

THE CHAMBER OF TAX CONSULTANTS

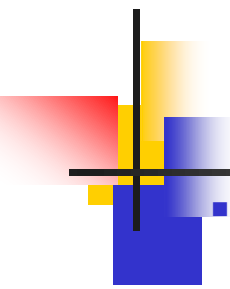
FEMA STUDY CIRCLE MEETING ON



ED Proceedings under FEMA with Practical Insights

by: CA Paresh P. Shah

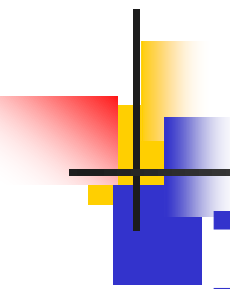
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FEMA - Abbreviations

Abbreviations:

Adjudication Authority (AA)
Directorate of Enforcement (ED)
External Commercial Borrowings (ECB)
Financial Intelligence Unit (FIU)
Foreign Exchange Management Act, 1999 (FEMA)
Foreign Direct Investment (FDI)
Foreign Investment (FI)
Foreign Investment Facilitation Portal (FIFP)
Government of India (GOI)
Overseas Direct Investment (ODI)
Overseas Investment (OI)
Prevention of Money Laundering Act, 2002 (PMLA)
Reserve Bank of India (RBI)



OVERVIEW OF PRESENTATION

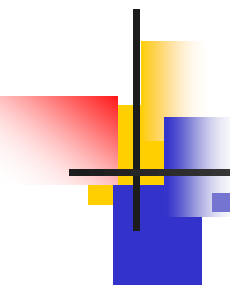
- Overview of FEMA provisions
- Provisions of Investigation, Enquiries, Compounding & Adjudication
- Role of RBI and ED
- Investigation by RBI
- Penalties
- Nature of Contraventions
- Remedial measures and options / arbitrage
- Power of Arrest
- Case Studies
- Recent Trend

Overview of provisions of Foreign Exchange Management Act

Section	Description
1	Application and commencement of FEMA w.e.f. 1/6/2000
2	Definitions (amended by Finance Act, 2015 to include "Authorised Officer" and "Competent Authority")
3 to 9	Substantive provisions, Dealing in FE, No drawal of FE, CAT, CAP, Export & Import, Repatriation, Possession of FE etc. (Section 6 amended by Finance Act, 2015 to provide that equity flows shall be under Central Govt.)
10 to 12	Authorized person, Delegation of power by RBI, ADs & Documents
13 to 15	Contraventions and penalties (Section 13 amended by Finance Act, 2015 for penalty for holding foreign exchange, security or property in excess of threshold specified in new S. 37A)
16 to 38	Adjudication, Appeal and Directorate of Enforcement [new Section 37A vide Finance Act, 2015: Special provisions relating to assets held outside India in contravention of section 4]
39 to 49	Miscellaneous provisions, Power of RBI, Power of Government of India, Procedure for issue of Notification etc. Sunset clause for FERA upto 31 st May 2002, Repeal and Savings

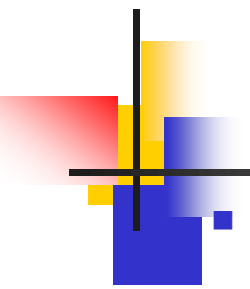
Provisions relating to Adjudication & Appeals under FEMA

- **S. 4: Holding of foreign exchange, foreign security and Property**
- **S. 13: Penalties**
- **S. 14: Enforcement of the orders of Adjudicating Authority**
- **S. 14A: Power to recover arrears of penalty**
- **S. 15: Power to compound contravention**
- **S. 16: Appointment of Adjudicating Authority**
- **S. 17: Appeal to Special Director (Appeals)**
- **S. 18: Appellate Tribunal**
- **S.19: Appeal to Appellate Tribunal**
- **S. 34: Civil Court not to have jurisdiction**
- **S. 35: Appeal to High Court**
- **S. 36: Directorate of Enforcement**
- **S. 37: Power of search, seizure, etc.**
- **S.37A: Special provisions for assets held outside India in contravention of S. 4**
- **S.42: Contravention by Companies**



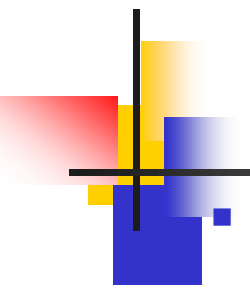
Powers of RBI & Central Govt.

- U/s. 46 of the FEMA, the Central Government has the power to make Rules to carry out the provisions of the Act.
- U/s. 47, RBI has powers to make Regulations to carry out the provisions of the Act and the Rules.
- The Finance Act, 2015 made certain key amendments to FEMA providing that control on capital flows as equity, powers of prosecution & investigation of foreign assets, etc. with attachment, will be exercised by the Central Government, in consultation with RBI.
- Controls on debt capital flows continue to be exercised by RBI. Further, even in the equity flows, the matter of pricing, reporting and valuation continues to be determined by RBI. Moreover, RBI administers the equity flows as regulator under the aegis of the Rules enacted by the Central Government.



Role of RBI

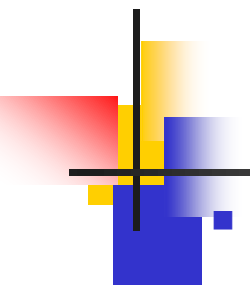
- RBI plays the role of the regulator for the purposes of FEMA:
 - RBI is empowered to give general or special direction to a person to deal in foreign exchange as provided in FEMA, rules or regulations
 - RBI to be consulted by the Central Govt. for imposing reasonable restrictions for Current Account transactions (Section 5)
 - RBI to consult Central Govt. to regulate Capital Account transactions involving debt instruments. Similarly, Central Govt. to consult RBI to regulate Capital Account transactions not involving debt instruments (Section 6)
 - RBI has the power to regulate export of goods & services (Section 7)



Role of RBI

■ RBI plays the role of the regulator for the purposes of FEMA (cont'd):

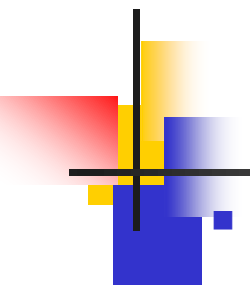
- RBI has the power to specify period and manner to repatriate foreign exchange (Section 8) and set limits under FEMA (Section 9)
- RBI has the power to authorize any person to deal in foreign exchange or in foreign securities, as an authorized dealer, money changer or off-shore banking unit (Section 10). RBI also acts as the regulating authority for the authorized persons as stated and has the power to issue directions to authorized persons (Section 11) and inspect them (Section 12)
- RBI has the power to compound contraventions committed by any person (Section 15) except those under Section 3(a) in accordance with FEMA (Compounding Proceedings) Rules, 2000.
- FEMA also grants RBI the power to make regulations to carry out the provisions of the Act and the rules made thereunder (Section 47)



Role of ED

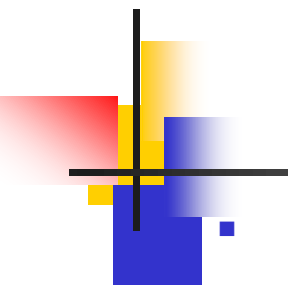
ED exercises mainly the following functions under the relevant laws:

- Compounding of matters covered under Section 3(a)
- Investigation of matters concerning national security, money laundering and terror financing
- Adjudicating the matters where complaint has been received under Section 16(3)
- Seize property / security / FE held in contravention of Section 4
- Adjudicating the matters arising out of investigation under Section 37A
- Initiate prosecution (Section 13), recover penalties levied on adjudication (Section 14)
- Power to Arrest (Section 14)



Role of ED (cont'd)

- It may be noted that the Directorate of Enforcement is a specialized body tasked with implementing two crucial financial laws – Prevention of Money Laundering Act, 2002 (PMLA) and Foreign Exchange Management Act, 1999 (FEMA).
- ED exercises mainly the following functions under the relevant laws:
 - conduct an investigation for violations of the FEMA provisions and money laundering offences under the PMLA;
 - attach and confiscate property if it is determined to be proceeds of crime derived from a Scheduled Offense under the PMLA; and
 - prosecute those who are involved in money laundering offences.



