IMPORTANT ACTS & AMENDMENTS - EXPLANATION

1. FERA - FOREIGN EXCHANGE REGULATION ACT

FERA was enacted in September 1973 and it came in force from January 1, 1974. It was amended by the Foreign Exchange Regulation (Amendment) Act 1993 and later in 2000, was replaced by FEMA.

- FERA applied to all citizens of India, all over India.
- The idea was to regulate the foreign payments, regulate the dealings in Foreign Exchange & securities and conservation of Foreign exchange for the nation.

Key Features

Important features of FERA are as follows:

1. RBI can authorize a person / company to **deal in foreign exchange**.
2. RBI can authorize the dealers to do transact the Foreign Currencies, subject to review and RBI was given power to revoke the authorization in case of non-compliancy
3. RBI would authorize the persons as Money Changers who will convert the currency of one nation to currency of their nation at rates **"Determined by RBI"**
4. NO person, other than "authorized dealer" would enter in **any transaction of the foreign currency.**
5. For whatever purpose Foreign exchange was required, it was to be used only for that purpose. If he feels that he cannot use the currency of that particular purpose, he would **sell it to a authorized dealer** within 30 days.
6. No person in India, without "permission from RBI" shall **make payments to a person resident outside India** and receive any payment from a person from outside India.
7. No person shall draw issue or negotiate any bill of exchange in which a right to receive payment outside India is created.
8. No person shall make **any credit in an account of a person resident out of India**.
9. No person except authorized by RBI shall **send foreign currency out of India**.
10. A person who has right to receive the foreign exchange would have **not to delay the receipt of the foreign exchange**.

To sum up, in FERA "**anything and everything**" that has to do something with Foreign Exchange **was regulated**. The Experts called it a "**Draconian Act"** which hindered the growth and modernization of Indian Industries. The important aspect of FEMA, in contrast with FERA is that it facilitates Trade, while that of FERA was that it "prevented" misuse. The focus was shifted from Control to Management.

2. BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT

A benami transaction is one:

· where a property is held by or transferred to person A but is paid for or money for which is provided for by person B. Also, this property is held for the immediate or future benefit of person B;

· where a transaction has been carried out in a fictitious name;

· where the person in whose name the property is denies any knowledge of ownership;

· where the person paying for a transaction or property-related arrangement is either not traceable or found to be fictitious.

However, certain transactions are exempt from this definition: (a) property held by a karta of a Hindu undivided family (HUF) for other members of the family or by an individual in the name of the spouse or children or by siblings who appear as joint owners in any document and (b) property held by a person in a fiduciary capacity for another person, for example, a trustee, executor, partner, director of a company or a depository. In the case of property held by the karta of a HUF, spouse, parent or siblings, the money for the transaction should have come from `known sources' (known source is a wider term than known source and covers loans, which are not classified as income).

Also exempted is a contract for the transfer of property which has been partly executed under the Transfer of Property Act, 1882, provided stamp duty has been paid and the contract has been registered.

The term `property' is not confined to a piece of real estate. The definition covers assets of any kind – moveable or immoveable, tangible or intangible, corporeal or incorporeal.

What happens to benami property?

The Act does not allow the re-transfer of benami property to the actual owner; any such transfer will be termed null and void. The Act clarifies that benami property that has been declared as part of the Income Disclosure Scheme of 2016 will not be acted against.

Any benami property will be confiscated by the central government. The Act sets out the procedure to be followed for this.

Penalty

Anyone entering into a benami transaction for whatever reason – to defeat the law, avoid payment of statutory dues or creditors – or abetting such a transaction is liable for rigorous imprisonment for a period between one and seven years as well as fine up to 25 per cent of the fair market value of the property. Anyone providing false information or providing false documentation can get rigorous imprisonment of six months to five years and may also have to pay fine up to 10 per cent of the fair market value of the property.

Who can take action?

An Initiating Officer (assistant commissioner of deputy commissioner of income tax), after getting a go ahead from the Approving Authority (additional commissioner or joint commissioner of income tax) can investigate alleged benami transactions. A notice has to be issued to the benamdar as well as the actual owner, if the identity is known. Procedures for investigation and inquiry are laid down in the Act.

