IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	02.04.2024
PRONOUNCED ON	03.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.Nos.19631 & 19632 of 2017
and
W.M.P.Nos. 21195 & 21196 of 2017

M/s.Advantage Strategic Consulting (P) Ltd.,
Represented by its Director,
Mr.Mohanan Rajesh
Having Office at No.2/33, Nageswara Road,
Nungambakkam, Chennai – 600 034. .... Petitioner in both W.Ps

Vs

1. The Assistant General Manager,
Reserve Bank of India,
Foreign Exchange Department,
Fort Glacis, Rajaji Salai,
Chennai – 600 001.

2. The Joint Director,
Directorate of Enforcement,
Southern Regional Office,
Government of India,
Ministry of Finance,
Shastri Bhavan, III Block,
III Floor, No.26, Haddows Road,
Chennai – 600 006.

3. Adjudicating Authority,
Directorate of Enforcement,
Southern Regional Office,
Government of India,
Ministry of Finance,
Shastri Bhavan, III Block,
III Floor, No.26, Haddows Road,
Chennai – 600 006. ..... Respondents in both W.Ps.

Prayer in W.P.No.19631 of 2017 : Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of declaration declaring the advice given by the second respondent to the first respondent to remit the case of the petitioner, seeking compounding of the contravention by the first respondent in exercise of powers under Rule 4 of th Foreign Exchange (Compounding Proceedings) Rules, 2000 by application dated 11.05.2017, to the third respondent for adjudicating the contraventions under Section 13 of FEMA, 1999 in terms of the proviso to Rule 8(2) of the Foreign Exchange (Compounding Proceedings) Rules, 2000 as amended by the Notification No.GSR 151(E) dated 20.02.2017 as a malafide exercise of power and arbitrary usurpation of power by the Enforcement Directorate without authority of law.

Prayer in W.P.No.19632 of 2017 : Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus calling for the records relating to the letter of the first respondent dated 27.06.2017 having Ref.No.Che.FED/FID/4352/25.28.001/2016-17 and quash the same as issued without application of mind and amounts to abdication of power vested in the first respondent under the Foreign Exchange (Compounding Proceedings) Rules, 2000 and consequently direct the first respondent to consider the application filed by the petitioner dated 11.05.2017 for compounding the contravention of Regulation 5(1), para 10 to Schedule I of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 on merits and in accordance with law.

In both W.Ps

For Petitioner	: Mr.N.R.R.Arun Natarajan
For R1	: Mr.C.Mohan for M/s.King & Partridge
For R2 & R3	: Mr.N.Ramesh Central Government Standing Counsel

COMMON ORDER

Both the writ petitions have been filed challenging the communication of the first respondent dated 27.06.2017, thereby returned the application filed by the petitioner for compounding contravention under the Foreign Exchange Management Act, 1999 (hereinafter referred as "FEMA, 1999").

2. In both the writ petitions, the petitioner is one and the same. The petitioner is engaged in the business of Consultancy. During the course of business, the petitioner purchased 1,50,000 equity shares of Rs.100/- each of M/s.Vasan Health Care Pvt. Ltd., for a total sale consideration of Rs.1,50,00,000/- on 30.10.2008. On 21.10.2010, a joint Share Purchase Agreement was entered into between the Sequoia Group (Purchaser) and the promoter of M/s.Vasan Health Care and the petitioner (both sellers). As per the

said agreement, the purchasers would purchase 30,000 equity shares of M/s.Vasan Health Care Pvt. Ltd. from the petitioner for a total consideration of Rs.22,50,00,502/- i.e., 7,500 per share. On 26.10.2010, the sale of shares was completed as per the terms of the Share Purchase Agreement dated 21.10.2010. Entire sale proceeds was credited to the account of the petitioner on the same day. Being 60 days time from the date of receipt of remittance, 25.12.2010 was the due date for filing the Form Foreign Currency Transfer of Shares (hereinafter referred as "FC-TRS") with Development Credit Bank (hereinafter referred as "DCB") as per Regulation 5(1), Para 10 to Schedule I of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000, who is authorised dealer bank for the petitioner.

3. On 01.11.2010, a Profit Share Agreement was entered into between the purchaser and sellers. On 30.04.2011, the petitioner filed the Form FC-TRS with DCB. However, it was filed belatedly. The second respondent issued summons to the petitioner and its Directors under Section 50 of the PMLA Act. The second respondent conducted search on 01.12.2015 under Section 37 of FEMA, 1999 in the office premises of the petitioner as well as the Directors residence. Consequently, the Income Tax Department also conducted

survey under Section 133A of the Income Tax Act in the office premises of the petitioner.