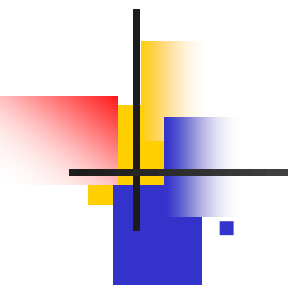
Penalties under S.13 of FEMA

- Penalties.

13. (1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(1A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, of the foreign exchange, foreign security or immovable property.

(1B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fit, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.



Penalties under S.13 of FEMA (cont'd)

- Penalties (con't)

13.(1C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Penalties under S.13 of FEMA (con't), S.14 & S.14A

■ Penalties (con't)

Explanation.—For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include—

- (a) deposits in a bank, where the said property is converted into such deposits;
- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property which has resulted out of the conversion of that property.

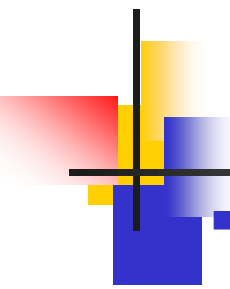
Sections 1A – 1D of Section 13 inserted by the Finance Act, 2015, w.e.f. 9-9-2015

S.14: Enforcement of the Orders of the Adjudicating Authority

S.14A: Power to recover arrears of penalty

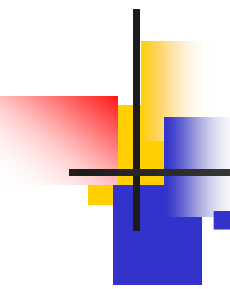
Operation of penalties – Two separate and distinct causes of penalties

Section 13(1)	Penalty for any contravention under FEMA	Section 13(1A)	Penalty for violation of Section 4, similar to that of u/s. 13(1)
Section 13 (2)	Refers to contravention u/s. 13(1); Foreign currency, security or any other money or property may be confiscated	Section 13 (1B)	Initiation of prosecution in above cases in addition to Penalty
		Section 13 (1C)	In addition to penalty imposed under sub-section (1A), provides for imprisonment & fine by a Competent Court



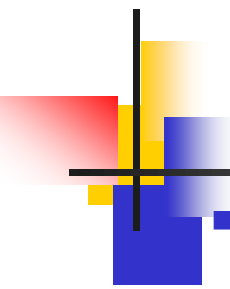
Investigations and Remedies-FEMA

- Intricacies of Investigation, Compounding and Adjudication:
 - Compounding by RBI under Section 15 requires declaration by the applicant relating to any on-going investigation / proceedings / adjudication
 - ED has power to advise and take up compounding on sensitive matters
 - Compounding authority is required to inform ED/ Adjudicating Authority about matters requiring Investigation and where Investigation is in process then about the Compounding orders if any.
 - Overlapping Penalty Provisions: Sec 13(1A) in reference to Sections 37A and 13(2) in reference to 13(1), namely.... Have acquired any Foreign Exchange... vs....and further direct that Foreign Exchange Holdings....



Investigations-Nature of Contraventions

- Nature of Contraventions:
 - Arising due to -
 - Efflux of time
 - Insufficient documentation
 - Non-observation of conditions of transactions or conditions of prior approval in the matter- e.g. Valuation
 - Transactions that cannot be undertaken e.g. Trading in Real estate
 - Transactions involving issues of sensitive nature e.g. Sec 3(d), involving national security, terror funding and serious breach of regulatory framework
 - Transaction in contravention of Sec 4 (holding of foreign exchange, foreign security & foreign immovable property)

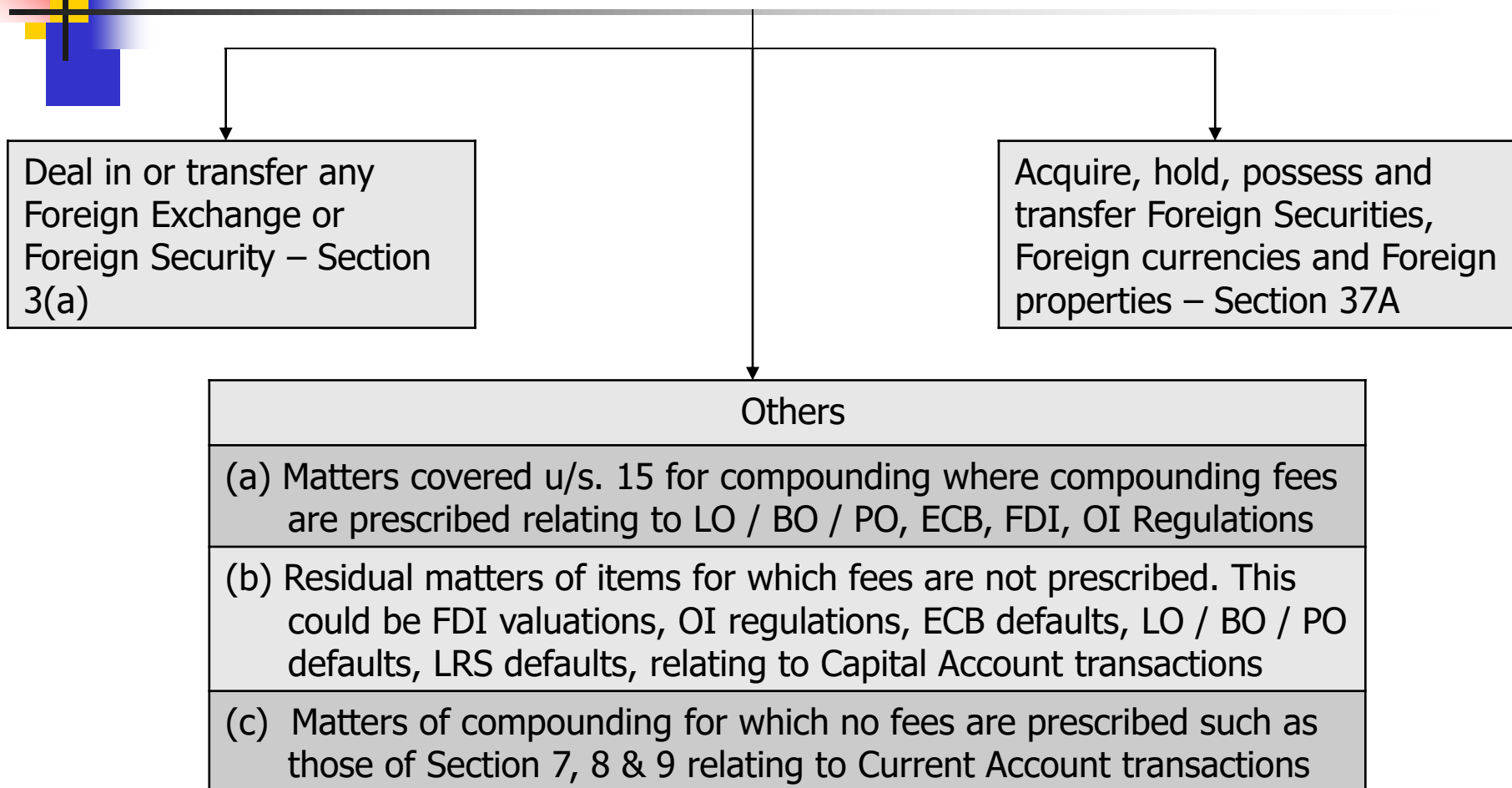


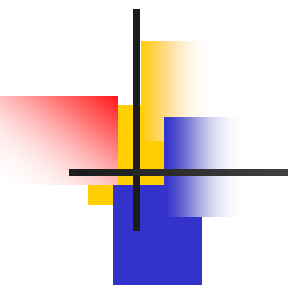
Investigation and Remedial Measures

■ Remedial measures:

- Compounding by RBI
- Compounding by ED for matters under Section 3(a) in respect of dealing in Foreign Exchange & Securities
- Arbitrage between Section 3(a), Section 16 and Section 37A
- Adjudication & Appeals

Contraventions





Possible overlap of Remedial measures

Items under (a), (b) & (c) of Contraventions in above slide –

All can come up for Adjudication u/s. 16 which can be compounded by RBI

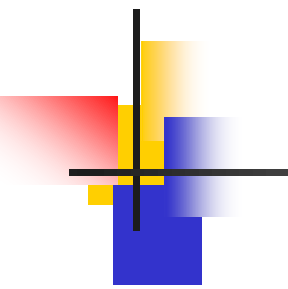
Contraventions in (b) above –

in respect of Financial securities referred in OI Regulations can be considered u/s. 15 by RBI

Or Adjudication u/s. 16 by ED

Or Compounding u/s. 3(a) in select cases

Or Adjudication u/s. 16 with attachment u/s. 37A(1)

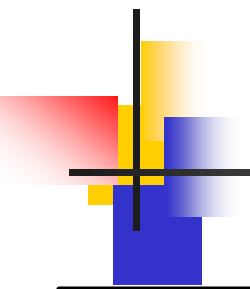


Possible overlap of Penal Provisions

Penalties u/s. 13(1) & 13(2) are generally a prescription for non-37A contraventions

Penalty u/s. 13(2) covers:

- (a) Foreign Currency, Foreign Security and Foreign Property thus overlaps with Section 37A violation; may not be for Immovable Property abroad
 - (b) Matters of Sections 7, 8 & 9 and LRS can overlap with penalties u/s. 13(1A), (1B) & (1C)
- Items of Sections 7, 8, 9 and LRS in respect of holding of Foreign currency can come up for Compounding u/s. 15
 - Adjudication u/s. 16
 - Adjudication u/s. 16 via section 37A i.e. after attachment



Remedial Measures-FEMA

Late Submission Fee (A.P.Dir Cir 16 dt. 30.09.2022)

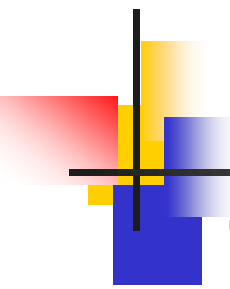
- LSF was introduced for reporting delays in FI, ECB & OI related transactions w.e.f. 07.11.2017, 16.01.2019 & 22.08.2022 resp.
- LSF payment is an additional facility for regularizing reporting delays without undergoing the compounding procedure.
- LSF is available up to 3 years from the due date of reporting / submission.
- LSF is also available for delayed reporting / submission under erstwhile FEMA Ntf. 120 up to 3 years from date of notification of new OI Rules & Regulations

Compounding (Section 15 of FEMA)

- Compounding provisions as per Foreign Exchange (Compounding Proceedings) Rules, 2000 dt. 03.05.2000 r.w. Master Direction – Compounding of Contraventions under FEMA dt. 01.01.2016
- LSF applies only to reporting delays whereas contravention of any provisions under FEMA, other than under Section 37A, would still be subject to compounding and adjudication under FEMA.
- RBI to compound except that of Section 3(a).

Adjudication (Section 16 of FEMA)

- For all contraventions for which complaint is received by the AA from the Investigating Officer under Section 16(3) of FEMA
- Also for matters under Section 37A for contravention of Section 4 of FEMA



Types of Investigation and the manner

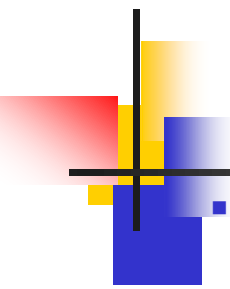
Stages of Investigation and Conclusion of the same:

- Stage I – Investigation by ED ———> Section 16 & background;
————> Section 37A
- Stage II – Adjudication under Section 16
————> Complaint under Section 16(3)
————> Process under Section 37 – Seizure of assets and
release of assets
- Stage III – Adjudication of offences of contraventions under
Section 37A and remaining will be under Section 16
- Stage IV – Final Order of Adjudication, Penalties & Arrest
provisions

Overview – Process of Investigation and Adjudication

- Four main stages up to Adjudication followed by Appeals –

	Stages	Provisions of FEMA
I	Investigation	Commences on information of contraventions under FEMA shared by RBI, AD-Bank, FIU, Foreign STR, CRR, FATCA, etc. with ED. Section 37(3) gives powers to ED for search, seizure, etc. Section 138 of I.T. Act provides for sharing of information with authorities under other laws.
II	Complaint	Filed by Investigating officer of ED with Adjudicating Authority ('AA') under Section 16(3)
III	Adjudication Proceedings	AA has powers to hold inquiry under Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 ("Adjudication Rules")
IV	Final Order	If AA is satisfied about contravention, it may impose penalty in accordance with the provisions of Section 13
	Appeal against Final Order	- If Order made by AA, being an Asst. Director or Deputy Director, appeal may be made with Special Director (Appeals) as per Section 17; - If Order made by AA, other than Asst. Director or Deputy Director, or by Special Director (Appeals), appeal may be made with Appellate Tribunal as provided in Section 19
	Appeal against Order of Appellate Tribunal	With High Court as provided in Section 35

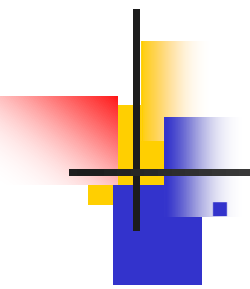


Adjudicating Authority

The Central Government has appointed the following officers of the Directorate of Enforcement specified in Column (2) of the Table below as Adjudicating Authorities to hold an inquiry for the purpose of adjudication under section 13 of FEMA, involving an amount or value as specified in column (3) of the said Table:

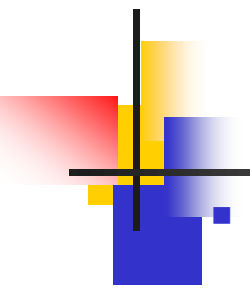
No.	Designation of Officers	Monetary limit
(1)	(2)	(3)
(1)	Director of Enforcement	Cases involving amount exceeding rupees twenty-five crores.
(2)	Principal Special Director of Enforcement	Cases involving amount exceeding rupees twenty-five crores.
(3)	Special Director of Enforcement	Cases involving amount exceeding rupees twenty-five crores.
(4)	Additional Director of Enforcement	Cases involving amount up to rupees twenty-five crores but not less than ten crores.
(5)	Joint Director of Enforcement	Cases involving amount up to rupees ten crores but not less than five crores.
(6)	Deputy Director of Enforcement	Cases involving amount up to rupees five crores and not less than two crores.
(7)	Assistant Director of Enforcement	Cases involved of amount not exceeding rupees two crores.

- Source: Notification F. No K-11022/54/2018-Ad.ED dt. 27.09.2018



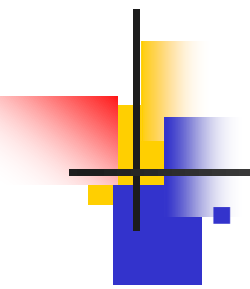
Compounding & Adjudication

- It may be noted that cases of serious contravention, such as suspected money laundering, terror financing or affecting sovereignty and integrity of the nation or where the contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order, shall be referred to the ED for further investigation and necessary action under FEMA or to the authority instituted for implementation of PMLA, or to any other agencies, for necessary action as deemed fit.
- Thus, whenever a contravention is identified by the RBI or brought to its notice by the entity involved in contravention, the Bank shall examine
 - (i) whether it is material and, hence is required to be compounded for which the necessary compounding procedure has to be followed or
 - (ii) whether the issues involved are sensitive / serious in nature and, therefore, need to be referred to the ED.
- If the Enforcement Directorate is of the view that the compounding proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13.
- Further, the cases attracting the provisions under section 3(a) or those attracting special provisions under section 37A of the FEMA, 1999 - relating to assets held outside India in contravention of section 4, shall also not be eligible for compounding by the Reserve Bank. However, Section 3(a) matters can be compounded by ED whereas Section 37A matters cannot be compounded.