The officer can also attach the property being investigated for a maximum of ninety days. If it needs to be attached for a longer period, the matter has to be referred to a three-member Adjudicating Authority. The Adjudicating Authority decides on whether or not a property is benami, after giving a fair hearing to those accused of a benami transaction. When the Adjudicating Authority declares a property benami, the property will pass into the custody of an Administrator.

Appeals against the order of the Adjudicating Authority can be made to a three-member Appellate Tribunal within 45 days. The Appellate Tribunal has to deliver its order within one year.

Will this help?

The Benami Transactions (Prohibition) Amendment Act is certainly a very comprehensive piece of legislation and also very stringent. There could be scope for harassment but how that plays out remains to be seen.

The Parliamentary Standing Committee on Finance that examined the Bill expressed concern at genuine transactions being labelled benami because of lack of clear titles, especially in rural areas. The finance ministry assured the committee that there were suitable safeguards in the Act to protect bona fide transfers.

3. PREVENTION OF MONEY LAUNDERING ACT 2002

Introduction

The purpose of a large number of criminal minds is to make profit or money for themselves or for any criminal organisation. Money laundering is the simplest way for these criminal to hide their illegal origin. Selling illegal arms, smuggling, drug trafficking, and other illegal activities can generate large amounts of money. Stealing Money through Fraud Way, accepting a bribe and doing computer fraud for some benefits can also produce huge profits and so this all fraud individual use Money Laundering to make their activities authorised. Because the Money which is generated by the illegal way is dangerous and can not be used directly so to make it happen Money Laundering is the process of conversation of such illegal activities to make it appear like authorised or legal.
Simply it is the process of engaging in specific Financial transactions to hide the identity, Process source and destination of money.

Money Laundering

The process of Money Laundering contains following stages.

Placement

The person who has the Money which is generated by illegal or fraud activities introduces such unauthorised funds into the Financial System by depositing smaller number of amounts in the Bank by using cheques or another instrument. In this stage the main work of the money launderer is the entry of his fund.

Layering

Now the second stage of Money Laundering is the layering. In this stage, the Money Launderer finds the unique way for transaction by creation of complex network In which he uses lots of different account so as to hide his true origin.He uses another person's account to place his money safe.

Integration

After successful placing of his criminal money through first two stages then money launderer uses such funds in the business, real estate, and in some other assets.Also then authorized money transferred or returned to the source where it has been originated.

The above stages always not work line by line sometimes illegal money gets mixed with authorized money like in the business of gambling nobody knows the source of money but after the gambling it becomes authorized for that individual.

Anti Money Laundering Act

In India, the Anti Money Laundering measures are controlled by using the Prevention of Money Laundering Act, 2002 which was introduced got working from 1st July 2005. RBI, SEBI and IRDA have introduced it under the PML Act, and hence it will be now applicable to all financial institutions, banks, mutual funds, insurance companies, and other financial agencies.The agency which is responsible for monitoring the Anti Money Laundering activities in India is called Financial Intelligence Unit (FIU IND) .It works under Department of Revenue, Ministry of Finance which analyses all the information related to person who is suspect.

Indian Government's Steps To Fight Against Money Laundering

- Government of India is doing best to fight against the threat of Money Laundering and so for that India has signed the rules with the following UN Conventions, which deal with Anti Money Laundering and Countering the Financing of Terrorism :
- International Convention for the Suppression of the Financing of Terrorism (1999).
- UN Convention against Transnational Organized Crime (2000).
- UN Convention against Corruption (2003).
- Under the special session held by United Nations General Assembly (UNGASS) during 8th to 10th June 1998 all the members of this group have to adopt the Anti Money Laundering Legislation & Programme and for that they have made act called 'Prevention Of Money Laundering Act 2002'.
- This Act has been again amended for enlarging its scope of money laundering, in 2009 by the law of Prevention of Money Laundering (Amendment) Act 2009. This Act was again further amended by Prevention of Money-Laundering (Amendment) Act 2012.

