounding Authority.
- The following factors, which are only indicative, may be taken into consideration and for arriving at the quantum of sum on payment of which contravention shall be compounded:

Compounding Order

- (ii) the amount of loss caused to any authority / agency / exchequer as a result of the contravention;
- (iii) economic benefits accruing to the contravener from delayed compliance or compliance avoided;
- (iv) the repetitive nature of the contravention, the track record and / or history of non-compliance of the contravener;
- (v) contravener's conduct in undertaking the transaction and disclosure of full facts in the application and submissions made during the personal hearing; and
- (vi) any other factor considered

RBI to decide



- (i) whether a contravention is technical and/or minor in nature and, as such, can be dealt with by way of an administrative/ cautionary advice;
- (ii) whether it is material and, hence, is required to be compounded for which the necessary compounding procedure has to be followed or
- (iii) whether the issues involved are sensitive / serious in nature and, therefore, need to be referred to the Directorate of Enforcement (DOE).

Few Pointers

- Contraventions which are wilful, intentional or having malafide and fraudulent intentions shall not be considered for compounding
- The applicant must indicate the following information about the authorized person of the entity who would be handling the complete process of the compounding:
 - Name and Designation of the authorised person for the contravener
 - Telephone/Fax/Email of the authorized person.
- In column-6 of the Form (Brief facts of the case) details of the contravener e.g. date of incorporation, ownership pattern, activity, transaction etc. may be

Few Pointers

- The applicant must also specify / describe in the application the details/facts (e.g. date, amount (in Indian Rupees), parties involved etc.) of the transaction for which the contravention has occurred.
- Incomplete applications will be rejected.
- Non submission of relevant information / documents considered seriously.
- If the applicant opts for appearing for the personal hearing, the Reserve Bank would encourage the applicant to appear directly for it rather than being represented / accompanied by legal experts / consultants, as compounding is only for admitted

Thank You

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