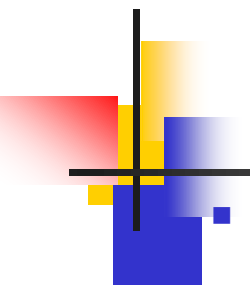
Compounding & Adjudication (cont'd)

- Information about existing enquiry / investigation / adjudication by AA, if any, at the time of making compounding application, or initiation of the same at any time there after, is required to be provided to the Compounding Authority
- In case there is simultaneous process of enquiry / investigation / adjudication by AA and compounding by Compounding Authority, it is advisable to also keep the AA informed of the same.
- It is possible for the ED to deny and advise RBI not to proceed with the compounding process under certain circumstances (Proviso to Rule 8 of Compounding Rules)



Compounding & Adjudication (cont'd)

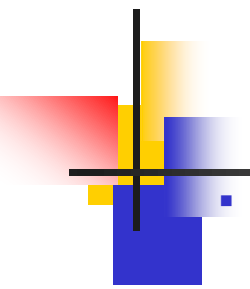
- Where any contravention is compounded before the adjudication of any contravention under section 16, no inquiry shall be held for adjudication of such contravention in relation to such contravention against the person in relation to whom the contravention is so compounded.
- Where the compounding of any contravention is made after making of a complaint under Section 16(3), such compounding shall be brought by the authority specified in rule 4 or rule 5 in writing, to the notice of the Adjudicating Authority and on such notice of the compounding of the contravention being given, the person in relation to whom the contravention is so compounded shall be discharged.
- In case where adjudication has been done by the AA and an appeal has been filed under section 17 or section 19 of FEMA, 1999, no contravention can be compounded in terms of Rule 11 of Foreign Exchange (Compounding Proceedings) Rules, 2000.



Compounding is not a right

- It is under the power of the competent authority to decide on a case-to-case basis whether or not compounding is to be granted. The same has been held by the Bombay High Court in the case of **Brentfield Travels Co. Pvt. Ltd v. Reserve Bank of India & Anr** (*Writ Petition No.1777 OF 2011*) -

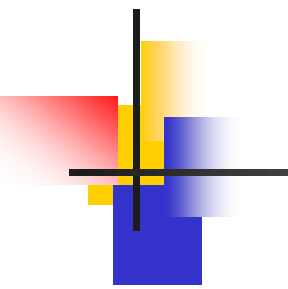
"The power to compound has to be exercised judiciously having regard to the considerations which have been set out in the statute and in the circular issued by the Reserve Bank of India. There is no absolute right to claim a compounding of contraventions. It is for the Competent Authority to decide as to whether the contravention is of a technical nature or whether it is of a sensitive nature involving broader issues of national security or money laundering or serious infringement of the regulatory framework in which case a compounding cannot be allowed."



Investigation - Types of Contraventions

■ Complaint under Section 16(3) vs operation of Section 37A and Compounding:

- Complaint under Section 16(3) can be made by officers of ED to AA for commencing inquiry for any contravention of FEMA as referred to in Section 13
- However, Section 37A specifies special dispensation for assets held outside India in contravention of Section 4 whereby, officers of ED can seize assets of equivalent value in India and report the same to the Competent Authority (i.e. officer not below the rank of Joint Secretary) who in turn shall confirm or set aside such order before final adjudication by the AA
- Contraventions of the kind specified in Section 37A cannot be compounded whereas all other contraventions under FEMA referred to in Section 13 can be compounded.
- Compoundable offenses include those relating to non-reporting / non-compliance or delay in reporting / compliance under FDI, ODI, ECB and LO/BO/PO for which specific guidance is provided in the Master Directions on Compounding by way of suggested table of penalties.
- It may be noted that the Master Direction is silent on other widely prevalent contraventions such as diversion / non-use of LRS remittances, realization & repatriation of foreign exchange, delay in receipt of export proceeds, receipt of advance export proceeds, delay in payment for imports, delay / non-receipt of goods after making advance payment of exports, etc. In such cases, if the ED is of the view that it relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13.

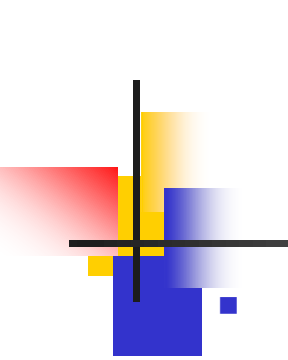


S. 15 of FEMA-A voluntary Process

- **Power to compound contravention**

15. (1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty 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 as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.



Investigation - Power of search, seizure, etc. under S. 37 of FEMA

- **Power of search, seizure, etc.**

37. (1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.

(2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.

(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.

Investigation - Power of search, seizure, etc. under S. 37 of FEMA (cont'd)

- Officers of ED not below the rank of Asst. Director have the power under Section 37(3) to exercise all the rights for investigation which have been conferred on income-tax authorities under the Income Tax Act, 1961 (ITA).
- Thus, the provisions under the ITA giving power of summons, search and seizure etc. for the purpose of investigation to the relevant authorities under ITA will apply analogously to the ED under FEMA.
- These powers under ITA include:
 - discovery and inspection; enforcing the attendance of any person, including any officer of a banking company and examining him on oath; compelling the production of books of account and other documents; and issuing commissions;
 - search and seizure, and the provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under the Act;
 - to require the officer or authority, as the case may be, to deliver such books of account, other documents or assets to the requisitioning officer;
 - to call for information as stated therein;
 - to enter and survey any place within the limits of his jurisdiction; to inspect books of account or other documents as he may require, to check or verify the cash, stock or other valuable article or thing which may be found therein; and to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under the Act.

Investigation - Power of search, seizure, etc. under S. 37 of FEMA (cont'd)

- The aforesaid powers similar to those conferred on income-tax authorities under the ITA were upheld by the Delhi High Court in the case of **Suman Sehgal v Union of India [AIR 2006 Delhi 216]** by holding:

"For that matter, Section 37(3) does not refer to any express provision of the Income Tax Act. The only conclusion which can be therefore logically read is that there is no pre-condition that any 'proceeding' ought to be pending against a particular or specified individual nor is the pre- requisite for exercise of such power dependent upon existing judicial proceeding. As long as there are certain matters under the investigation of the concerned authority, it can invoke the power under Section 37(3)."

Investigation - Power of search, seizure, etc. under S. 37 of FEMA (cont'd)

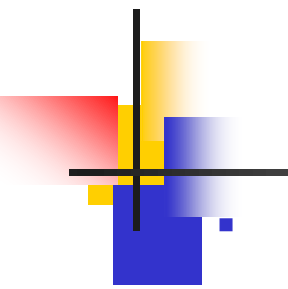
- The right of the ED to issue summons has been upheld by the Madras High Court in the case of **KA. Manzoor Vs. Assistant Director, Enforcement Directorate** by stating that such a right under s. 37(3) to be summoned by the ED cannot be disputed in court by way of writ. The ability to summon a person to appear in order to submit relevant documents is part of the ED's preliminary inquiry and does not render a person 'accused' in the eyes of the law. As a result, the issuance of a summons does not infringe on a person's rights, and they are unable to challenge it in court.
- The Act has deliberately chosen not to apply the concept of summons used either under the Code of Civil Procedure or under the Code of Criminal Procedure, but has chosen to apply analogous provisions found in the ITA. Therefore, while interpreting the scope and width of Section 37 of FEMA, one cannot apply the concept of summons as available to a Civil Court under the Code of Civil Procedure, only because the power of a Civil Court was conferred on the authorities.
- Similarly, the Hon'ble Supreme Court held in **Standard Chartered Bank v. Directorate of Enforcement [(2006) 4 SCC 278]**, that when a show-cause notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice, at this stage, unless the notice is shown to have been issued palpably without any authority of law.