International response to Fight against Money Laundering

- Financial Action Task Force (FATF) is a government body which is established and introduced in 1989 by the initiative of G7 group.
- The main objectives of FATF are to regulate the effective implementation for fighting against money laundering, terrorist Financial activities and other problems related to the international financial system.
- Freezing terrorist assets , establishing Financial intelligence unit for collection , evaluation and find suspicious transactions reports from Financial institution are the functions of FATF.
- Indian is one of the active member of this FATF group.

Offence of Money Laundering

- Offence of money laundering has been defined in the section 3 of the Prevention Of Money laundering Act.

- Any person who is directly or indirectly attempts to become the part of such illegal activity shall be guilty according to the offence of money laundering.

Actions taken against persons involved in Money Laundering

- Under the section 17 and section 18 of Money laundering Act freezing of all unauthorised property and records takes place.
- Persons who committed this crime and found responsible according to offence of money are punishable to put in the prison for three years which may be extended upto seven years and also that person have to pay fine under the section 4 of money laundering act.
- If the offence committed is under the Narcotics and Psychotropic Substance Act 1985 then in that case the guilty person gets three years of prison which can be extended upto ten years and also that person have to pay fine.

4. GAAR-GENERAL ANTI-AVOIDANCE RULES

Introduction

General Anti-Avoidance Rule (GAAR) is an anti-tax avoidance regulation of India. It was introduced by then Finance Minister, Pranab Mukherjee, on 16 March 2012 during the Budget session.

Tax Avoidance

Avoidance means nothing but an attempt to reduce the tax liability through the legal means.

The difference between Tax Avoidance and Tax Evasion
Evasion & Avoidance are two different entities. In Avoidance, tax reduction is done legally but in evasion, it is done illegally.

GAAR in simple terms

Tax Avoidance is one of the major concerns across the world. Different countries framed different rules to minimise such tax avoidance. Such rules in simple terms are known as General Anti-Avoidance Rule (GAAR).Thus GAAR is nothing but the set of rules ratified so as to check the avoidance of tax.

History of GAAR in INDIA

- In India, the actual discussions started on 12th-Aug-2009, when the draft of Direct Taxes code Bill (DTC) released.

Some of the recent developments about GAAR are

- On 16th-Mar-2012: Finance Minister, Pranab Mukherjee takes a tough decision & announces that the government will curb on tax avoidance effective from the fiscal year 2012-13.
- On7th–May-2012: Finance Minister, Pranab Mukherjee forced to change his opinion and agreed to defer GAAR by a year as his announcements spooked oversea investors.
- On 28th-Jun- 2012: Finance Ministry releases the first draft on GAAR, there was the wide criticism of the provisions.

- On 14th-Jul-2012: PM, Manmohan Singh, formed a review committee under Parthasarathi Shome, for preparing a second draft by 31st August and final guidelines by 30th September 2012.
- On 1st-sept- 2012: Shome Committee recommends to defer GAAR by three years.
- On 14th-Jan-2013: Govt. of India partially accepts the recommendations of Shome Committee and has decided to defer the same for 2 years and will now be effective from the year 2016-17.
- On 27th-sept-2013, as per the notification issued by Govt. of India, GAAR would be valid for foreign institutional investors that have not taken the benefit of an agreement under Section 90 or Section 90A of the I-T Act or Double Taxation Avoidance Agreement (DTAA).

Thus,

- GAAR will not be applicable for the investments made by foreign investors prior to Aug-2010
- GAAR provisions that will come into effect from April 2016 and
- apply only to business arrangements with a tax benefit exceeding Rs3 crores.

Some recommendations of Parthasarathi Shome panel

- Defer implementation of GAAR by 3 years.
- The threshold of tax benefit is Rs.3 crores & additional with changes in 1962 Income Tax Rules.
- Mauritius Issue- GAAR should not appeal to inspect the realness of the residency FII from Mauritius. The government should hold the provisions of the CBDT circular that was issued in the year 2000 on acceptance of TRC (Tax Residence Certificate) issued by Mauritius government.
- The Approving panel is Five-member committee, two members must be non-government persons & of renown from the fields of Accountancy, Business or Economics.
- The other two members must be chief commissioners of IT dept., chaired by a retired High court judge.

