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ISSUES SURROUNDING FEMA, 1999 AND PREVENTION OF MONEY LAUNDERING ACT, 2002

The twin objectives of Foreign Exchange Management Act, 1999 (“**FEMA, 1999**”) are (i) promotion and regulation of foreign trade; and (ii) prevention of volatility and undue fluctuations in the value of Indian currency along with the orderly maintenance and development of the foreign exchange market.

With the removal of restrictions on free trade in various sectors in the spirit of liberalization over the years, a sizeable number of money laundering cases have been unearthed. This has resulted in insertion of suitable hacks in the legislation so that routing and parking of wealth in other countries is nipped in the ‘bud’ stage. The recent allegations against Advantage Strategic Consultancy Private Limited (“**Advantage India**”) and its subsidiary in Singapore (“**Advantage Singapore**”) have been eye-openers on the areas where regulation of transactions under FEMA, 1999 could be improved.

How was it played out?

Mentioned below are the facts as presented by various news reports and the facts of the matter are still under investigation:

- ☞ INX Media Private Limited (“**INX**”), an Indian company, obtained FIPB approval to receive 46.2 % (Forty Six point Two percent) amounting to Rs. 4.6 crores from entities based in Mauritius, which was allowed on May 18, 2007.
- ☞ Additionally, INX had also applied for downstream investment in its subsidiary, which was categorically rejected by FIPB stating that the said proposal was to be made separately. However INX has been alleged to have received hundreds of crores of rupees and made the downstream investment in violation of the approval.
- ☞ Upon getting a trigger from Tax authorities, FIPB issued

notice to INX. INX was alleged to have conspired with one Mr. A, son of a renowned politician, to obtain an undue favour from FIPB to not proceed with the allegations, and a huge sum was reported to have been paid to Advantage India which is allegedly owned by Mr. A through his *benamis* in consideration. The allegations will materialise on proving that Advantage India and Advantage Singapore are indirectly owned and controlled by Mr. A, which is sought to be made by CBI based on the facts mentioned below.

- ☞ Advantage India, a private company in Chennai incorporated in the year 2005, incorporated a wholly owned subsidiary in Singapore which owns huge global wealth. From March 2006 to May 2011, Mr. A, held two-thirds of Advantage India through Ausbridge Holdings and Investments Private Limited (Ausbridge) which he owned almost entirely. In 2011, as the media turned the limelight on Mr. A’s business interests, he transferred the ownership of Ausbridge to his close friend. Since 2011, the ultimate shareholders and directors of Advantage India have been Mr. A’s close friends and associates.
- ☞ Presently, 60% of the ownership of Advantage India is held by Mr. A’s four close friends, who have executed wills giving entire 60% ownership of Advantage India to Mr. A’s daughter (“**Personal Wills**”) which implies that the gift includes the global wealth of hundreds of crores of rupees held by Advantage Singapore. All these Personal Wills were identical in language and content and were uniformly executed on the same day, 19th June, 2013. All Personal Wills divide the properties into two parts – (i) the writer’s own properties which are worth very little were bequeathed to their spouse and children and (ii) shares of Advantage India which are worth hundreds of crores of rupees were willed away to Mr. A’s daughter.
- ☞ The CBI is probing into the issue further in order to

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prove the *benami* holdings and hoarding of questionable wealth outside India, influencing public servants, among other charges.

How does FEMA, 1999 affect these transactions? Keeping in mind, the transactions mentioned above, let us dwell into the regulations under FEMA, 1999.

The ownership of shares of a wholly owned subsidiary being transmitted from one person to another is not required to be reported to the RBI as the extant regulations under FEMA, 1999 do not require the same in case of transmission of shares. This implies that huge amount of wealth could be moved from one hand to another without it being reported to the RBI.

- ☞ In the given instance also, the allegations were triggered by tax authorities and not by RBI as the extant regulations do not deal with the transmission of shares.
- ☞ Additionally, this could enable change in ownership of shares without any consideration between residents and non-residents which could adversely affect the value of Indian currency.