Investigation - Power of search, seizure, etc. under S. 37 of FEMA (cont'd)

- In **T.T.V. Dinakaran and Another vs The Enforcement Officer** [1997 (57) ECC 25], the Madras High Court categorically held that when there is suspicion against the petitioner, the authorities may summon him for inquiry with all relevant documents in his possession. It cannot be concluded that the petitioner is innocent or not involved, until the inquiry is completed.
- Appearance by Advocate or C.A.

During the investigation, the ED can record statements from the accused, for collecting material and gathering facts to investigate the matter further. However, when collecting materials to take further action, the officers of FEMA do not act as a Court. Therefore, even at the initial stage itself, before the Adjudicating Authorities comes to a conclusion to proceed further or not, there need be no assistance to the petitioners either by an Advocate or by a Chartered Accountant

- **P. Giribabu vs. Deputy Director of Enforcement** [2010 SCC Online Mad 2858]



Complaint under S. 16 of FEMA

- After completion of the investigation, the investigating officer has to file a formal complaint before AA under Section 16 of FEMA, against the alleged defaulter(s).
- The complaint contains- nature of contraventions likely to have been committed; detailed facts and circumstances leading to such contraventions; and list of documents relied upon by the investigating officer/complainant.
- AA is required to issue a notice to the alleged defaulter to show cause within the period specified in the notice (being not less than ten days from the date of service of notice) as to why an inquiry should not be held against such defaulter as provided in Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 ('Rules').
- While holding an inquiry under the said Rules, the AA has the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case, to give evidence or to produce any document which in the opinion of the AA may be useful for or relevant to the subject matter of the inquiry.
- It is also provided that if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed, the AA, after recording the reasons in writing, recommend the initiation of prosecution and if the ED is satisfied, it may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director (Section 13-1B).

Adjudication Proceedings under S. 16 of FEMA

- If the AA is of the opinion that an inquiry should be held, it shall issue a notice fixing a date for the appearance of the accused either personally or through his legal practitioner or a chartered accountant duly authorised by him (Rule 4(3) of the said Rules).
- The AA is not bound to observe the provisions of the Indian Evidence Act, 1872 (Rule 4(5) of the said Rules).
- In **Sidhartha Vashisht v. State (NCT of Delhi)** [(2010) 6 SCC 1], the Supreme Court has held that under the Code of Criminal Procedure, 1973, the right of the accused to receive the documents/statements submitted before the Court is absolute and it must be adhered to by the prosecution and the Court must ensure the same. The expression 'due process of law' shall deem to include fairness in trial. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in Court or not.
- The Court has clarified in **Shashank Vyankatesh Manohar v. Union of India** [2014(1) MhLj 838] that after issuing show cause notice and receiving objections to the notice from the noticee, the AA is required to apply his mind to the objections by recording his reasons for forming an opinion on the file.
- The Act provides that the AA should dispose of the complaint as expeditiously as possible and endeavour shall be made to do the same within one year from the date of receipt of the complaint and, in the event, the complaint cannot be disposed of within the said period, the AA has to record such reasons in writing periodically, for not disposing of the complaint within the said period (Section 16(6)).

Final Adjudication Order under S. 13 of FEMA and its Enforcement under S. 14

- If the AA is satisfied that the accused has committed the contravention, he may, by a reasoned order in writing, impose such penalty as he thinks fit, in accordance with the provisions of Section 13 of FEMA
- The penalties for contraventions, as provided under FEMA are:-
 - a. thrice the sum involved in such contravention (where such amount is quantifiable); or
 - b. up to two lakh rupees where the amount is not quantifiable; and
 - c. in case of a continuing contravention, a further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.
- If a person fails to make full payment of penalty imposed on him by the AA within a period of 90 days from the date of service of the notice of payment on him, he shall be liable to civil imprisonment [Section 14(1)]
- No order for arrest and detention in a civil prison of the defaulter will be made by the AA, without providing an opportunity to the defaulter to show cause why he should not be committed to the civil prison [(Section 14(2)]
- A warrant for the arrest of the defaulter may be issued by the AA if the AA is satisfied that the defaulter is likely to abscond or leave the local limits of the jurisdiction of the AA with the object or effect of delaying the execution of the certificate [(Section 14(3)]

Appeals against the Order

- Provisions for Appeals against the Order of the AA as under:

Appeal against Final Order within 45 days or receiving Final Order	- If Order made by AA, being an Asst. Director or Deputy Director, appeal may be made with Special Director (Appeals) as per Section 17; - If Order made by AA, other than Asst. Director or Deputy Director, or by Special Director (Appeals), appeal may be made with Appellate Tribunal as provided in Section 19
Appeal against Order of Appellate Tribunal	To be filed with High Court as provided in Section 35 within 60 days from the date of receipt of the order passed by the Appellate Tribunal on any question of law arising out of such an order.

- The Appellate Tribunal and the Special Director (Appeals) are not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice [Section 28(1)]
- The Appellate Tribunal shall dispose off the appeal as expeditiously as possible and shall endeavour to dispose of the appeal within a period of one hundred and eighty (180) days from the date of receipt of the appeal. In the event, the Appellate Tribunal fails to dispose off the appeal within a period of one hundred and eighty (180) days then Appellate Tribunal shall record its reasons in writing for the same [Section 19(5)]

Special provisions relating to assets held outside India under S. 37A of FEMA

- **Section 4.** Holding of foreign exchange, etc.—Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.
- **Special provisions relating to assets held outside India in contravention of section 4**

37A. (1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property: Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

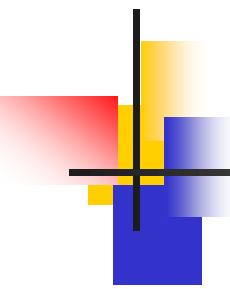
(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

Special provisions relating to assets held outside India under S. 37A of FEMA (cont'd)

37A. (3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1): Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).



Special provisions relating to assets held outside India under S. 37A of FEMA (cont'd)

37A.

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(6) Nothing contained in section 15 shall apply to this section.

Section 37A inserted by the Finance Act, 2015, w.e.f. 9-9-2015

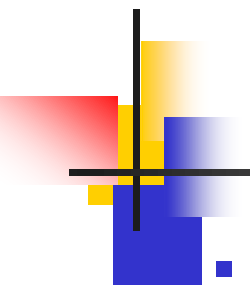
- **Mutual Legal Assistance Treaty with Foreign countries in criminal matters**
- **Prosecution and value of fine**

Powers of various Authorities under FEMA

Compounding	Investigation	Adjudicating Authority	Appellate Tribunal & Special Director (Appeals)
Compounding Authority can call for any information, record or any other documents relevant to the compounding proceedings. Failure to submit can result in return of compounding application.	S. 37(3): Officers of ED can exercise the like powers which are conferred on tax authorities under Income-Tax Act.	S.16(5): Deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (which imposes imprisonment and / or fine in certain cases of contempt being omission to produce document or insulting / interrupting public servant in course of duties)	S.28(5): Deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (which imposes imprisonment and / or fine in certain cases of contempt being omission to produce document or insulting / interrupting public servant in course of duties)
RBI encourages the applicant to appear directly for it rather than being represented / accompanied by legal experts / consultants, as compounding is only for admitted contraventions. However, legal practitioner or CA can appear before the Compounding Authority.		S.16(5): All proceedings deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (i.e. intentionally giving false evidence or insulting / interrupting public servant in course of duties can attract imprisonment and also be liable to fine)	S.28(5): All proceedings deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (i.e. intentionally giving false evidence or insulting / interrupting public servant in course of duties can attract imprisonment and also be liable to fine)
Appearing for or opting out of personal hearing does not have any bearing whatsoever on the amount imposed in the compounding order.		S. 14(13): Enforcement of Order of AA: A detention order may be executed in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973	S.28(1) & (2): Have same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of, inter alia, summons, enforcing attendance, search, discovery & production of documents, receiving evidence, etc. But are not bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and shall have powers to regulate own procedure.