5. Principal Provisions of Banking Regulation Act, 1949

1. Prohibition of Trading (Sec. 8):

According to Sec. 8 of the Banking Regulation Act, a banking company cannot directly or indirectly deal in buying or selling or bartering of goods. But it may, however, buy, sell or barter the transactions relating to bills of exchange received for collection or negotiation.

2. Non-Banking Assets (Sec. 9):

According to Sec. 9 "A banking company cannot hold any immovable property, howsoever acquired, except for its own use, for any period exceeding seven years from the date of acquisition thereof. The company is permitted, within the period of seven years, to deal or trade in any such property for facilitating its disposal". Of course, the Reserve Bank of India may, in the interest of depositors, extend the period of seven years by any period not exceeding five years.

3. Management (Sec. 10):

Sec. 10 (a) states that not less than 51% of the total number of members of the Board of Directors of a banking company shall consist of persons who have special knowledge or practical experience in one or more of the following fields:

(a) Accountancy;

(b) Agriculture and Rural Economy;

(c) Banking;

(d) Cooperative;

(e) Economics;

(f) Finance;

(g) Law;

(h) Small Scale Industry.

The Section also states that at least not less than two directors should have special knowledge or practical experience relating to agriculture and rural economy and cooperative. Sec. 10(b) (1) further states that every banking company shall have one of its directors as Chairman of its Board of Directors.

4. Minimum Capital and Reserves (Sec. 11):

Sec. 11 (2) of the Banking Regulation Act, 1949, provides that no banking company shall commence or carry on business in India, unless it has minimum paid-up capital and reserve of such aggregate value as is noted below:

(a) Foreign Banking Companies:

In case of banking company incorporated outside India, aggregate value of its paid-up capital and reserve shall not be less than Rs. 15 lakhs and, if it has a place of business in Mumbai or Kolkata or in both, Rs. 20 lakhs.

It must deposit and keep with the R.B.I, either in Cash or in unencumbered approved securities:

(i) The amount as required above, and

(ii) After the expiry of each calendar year, an amount equal to 20% of its profits for the year in respect of its Indian business.

(b) Indian Banking Companies:

In case of an Indian banking company, the sum of its paid-up capital and reserves shall not be less than the amount stated below:

(i) If it has places of business in more than one State, Rs. 5 lakhs, and if any such place of business is in Mumbai or Kolkata or in both, Rs. 10 lakhs.

(ii) If it has all its places of business in one State, none of which is in Mumbai or Kolkata, Rs. 1 lakh in respect of its principal place of business plus Rs. 10,000 in respect of each of its other places of business in the same district in which it has its principal place of business, plus Rs. 25,000 in respect of each place of business elsewhere in the State.

No such banking company shall be required to have paid-up capital and reserves exceeding Rs. 5 lakhs and no such banking company which has only one place of business shall be required to have paid- up capital and reserves exceeding Rs. 50,000.

In case of any such banking company which commences business for the first time after 16th September 1962, the amount of its paid-up capital shall not be less than Rs. 5 lakhs.

(iii) If it has all its places of business in one State, one or more of which are in Mumbai or Kolkata, Rs. 5 lakhs plus Rs. 25,000 in respect of each place of business outside Mumbai or Kolkata? No such banking company shall be required to have paid-up capital and reserve excluding Rs. 10 lakhs.

5. Capital Structure (Sec. 12):

According to Sec. 12, no banking company can carry on business in India, unless it satisfies the following conditions:

(a) Its subscribed capital is not less than half of its authorized capital, and its paid-up capital is not less than half of its subscribed capital.

(b) Its capital consists of ordinary shares only or ordinary or equity shares and such preference shares as may have been issued prior to 1st April 1944. This restriction does not apply to a banking company incorporated before 15th January 1937.

(c) The voting right of any shareholder shall not exceed 5% of the total voting right of all the shareholders of the company.

6. Payment of Commission, Brokerage etc. (Sec. 13):

According to Sec. 13, a banking company is not permitted to pay directly or indirectly by way of commission, brokerage, discount or remuneration on issues of its shares in excess of 2½% of the paid-up value of such shares.

7. Payment of Dividend (Sec. 15):

According to Sec. 15, no banking company shall pay any dividend on its shares until all its capital expenses (including preliminary expenses, organisation expenses, share selling commission, brokerage, amount of losses incurred and other items of expenditure not represented by tangible assets) have been completely written-off.