Way ahead: With ninety percent of sectors opened up for foreign direct investment, another instance of laundering of funds on a large scale through *benamis* has taken the floor. Although the Wills serve as open and shut evidence in the current instance of indirect ownership and money laundering, FEMA, 1999 should be amended to curb such transactions at the initial stage.



REAL ESTATE (REGULATION AND DEVELOPMENT) ACT AND ITS IMPLICATIONS

The Real Estate (Regulation and Development) Act, 2016 ("the Act") came into effect on 01st May, 2017 (59 sections were notified on 01st May, 2016).

Before the commencement of the Act, there was no specific legislation governing the matters with respect to real estate, which everyone is majorly involved in their daily lives. Upon arising of any dispute, people resorted to claim (i) relief as a consumer under Consumer Protection Act, 1986 and (ii) damages under the Indian Contract Act, 1872, both of which tended to be curative and not preventive.

In order to systematically regulate the real estate matters, the Real Estate (Regulation and Development) Act, 2016 has been introduced with specific provisions where disputes have been proven to arise in the past. The key provisions of the Act have been summarised below for better understanding:

Real Estate Regulatory Authority: The institutional structure of the Act consists of establishing a Regulatory Authority and Appellate Tribunal, which shall handle all matters with respect to the real estate sector including but not limited to all the issues between the Promoter and the Consumer. Further, a Central Advisory Council may be set up to advice and recommend to the Central Government, on issues arising out of this Act.

Obligations of the Promoter:

- ▲ Every person engaged in carrying out any real estate project ("Promoter") shall register every project undertaken by him with the respective Regulatory Authority by making an application under Section 4 of the Act.
- ▲ The Promoter is required to update all project information as furnished at the time of application (as provided under Section 4 of the Act) on the website of the Authority.
- ▲ The Promoter shall rectify any structural defect in the workmanship, quality or provision of services which is brought to his notice within a period of 5 (Five) years from the date of handing over possession to the said consumer. If the promoter fails to do so, he shall pay an appropriate compensation to the aggrieved consumer as prescribed under the Act.

Separate Account for Every Project: Every Promoter shall open a separate account in a scheduled bank for every project in which 70% (Seventy per cent) of the amount realised shall be deposited to cover the cost of construction and the land cost and shall be used only for the said purpose. This provision prevents the Promoters from using

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the proceeds of one project in respect of another which ultimately results in delay in delivery to the consumer.

The Promoter is required to withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. In addition, the Promoter is permitted to withdraw from the separate account after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project.

Cap on the Advance: The Act mandates that the Promoter cannot accept a sum more than 10% (Ten percent) of the apartment / plot cost as an advance payment / application fees. For any further collection towards the apartment / plot cost, the Promoter is required to enter into an 'Agreement for Sale' with the consumer.

Restrictions on the Promoter:

The Promoter is not entitled to transfer or assign his majority rights and liabilities in the project to a third party, without obtaining the prior written consent of two-third of the consumers and the Regulatory Authority. In addition, for arriving at the number of two-third of the consumers, the number of apartments held by the promoter will be excluded. Also, irrespective of the number of apartments held by a consumer he/she shall only be entitled to 1 (One) vote.

- ▲ The Promoter is not allowed to make addition or alteration in the plan already approved, structural designs, specifications and amenities of the apartment, plot or building, without the previous consent of the consumer.

Role of State Governments: Effective implementation of the

Act can be done only through specific rules formulated and notified by the States since 'Land' falls under the State list. According to a news report in Economic times dated May 05, 2017, only 14 States and Union Territories have notified their respective rules. However, the Rules made by certain States have diluted the provisions of the Act with respect to the following key provisions:

- ▲ The Rules implemented by the States of Andhra Pradesh, Delhi, Gujarat and Kerala, provide for the term 'project' for mandatory registration and do not specifically include 'ongoing project' although the Act specifically thereby exempting mandatory registration for ongoing projects.
- ▲ Guidelines or rules pertaining to withdrawal of money from the escrow accounts are not specified in the State rules implemented by AP, Kerala, Madhya Pradesh and Gujarat thereby creating ambiguity.