4. In the meanwhile, the petitioner also challenged the search conducted by the second respondent in W.P.No.40240 of 2015 and the same was dismissed by this Court by an order dated 05.01.2017. Aggrieved by the same, the petitioner filed writ appeal before this Court in W.A.Nos. 493 & 494 of 2017. Thereafter, the second respondent lodged a complaint under Section 16(3) of FEMA, 1999 before the Special Director, Directorate of Enforcement, Chennai. Pursuant to the same, the petitioner and its Directors were issued show cause notice as to why adjudicating proceedings as contemplated under Section 16 of FEMA, 1999, should not be held against them, in the manner provided under Rule 4 of the FEMA (Adjudicating Proceedings and Appeal) Rules, 2000 for the contraventions of FEMA, 1999 and the Regulations issued thereunder. The allegation is that the petitioner received the sale consideration from Sequoia as a deferred payment to the tune of Rs.22,50,00,502/- for the sale of 30,000 shares of M/s.Vasan Health Care Pvt Ltd and the contravention relating to "no filing Form FC-TRS" within the due date. These contravening under Section 6(3) (b) read with Regulation 5(1), Para 10 to Schedule I of FEMA, 1999, (Transfer of issue of security by a person resident outside India)

Regulations, 2000.

5. Pending writ appeals, the petitioner, on 11.05.2017, filed an application for compounding of contravention under Form FC-TRS to the first respondent. On 15.05.2017, the petitioners also submitted their explanation for the show cause notices and requested for personal appearance before passing final orders. However, the application was returned, on the ground that already the contraventions were remitted to the adjudicating authority, viz., the Special Director of Enforcement, Southern Region, Chennai for adjudicating the contraventions under Section 13 of FEMA, 1999 in terms of the proviso to Rule 8(2) of the Foreign Exchange (Compounding Proceedings) Rules as amended by the Notification No.GSR 151 (E) dated 20.02.2017.

6. The learned counsel appearing for the petitioner submitted that the petitioner sold 30,000 shares of M/s.Vasan Health Care Private Limited of face value Rs.100 to M/s Sequoia Capital India Growth Investment. On 26.10.2010 for a consideration of Rs.22,50,00,502/-, it was received on the same day by Foreign Inward Remittance Certificate. FC-TRA signed by M/s Sequoia Capital India Growth Investment was filed by the petitioner with the authorized dealers, DCB, vide its certificate dated 30.04.2011. As per Foreign

Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 the FC-TRS ought to have been filed with Development Credit bant on or before 27.12.2010 i.e. 60 days of the receipt of the sale consideration. But it was filed only on 30.04.2011 with a delay. The said contravention being technical, the petitioner opted to file compounding application before the Reserve Bank of India under Rule 4 of the Foreign Exchange (Compounding Proceedings) Rules. As per the directions issued by the Reserve Bank of India, insofar as compounding the contravention under FEMA, every officer specified under Rule (1) of Rule 4 of the Reserve Bank of India (Compounding Proceedings) Rules shall exercise the powers to compound any contravention subject to the direction, control and supervision of the Governor of the Reserve Bank of India. Accordingly, the penalty amount will be imposed on the petitioner for delayed filing of FC-TRS to the tune of Rs.1,00,000/-. Therefore, the first respondent ought not to have returned the application for compounding the contraventions. In fact, the first respondent without even issuing any show cause notice to the petitioner, before remitting the contraventions before the adjudicating authority is a clear violation of Principles of natural justice. The first respondent with a malafide intention referred before the adjudicating authority under political pressure.

7. A perusal of the counter filed by the respondents and the submissions made by the learned counsel for the respondents 1 to 3 revealed that in the course of investigation by the second respondent under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA, 2002) in File ECIR/05/DZ/2012 noticed relating to contravention of FEMA, 1999 by M/s Vasan Health Care Private Limited and the petitioner. Further, the second respondent found so many contraventions that the petitioner had entered into capital account transactions from time to time and was found to have entered into a profit sharing agreement with non-resident acquirer, which contains a clause proposing deferment of payment of the consideration arising out of sale profit at a future dated and thereby, contravened the provisions of Section 6(3)(b) of FEMA, 1999 read with Regulation 4 and Regulation 10(A) (d) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 to an extent of Rs.22,50,00,502/- and rendered themselves liable to penalty under Section 13(1) of FEMA, 1999. Further, the transfer of 30000 shares involving receipt of the said amount, the transferor company resident in India has not filed the Form FC TRS within the due date i.e.27.12.2010. The petitioner filed belatedly, only on 30.04.2011, ie. Beyond the mandated period of 60 days. Therefore, the petitioner had contravened the provisions of Section 6(3)(b) of FEMA, 1999 read with

Regulation 5(1), Para 10 to Schedule 1 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and liable for penalty.