But Banking Company need not:

(a) Write-off depreciation in the value of its investments in approved securities in any case where such depreciation has not actually been capitalized or otherwise accounted for as a loss;

(b) Write-off depreciation in the value of its investments in shares, debentures or bonds (other than approved securities) in any case where adequate provision for such depreciation has been made to the satisfaction of the auditor;

(c) Write-off bad debts in any case where adequate provision for such debts has been made to the satisfaction of the auditors of the banking company.

Floating Charges:

A floating charge on the undertaking or any property of a banking company can be created only if RBI certifies in writing that it is not detrimental to the interest of depositors — Sec. 14A. Similarly, any charge created by a banking company on unpaid capital is invalid — Sec. 14.

8. Reserve Fund/Statutory Reserve (Sec. 17):

According to Sec. 17, every banking company incorporated in India shall, before declaring a dividend, transfer a sum equal to 20% of the net profits of each year (as disclosed by its Profit and Loss Account) to a Reserve Fund.

The Central Government may, however, on the recommendation of RBI, exempt it from this requirement for a specified period. The exemption is granted if its existing reserve fund together with Securities Premium Account is not less than its paid-up capital.

If it appropriates any sum from the reserve fund or the securities premium account, it shall, within 21 days from the date of such appropriation, report the fact to the Reserve Bank, explaining the circumstances relating to such appropriation. Moreover, banks are required to transfer 20% of the Net Profit to Statutory Reserve.

9. Cash Reserve (Sec. 18):

Under Sec. 18, every banking company (not being a Scheduled Bank) shall, if Indian, maintain in India, by way of a cash reserve in Cash, with itself or in current account with the Reserve Bank or the State Bank of India or any other bank notified by the Central Government in this behalf, a sum equal to at least 3% of its time and demand liabilities in India.

The Reserve Bank has the power to regulate the percentage also between 3% and 15% (in case of Scheduled Banks). Besides the above, they are to maintain a minimum of 25% of its total time and demand liabilities in cash, gold or unencumbered approved securities. But every banking company's asset in India should not be less than 75% of its time and demand liabilities in India at the close of last Friday of every quarter.

10. Liquidity Norms or Statutory Liquidity Ratio (SLR) (Sec. 24):

According to Sec. 24 of the Act, in addition to maintaining CRR, banking companies must maintain sufficient liquid assets in the normal course of business. The section states that every banking company has to maintain in cash, gold or unencumbered approved securities, an amount not less than 25% of its demand and time liabilities in India.

This percentage may be changed by the RBI from time to time according to economic circumstances of the country. This is in addition to the average daily balance maintained by a bank.

Again, as per Sec. 24 of the Banking Regulation Act, 1949, every scheduled bank has to maintain 31.5% on domestic liabilities up to the level outstanding on 30.9.1994 and 25% on any increase in such liabilities over and above the said level as on the said date.

But w.e.f. 26.4.1997 fortnight the maintenance of SLR for inter-bank liabilities was exempted. It must be remembered that at the start of the preceding fortnights, SLR must be maintained for outstanding liabilities.

11. Restrictions on Loans and Advances (Sec. 20):

After the Amendment of the Act in 1968, a bank cannot:

(i) Grant loans or advances on the security of its own shares, and

(ii) Grant or agree to grant a loan or advance to or on behalf of:

(a) Any of its directors;

(b) Any firm in which any of its directors is interested as partner, manager or guarantor;

(c) Any company of which any of its directors is a director, manager, employee or guarantor, or in which he holds substantial interest; or

(d) Any individual in respect of whom any of its directors is a partner or guarantor.

Note:

(ii)(c) Does not apply to subsidiaries of the banking company, registered under Sec. 25 of the Companies Act or a Government Company.

12. Accounts and Audit (Sees. 29 to 34A):

The above Sections of the Banking Regulation Act deal with the accounts and audit. Every banking company, incorporated in India, at the end of a financial year expiring after a period of 12 months as the Central Government may by notification in the Official Gazette specify, must prepare a Balance Sheet and a Profit and Loss Account as on the last working day of that year, or, according to the Third Schedule, or, as circumstances permit.