Inference

Based on the aforementioned key provisions, it can be inferred that the Act has enunciated various protection measures aimed to ensure proper delivery of the buildings to the consumers without undue delay to ensure transparency and good governance in the manner of carrying out of the projects.

As we explore the various implications of the Act, it is pertinent to note that various consumer friendly provisions introduced in the Act, to effectively regulate the real estate sector have been attempted to be diluted by certain States as explained above. Therefore, their effectiveness can be better validated only after the issues regarding dilution of provisions by States has been ironed out and after the notification of rules by all other States.



Bibliography:

1. *Article published in 'The Indian Express – Chennai edition' dated May 25, 2017.
2. Article from 'The Business-Standard' [<https://thewire.in/136445/cbi-files-fir-karti-chidambaram/>]
3. FAQs issued on Real Estate (Regulation and Development) Act, 2016 by Ministry of Housing & Urban Poverty Alleviation Government of India

*Note: The information mentioned in respect of INX, Advantage India and Advantage Singapore are based on the articles published in newspapers as mentioned above and are yet to be proved in a Court of Law.

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- The Foreign Investment and Promotion Board (FIPB) was abolished on 24th May, 2017. Individual departments of the Government have been empowered to clear FDI proposals in consultation with Department of Industrial Policy and Promotion (DIPP) which will also issue the standard operating procedures for processing applications [Source: Press Release dated 24th May 2017 available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=162097>. No notification is issued in this respect].
- A Technical Committee was constituted on 04th May, 2017 in accordance with Regulation 14 of the IBBI Regulations, 2017, by the Insolvency and Bankruptcy Board of India (IBBI). The Committee shall give its recommendation for laying down Technical Standards for the performance of core services and other services under Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 [Source: Press release dated IBBI dated 04th May, 2017].
- In order to promote digitalization, SEBI allows investment in mutual funds through e-wallets. Also, MF/AMCs can now accept investment by an investor through e-wallets (Prepaid Payment Instruments (PPIs)) [Source: Circular No. SEBI/HO/IMD/DF2/CIR/P/2017/39, dated 8-5-2017].
- The National Company Law Tribunal, Chandigarh Bench was reconstituted and can now exercise the powers of Division Bench for the disposal of cases related to Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016 [Source: NCLT order no. 10/36/2016-NCLT dated 12.05.2017].
- Section 2 (a) to (d) of the Insolvency and Bankruptcy Code, 2016, which deals with voluntary liquidation or bankruptcy shall be effective from 1st April, 2017 [Source: MCA Notification no. S.O. 1570(E) dated 15th May, 2017].
- The Employee's Compensation (Amendment) Act, 2017 shall come into force on 15th May, 2017. The amendment purports to lay an obligation on every employer to inform the employee of his rights to compensation under the said Act, in writing as well as through electronic means, in English or Hindi or in the official language of the area of employment, as may be understood by the employee immediately at the time of employment of an employee [Source: The Employee's Compensation (Amendment) Act, 2017 notified on 12.04.2017].
- The Ministry of Corporate Affairs ("MCA") vide Circular no.05/2017 dated 16th May, 2017 withdraws Circular no.03/2017 dated 27th April, 2017, regarding the transfer of shares in respect of which dividends have remained unclaimed to IEPF Authority. The subject matter of the above mentioned circular stands withdrawn with immediate effect. Fresh instructions on the matter will be issued in due course of time. Further, vide General Circular no. 06/2017, it has been clarified that the modalities of transfer are being finalised with depositories and since it may involve opening of special demat accounts, the revised due date for transfer stands extended and shall be notified soon. [Source: Circular no.05/2017 dated 16th May, 2017 and 06/2017 dated 29th May, 2017].
- The blue double ticks in Whatsapp have been accepted by Delhi High Court as valid proof of serving of summons [Source: <https://indianexpress.com/cdn.ampproject.org/c/indianexpress.com/article/india/court-accepts-whatsapp-blue-double-tick-as-receipt-proof-summon-delhi-hc-4661278/lite/>].



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