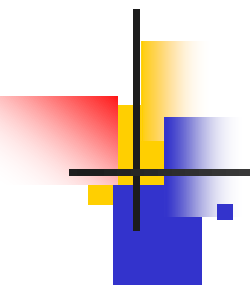
Powers of various Authorities under FEMA (cont'd)

Compounding	Investigation	Adjudicating Authority	Appellate Tribunal & Special Director (Appeals)
		Rule 4(3) of AA Rules: The accused may appear at the inquiry, either personally or through his legal practitioner or a chartered accountant duly authorised by him.	S.32: Legal Practitioner or CA can appear in appeal before Special Director (Appeals). Such appearance was also permitted by FEMA before Appellate Tribunal prior to amendment by Finance Act 2017 when a number of Tribunals were merged. The Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 is now the Tribunal for purposes of FEMA.
		S.34: Civil Court has no jurisdiction to entertain any suit or proceedings in these matters. No injunction can be granted by any Court or authority in respect of matters under FEMA. Civil Courts below the High Court include District Court, City Civil Court, Small causes Court, etc.	S.34: Civil Court has no jurisdiction to entertain any suit or proceedings in these matters. No injunction can be granted by any Court or authority in respect of matters under FEMA. Civil Courts below the High Court include District Court, City Civil Court, Small causes Court, etc.



Financial Intelligence Unit-India (FIU)

- FIU is the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspected financial transactions involving tax evasion and scheduled offences of PMLA.
- Powers and functions include:
 - receiving information and reports being Cash Transaction reports (CTRs), Non-Profit Organisation Transaction Report (NTRs), Cross-Border Wire Transfer Reports (CBWTRs), Reports on Purchase or Sale of Immovable Property (IPRs) and Suspicious Transaction Reports (STRs) from various Reporting Entities under PMLA.
 - processing, analysing and disseminating information to any authority in law in relation to suspected financial transactions.



Financial Intelligence Unit-India (FIU)

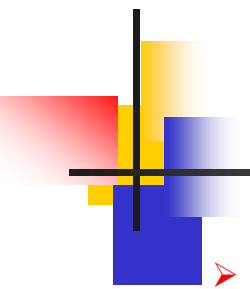
- Type of information to be furnished to FIU by every Reporting Entity (specified under Section 12 of PMLA):
 - all cash transactions of the value of more than Rs. 10 lakhs or its equivalent in foreign currency
 - all series of cash transactions integrally connected to each other which have been individually valued below Rs. 10 lakhs or its equivalent in foreign currency where such series of transactions have taken place within a month and the monthly aggregate exceeds an amount of Rs. 10 lakhs or its equivalent in foreign currency
 - all transactions involving receipts by non-profit organizations of value more than Rs. 10 lakhs, or its equivalent in foreign currency
 - all cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine or where any forgery of a valuable security or a document has taken place facilitating the transactions
 - all suspicious transactions whether or not made in cash
 - all cross border wire transfers of the value of more than Rs. 5 lakhs or its equivalent in foreign currency where either the origin or destination of fund is in India.
 - all purchase and sale by any person of immovable property valued at Rs. 50 lakhs or more that is registered by the reporting entity, as the case may be



Financial Intelligence Unit-India (FIU)

Suspicious transaction means a transaction referred to in Rule 2(1)(h) of PMLA (Maintenance of Records) Rules 2005, including an attempted transaction, whether or not made in cash, which to a person acting in good faith-:

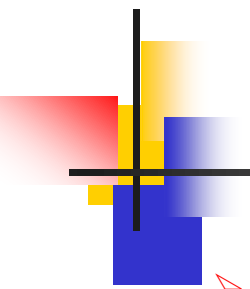
- (a) gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or
 - (b) appears to be made in circumstances of unusual or unjustified complexity; or
 - (c) appears to have no economic rationale or bona fide purpose; or
 - (d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism;
- Transaction involving financing of the activities relating to terrorism includes transaction involving funds suspected to be linked or related to, or to be used for terrorism, terrorist acts or by a terrorist, terrorist organisation or those who finance or are attempting to finance terrorism.



Case Study I – Seizure of assets under Section 37A

Facts of the case:

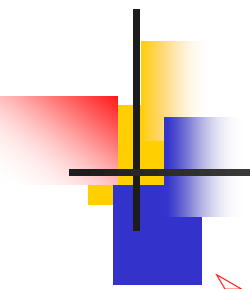
- India Hold. Co. is a promoter-owned investment company holding investments in various shares and securities of promoter group.
- During FY 17-18, the company incorporated its 100% wholly owned subsidiary in Singapore namely Sing.Hold. Co. with an objective of holding the investments by the Group outside India.
- Further, Singapore Hold. Co. incorporated a 100% wholly owned subsidiary in UAE namely UAE Trade Co. for exploring trading opportunities.
- UAE Trade Co. incorporated its 100% wholly owned subsidiary in BVI namely BVI Trade Co. for purpose of trading activities in UAE. It also held a small investment in an innovation pharma research Company in USA.
- India Hold Co., through ODI under Automatic Route, remitted \$ 2.5 million in tranches to its Singapore Company as equity capital for trading operation. The money received by Singapore Company was invested in Dubai Co and by Dubai Co into BVI Co as capital and loan.
- BVI Trade Co. took a decision to purchase a property in London to be used as guest house accommodation to facilitate such trading business. It purchased a property in London at \$ 5.5 million essentially to be used as guest house for people travelling for trading operation as stated above. BVI company used \$ 1.50 million out of remittance from India and balance of \$ 4.00 million was out of loan taken from unrelated source in UAE.
- India Hold. Co. duly disclosed all the details while filing Forms for ODI under Automatic Route to RBI through Authorized Dealer Bank.



Case Study I – Seizure of assets under Section 37A (cont'd)

Facts of the case (cont'd):

- Post Panama Papers Leak, the Investigation Wing of Income Tax Department initiated enquiry. All the details were submitted to IT Department to their satisfaction.
- Subsequently, Enforcement of Directorate also initiated enquiry in the name of India Hold. Co. and its Promoters & family members as ultimate beneficiaries. All the details were disclosed to ED.
- The statements of director of India Hold. Co. and family members were recorded at various dates before ED.
- ED alleged that the purchased property outside India was in contravention of provisions of Section 4 of FEMA.
- ED seized some mutual fund investments of India Hold. Co. of Rs. 10.00 crore (equivalent to \$ 1.50 million).
- ED passed order u/s 37A for seizure of Rs. 10.00 crore and forwarded it to the Competent Authority viz. Commissioner of Customs (Appeals) for consideration / confirmation of said order u/s 37A.



Case Study I – Seizure of assets under Section 37A (cont'd)

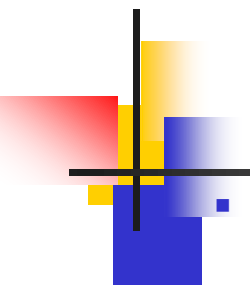
Questions / Issues for discussion:

- Whether the above purchase of property by BVI subsidiary is in violation of ODI regulations (i.e. remittances should be made for bonafide business purposes only under ODI) or not
- If it is in violation of FEMA, whether it will be treated as technical and will be subject to compounding? If so, what kind of compounding fees or penalty is expected?
- Whether at this stage also, if the transaction is unwound by selling the property and bringing the money back to India, can a compounding application be made to RBI?
- Which would be the best authority for seeking compounding – RBI or Special Director ED or to submit to Adjudication?