At the same time, every banking company, which is incorporated outside India, is required to prepare a Balance Sheet and also a Profit and Loss Account relating to its branch in India also. We know that Form A of the Third Schedule deals with form of Balance Sheet and Form B of the Third Schedule deals with form of Profit and Loss Account.

It is interesting to note that a revised set of forms have been prescribed for Balance Sheet and Profit and Loss Account of the banking company and RBI has also issued guidelines to follow the revised forms with effect from 31st March 1992.

According to Sec. 30 of the Banking Regulation Act, the Balance Sheet and Profit and Loss Account should be prepared according to Sec. 29, and the same must be audited by a qualified person known as auditor. Every banking company must take previous permission from RBI before appointing, re-appointing or removing any auditor. RBI can also order special audit for public interest of depositors.

Moreover, every banking company must furnish their copies of accounts and Balance Sheet prepared according to Sec. 29 along with the auditor's report to the RBI and also the Registers of companies within three months from the end of the accounting period.

6. EMPLOYEE PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952

Introduction

The objective of this act is to provide substantial security and timely monetary assistance to the employer and their family members. This act covers all the state of India except Jammu and Kashmir. It applies to any factory or any other establishment employing 20 or more persons with the permission of central, according to central government's official gazette. But the central government is empowered to apply this provision to any employing less than 20 persons with prior notification at least 2 months before.

Major schemes

This act covers three major scheme, they are

- Employees provident fund scheme
- Employees pension scheme
- Employees deposit linked insurance scheme

Central government constitute a Central Board to diagnose where all the act applies and all appointments by the central government. The Central Board shall constitute of

- Chairman, Vice Chairman
- Central provident fund (CPF) commissioner who shall be an ex-office member of the board
- Not more than 15 persons appointed by central government
- Not more than 15 persons representing the government of state
- 10 person representing employees of the establishments to which the scheme applies.

The board's duties are administering the funds vested in it by means of contributions and maintain proper accounts of its income and expenditure in central government's prescribed way. It also performs other functions under any provisions of Employees Provident Fund scheme and Insurance scheme.

Central government constitute Executive Committee to assist the central board in the performance of its function

- Chairman, he is appointed from amongst members of central board
- 2 persons from central amongst central board
- 3 persons representing employers and 3 persons representing employees

Government CPF commissioner is to serve as CEO of Central Board, a Financial advisor and Chief Accounts Officer to assist central provident fund commissioner in the discharge of his duties.

The Central government also constitutes Employee Provident Fund Appellate tribunal and it consists of only one person who is Presiding officer. Eligibility for the presiding officer is that a person must be the judge of high court or district court.

Contributions

The provident fund contributions consist of contribution both by Employee and by Employer.

Employee's Contribution:

An employee is eligible for membership of Employee Provident Fund from the very 1st date of joining in any establishment getting salary up to Rs6500 Provident fund contribution is recovered at 12% of wages from employee salary. The pension is that which represents a person has retired. To avail pension a person should have 10years of continues service and with age of 50years or more will receive pension amount on monthly basis after the age of 58. A member is eligible to apply for withdrawing his provident and pension fund only after 2 months from the date of registration, provident that he/she is not employed during those 2months. Employer's Contribution: Employer is also required to contribute towards provident fund, the deduction rate is same as employee's contribution i.e. 12% of the wages. Of this 12%, 3.67% goes to Provident Fund and the balance of 8.33% goes to Pension Fund.

Advance PF

A person is eligible to withdraw money in advance from their PF Account for purposes like marriage, education, medical treatment etc, subject to the prescribed conditions. Note that the said advance is totally tax-free and interest-free.

Employees Deposit-linked Insurance Scheme (EDLI)

Apart from contributing to provident fund and pension fund, an employer is also required to contribute towards Employee Deposit Linked Insurance Scheme. The rate of contribution is 0.5% of the wages.

The employees need not contribute anything towards this scheme. In the case of death of a member, his / her nominee will get a maximum of Rs.60,000 from this scheme. The employer is also required to pay administrative charges at 1.10% of emoluments towards provident fund charges and 0.01% towards EDLI Scheme. Employees need not contribute anything towards these charges.