8. After conclusion of investigation, a complaint was lodged before the authorized officer under Section 16(3) of FEMA, 1999. On the receipt of the said complaint and documents filed along with the complaint, the third respondent issued a show cause notice dated 17.04.2017 in terms of Rule 4 of The Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 to the petitioner and 6 others including its Directors. On receipt of the same, the petitioner submitted a reply through their counsel. As per the proviso to Rule 8(1) of the FEMA (Compounding Proceedings) Rules, 2000, if the contravention is suspected to be relating to money laundering, terror financing or affecting the sovereignty and integrity of the nation, the compounding authority shall not proceed with compounding and shall remit the case to the adjudicating authority for adjudicating the contravention.

9. Admittedly, there was a delay in filing FC-TRS for transfer of shares and the petitioner is liable to pay fine in terms of Section 13 of FEMA, 1999. That apart, the petitioner is arrayed as an accused in the complaint filed

under Section 45 of PMLA, 2002 for the offence of money laundering which is made punishable under Section 4 of PMLa, 2002. The said complaint has been taken cognizance in Case No.08 of 2020 on the file of Spoecial Judge (PC Act) (CBI)09, (MPs/MLAs ccases), RADC, New Delhi.

10. Further, the FEMA (Compounding Proceedings) Rules, 2000 have been made under the provisions of Section 15(1) of FEMA, 1999. Rule 8(1) of the Rules states that the Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. Under the process established to operationalize this Rule, the applicant, while filing the Compounding Application, is required to submit an undertaking, whether it is under the investigation by an investigative agency. The petitioner submitted a compounding application on 11.05.2017 which was received by the first respondent on 15.05.2017 for compounding of contravention of delayed filing of Form FC-TRS for transfer of shares from Resident to Non-Resident. The petitioner along with the compounding application, submitted an undertaking that they had received a show cause notice on 17.04.2017 from the respondent.

11. Rule 8(2) of the Compounding Proceeding Rules states that

"The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all concerned as expeditiously as possible and not later than 180 days from the date of application. Thus, the second respondent becomes a concerned party. In case the first respondent was advised by the letter dated 15.06.2017, since the investigations on charges of money laundering against the petitioner were ongoing, compounding proceedings ought not to be undertaken in the matter and the case has to be remitted to the respondent Department.

12. Rule 4(1) of the Compounding Proceeding Rules specifies the powers of the first respondent to compound contraventions, stating that if any person contravenes any provisions of FEMA, 1999, except clause (a) of Section 3 of that Act. Section 3 (a) deals with contraventions which are suspected of Money Laundering. Thus, Rule 4(1) clearly empowers the first respondent to compound all contravention, except for those that might be suspected of money laundering. In addition to the that, a proviso has been added to Rule 8(2) of the FEMA (Compounding Proceedings) Rules, 2000 vide Gazette Notification dated 20.02.2017, which states that provided that with respect to any proceeding initiated under Rule 4, if the Enforcement Directorate is of the view that the said proceeding relates to a serious contravention suspected of terror financing, or

affecting the 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. Therefore, the compounding application was returned to the petitioner on account of the Proviso to Rule 8(2) of the FEMA (Compounding Proceedings) Rules, 2000 which does not empower the first respondent to compound contraventions suspected of money laundering.

13. In view of the above, this Court finds no infirmity or illegality in the order passed by the first respondent and these writ petitions are devoid of merits and are liable to be dismissed. Accordingly, these writ petitions are dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

03.06.2024

Internet: Yes
Index : Yes/No
Speaking/Non Speaking order
Neutral Citation : Yes/No
Lpp/mn

To

1. The Assistant General Manager,
Reserve Bank of India,

Foreign Exchange Department,
Fort Glacis, Rajaji Salai, Chennai – 600 001.

2. The Joint Director,
Directorate of Enforcement,
Southern Regional Office,
Government of India, Ministry of Finance,
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G.K.ILANTHIRAIYAN. J,

Lpp/mn

Pre-delivery order in
W.P.Nos.19631 & 19632 of 2017
and
W.M.P.Nos. 21195 & 21196 of 2017

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