Case Study I – Seizure of assets under Section 37A (cont'd)

Outcome of the matter:

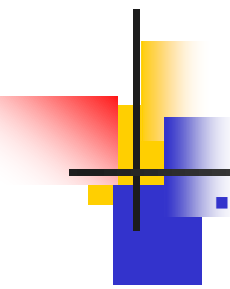
- The Competent Authority upheld the seizure of equivalent value in India under Section 37A as the Indian Party had contravened the provisions of ODI and consequently Section 4 as the remittance was not utilized for bonafide business purpose and that the so-called trading activities were a smoke-screen to cover the real intention of acquiring valuable immovable property outside India for the personal use of the Promoters of the group.
- India Hold. Co. and its Promoters preferred an appeal to the Appellate Tribunal against the said Order of the Competent Authority.
- In the meanwhile, after passing of the said seizure Order, India Hold Co. was able to repatriate back to India, the entire foreign exchange that it had remitted under the ODI scheme. This was pursuant to the sale of their property in UK by the step down BVI subsidiary.
- As per Section 37(A)(4) proviso, if *"at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority as the case may be on receipt of an application in this regard from the aggrieved person..... shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-Section (1)"*.
- Accordingly, on Adjudication, the seizure of Indian assets was released by the Adjudicating Authority.
- As the matter was resolved, India Hold Co. did not press its appeal at the Appellate Tribunal against the Order of the Competent Authority.



Case Study II – ED Adjudication on seizure of foreign currencies

Facts of the case:

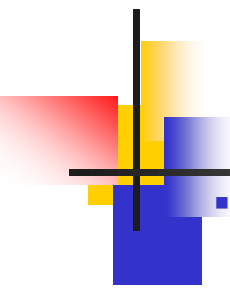
- XYZ Education Society is engaged in education activities in Mumbai having Engineering & Medical Colleges. Shri ABC is one of its Trustees who is resident Indian.
- During the course of investigation conducted under Section 132 of the I.T. Act against XYZ group of entities, a search was conducted by the tax authorities in July 2016 at the residence of Shri ABC and assorted foreign currencies equivalent to about INR 40 lakhs were seized from the personal bank locker of Shri ABC.
- Intimation of the above search and seizure of foreign currencies was received by the offices of ED from the tax authorities.
- Accordingly, investigation under FEMA was initiated against Shri ABC by the ED. Directive was issued to Shri ABC under Section 37 of FEMA r.w. Section 133(6) of I.T. Act to furnish records / documents relating to source of the foreign currencies. Summons was also issued to Shri ABC under Section 37(1) and (3) of FEMA r.w. Section 131(1) of I.T. Act requiring personal attendance and the statement of Shri ABC was recorded at the personal hearing.



Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Explanations given by Shri ABC regarding source of foreign currencies are:

- The said foreign currencies (USD, GBP, Euro, HK\$, Swiss Francs, AED) aggregating equivalent to about USD 60,000 partly represent unspent foreign exchange from earlier business trips, have partly been purchased for the business trip for alumni event to USA in March 2016 and partly been received during the event conducted in the USA from non-resident ex-students who voluntarily contributed towards the expenditure of the event in appreciation that their college hosted this remarkable gathering.
- The contribution received from the alumni students was carried back to India by twelve officials of XYZ who had travelled to USA for the event and had personally collected the contribution from the alumni students.
- At arrival in India, Cash declaration Form was not required to be submitted to Customs as each official of XYZ was carrying less than US\$ 5,000 or equivalent in cash
- For security reasons, the said foreign currencies were kept with the trustee Shri ABC.
- The said foreign currencies were duly recorded in the books of account of XYZ.
- These foreign currencies were validly held for future trips as 180 days were still not over for surrender to AD-Bank when the search operation was conducted and the currencies were seized during July 2016.



Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

■ **Contraventions of FEMA as determined by the ED and consequences:**

- Shri ABC, who is resident Indian, was unauthorizedly possessing foreign currencies equivalent valued at Rs. 40 lakhs without any special or general permission of RBI and also did not deposit the foreign currencies within the prescribed limit of 90 days.
- Shri ABC has therefore contravened provisions of Section 3(a), Section 9(a) and (e) r.w. Regulation 3 of Fema Ntf. 11(R) i.e. Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 to the extent of Rs. 40 lakhs
- Thereby the foreign currency seized is also liable to confiscation under Section 13(2)
- Accordingly, Show Cause Notice to be issued to Shri ABC for the aforesaid contraventions and Adjudication Proceedings as contemplated under Section 16 may be initiated.

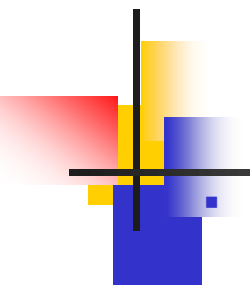
■ **Question:**

- What can be the likely grounds of defense for Shri ABC in the Adjudication Proceedings?

Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Discussions – Provisions of law:

- Section 3. Dealing in foreign exchange, etc.— Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—
 - (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- Section 4. Holding of foreign exchange, etc.— Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.
- Section 8. Realisation and repatriation of foreign exchange.— Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.
- Section 9. Exemption from realisation and repatriation in certain cases.— The provisions of sections 4 and 8 shall not apply to the following, namely:—
 - (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;
 -
 - (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify;



Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Discussions – Provisions of law (cont'd):

- It may be noted that Section 4 of FEMA prohibits any person resident in India from acquiring, holding, owning, possessing or transferring any foreign exchange, foreign security or any immovable property situated outside India save as otherwise provided in FEMA. Similarly, Section 8 imposes an obligation where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.
- However, Section 9 of FEMA provides exemption from Sections 4 and 8 of FEMA relating to mandatory realisation and repatriation of foreign exchange into India by a person resident in India. According to Section 9(e), a person resident in India is exempted from repatriating foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify.
- The above provisions of Section 8 and Section 9 read with their relevant Notifications viz. FEMA Ntf. 9(R) and FEMA Ntf. 11(R) are summarized in the table below for ease of understanding:

Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Discussions – Provisions of law – Summary of FEMA Ntf. 9(R) and FEMA Ntf. 11(R):

FEMA Ntf. (9R) [Ref. Sec. 8] Realisation, repatriation and surrender of foreign exchange	FEMA Ntf. 11(R) [Ref. Sec. 9] Possession and Retention of Foreign Currency
<u>Regn. 5:</u> In case of Resident Person not being Individual - (1) Sell to AD <u>realized foreign exchange</u> due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within 7 days from the date of its receipt; (2) in all other cases within 90 days from the date of its receipt.	<u>Regn. 3:</u> For the purpose of Section 9 clause (a) and clause (e), the following limits are specified for possession or retention of <u>foreign currency or foreign coins</u>:- i) Possession without limit of foreign currency and coins by an authorised person within the scope of his authority; ii) Possession without limit of foreign coins by any person; iii) Retention by a PRII of foreign currency notes, bank notes and travellers' cheques upto US\$ 2000 or its equivalent in aggregate, provided that such FE - (a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or (b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or (c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or (d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Discussions – Provisions of law – Summary of FEMA Ntf. 9(R) and FEMA Ntf. 11(R) (cont'd):

FEMA Ntf. (9R) [Ref. Sec. 8] Realisation, repatriation and surrender of foreign exchange	FEMA Ntf. 11(R) [Ref. Sec. 9] Possession and Retention of Foreign Currency
<u>Regn. 6:</u> In case of Resident Person not being Individual – (1) Unspent or unused <u>FE purchased / acquired</u> for any purpose as per declaration to be surrendered within 60 days of purchase / acquisition by him. (2) However, if above <u>FE is for foreign travel</u>, unspent FE to be surrendered within 90 days of return to India if in form of notes & coins and within 180 days if in form of Travellers cheques.	
<u>Regn. 7:</u> In case of Resident Person being Individual - Surrender the received / realized / unspent / unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within 180 days from the date of such receipt / realization / purchase / acquisition or date of his return to India, as the case may be.	

Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

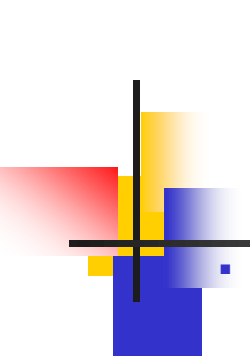
Solution: Possible line of defense -

Source of Foreign Currency		Applicability of FEMA Notification	Due-date for surrender to AD
Unspent amounts from prior trips (before Feb. 2016) as under:			
(a)	Unspent amounts from prior visits in various currencies aggregating less than US\$ 2,000	Ntf. FEMA 9(R) is applicable	Full amount may be retained as it is below US\$ 2,000
Currency brought back to India after alumni trip to USA in March 2016 aggregating US\$ 55,000 as under:			
(b)	Contribution of US\$ 40,000 received from ex-students settled in USA of XYZ for expenses of the alumni event held in USA	Ntf. FEMA 9(R) is not applicable but Ntf. FEMA 11(R) is applicable	No due-date specified in Ntf. FEMA 11(R)
(c)	i. Currency purchase of US\$ 12,000 from Authorized Dealer for the trip ii. Unspent amount from ATM withdrawal of US\$ 3,000	Ntf. FEMA 9(R) is applicable	September 2016 (currency is seized before the due-date of surrender)
Unspent amounts from trips after March 2016 as under:			
(d)	GBP 3,000 from the trip of June 2016 prior to the search	Ntf. FEMA 9(R) is applicable	December 2016 (currency is seized before the due-date of surrender)

Case Study II – ED Adjudication on seizure of foreign currencies (cont'd)

Solutions: Possible line of defense (cont'd):

- The amounts received from the alumni event organizing committee of XYZ but held by Shri ABC in capacity as trustee / custodian of XYZ in nature of foreign exchange falls within the ambit of Section 9(e) of FEMA.
- Section 9 of FEMA deals with exemption from realisation and repatriation in certain cases and states that the provisions of Section 4 and Section 8 do not apply to the possession or acquisition of foreign exchange under Section 9(a) to 9(e). Accordingly, provisions of Notification No. FEMA 9(R) / 2015-RB dt. 29.12.2015 which deals with realisation, repatriation and surrender of foreign exchange (within 90 days from date of return to India in case of non-individuals and 180 days in case of individuals) as stipulated under Section 8 does not apply to the instant case.
- Further, the possession and retention of US\$ 40,000 falls within the purview of provisions of Notification No. FEMA 11(R) / 2015-RB dt. 29.12.2015 which is applicable to instances referred to in Sections 9(a) and 9(e) of FEMA.
- No time period is stipulated under Notification FEMA 11(R) for surrender of foreign currency acquired in manner contemplated in Section 9(e). Moreover these amounts were also reflected as miscellaneous income in the Financial Statements of XYZ. Therefore, it was a bona fide belief that the said amount of US\$ 40,000 can be utilised for future trips within 180 days from the date of importing the FC. However before the due-date of surrender or utilisation for future trips, the search took place and currency was seized by Income-Tax authority.
- Hence, as no time period for surrender is specified under Notification No. FEMA 11(R) for cases of foreign exchange falling under Section 9(e) of FEMA, a lenient view may be taken by the AA while deciding on the violation of FEMA and the consequent penalty / confiscation of the sum involved being equivalent to US\$ 40,000.



Survey of recent Investigation & Adjudication cases

■ Xiaomi Technology India Ltd. vs UOI, ED [Karnataka High Court Judgment dt. 05.07.2022]

- ED, on the basis of information from the credible sources that petitioner had made certain foreign remittances in the name of royalty to foreign based entities in violation of the provisions of FEMA, initiated investigation. Summons under the provisions of FEMA were issued to the Ex-country head and Managing Director of the petitioner and their statements were recorded. Based on the collected information, the Authorized Officer passed seizure order under Section 37A[1] of FEMA.
- ED claimed that Petitioner has not received any kind of service, software/IPR/technology directly or indirectly. When there is no use of any intellectual property by the petitioner, there arises no occasion for the petitioner to pay royalty.
- As the matter was before Competent Authority, the issue before the Hon'ble Court at this stage was "whether the writ petition is liable to be dismissed as not maintainable on the ground of availability of alternate remedy and the writ petition is premature?"
- The Hon'ble High Court observed that FEMA is a complete Code in itself and is an act to consolidate and maintain law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange management in India. Further, when statute creates a special mechanism for adjudication and when statute itself provides for remedy that too in a physical statute, a writ petition should not be entertained ignoring the statutory dispensation.
- The Hon'ble Court stayed the impugned seizure order subject to condition that the petitioner shall operate Bank accounts which are seized under the impugned order, only for the purpose of meeting expenses for carrying out day to day activities of the Company and observed that order shall not confer any right on the petitioner to make payment in the form of royalty or in any other form to the Companies located outside India. Interest of justice would be met, if the above interim order is continued till orders are passed by the Competent Authority as stated above.

Survey of recent Investigation & Adjudication cases (cont'd)

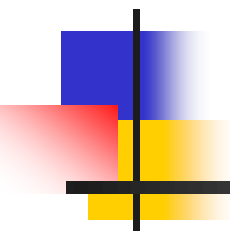
■ Akzo Nobel India Ltd. vs ED [FPA-FE-21/DLI/2015; Order dt. 03.07.2023]

- Akzo made 12 outward remittances in 2014 totalling Rs. 240 lakhs but no Exchange Control Copy of the Bills of Entry had been submitted and the said Foreign Currency had not been surrendered to the Authorised Dealer Bank. Show Cause Notice was issued for contravention of the provisions of Section 10(6) r/w 10(5) of FEMA further r/w Regulation 6(1) of Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations 2000. The Company and four Directors were charged for aforementioned contraventions under Section 42(1) of FEMA.
- The Adjudicating Authority in the Order dated 30.01.2015 held the five appellants herein guilty of charges levelled in the Show Cause Notice. He imposed penalty of Rs. 25 lakhs on Akzo for the aforementioned contraventions but took a lenient view as the role of Directors was not clearly spelt out in the Show Cause Notice and therefore, imposed penalty of Rs. 1 lakh each on the four Directors.
- The appellants preferred an appeal to the Appellate Tribunal against the Order of the AA on the main ground that the Show Cause Notice suffers from serious latches as it has been issued after 12 years of the initial detection of the case by the respondent. They have pleaded that they were under the impression that the matter had been closed because of the prolonged silence on the part of the said Authorised Dealer as well as the Enforcement Directorate.
- The Appellate Tribunal reduced the penalty to Rs. 5 lakhs on Akzo as it is only in miniscule percentage of cases that the Company failed to submit proof of imports against 10 remittances. No penalty was levied on the Directors as the Show Cause Notice had failed to spell out clearly the role of the Directors.

Survey of recent Investigation & Adjudication cases (cont'd)

■ Rockwell India (P) Ltd. vs ED [FPA-FE-53/BNG/2015; Order dt. 12.09.2023]

- Complaint of ED in Dec. 2012 alleged that the export value in respect of 48 Bills of Exports for a total invoice value of US \$ 698572.30 equivalent to Rs. 3,28,32,901.86/- was not realized by the Appellant Company M/s. Rockwell India (P) Ltd. for more than six months from the dates of the exports. The complaint charged the Appellant Company under Section 7 (1) (a) of FEMA r/w Regulations Nos. 8, 9 & 13 of Foreign Exchange Management (Export of Goods & Services) Regulations 2000 r/w Regulation No. 3 of the Foreign Exchange Management (Manner of Receipt and Re-payment) Regulations 2000 and Regulation No. 3 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations 2000.
- The Adjudicating Authority vide Order dated 09.03.2015 made the finding that the appellants have failed to receive the export proceeds and hence have contravened the aforementioned provisions of the Act and the Regulations thereunder to the extent of US \$ 3,74,770.19 equivalent to Rs. 1,72,36,019/-. He accordingly imposed penalty of Rs. 25 Lakhs on the Company and Rs. 15 lakhs on its Managing Director.
- The appellants preferred an appeal to the Appellate Tribunal against the Order of the AA disputing the correctness of the amount which has been shown as unrealized export proceeds as the AD-Bank had not properly accounted for the realisations.
- The Appellate Tribunal ruled that the Order of the AA cannot be sustained as it is without looking into the matter comprehensively. The AA is therefore, required to re-examine the matter afresh giving opportunity to the Appellants and to the Karnataka Bank to verify the accounts to settle the issue as to what is the correct amount of the export outstanding.



Thank You
