



REGULATORY UPDATES

KARNATAKA HIGH COURT INSTRUCTS GOOGLE INDIA TO DEPOSIT 50% OF THE FINE IN FEMA VIOLATION CASE

BACKGROUND:

The Hon'ble High Court of Karnataka (hereinafter referred to as "Court") recently passed a significant judgement directing Google India Private Limited ("GIPL") to deposit 50% of the penalties imposed by Directorate of Enforcement ("ED") for alleged violations of Foreign Exchange Management Act, 1999 ("FEMA").

BRIEF FACTS:

The case revolves around two current account transactions conducted by GIPL between 2007 and 2010:

1. Payments remained outstanding to Google Ireland for distribution fees under the Ad Words Program, amounting to approx. ₹363.8 crore for over 4 years as on May 2014.
2. Payments remained outstanding to Google US for purchasing fixed assets, totalling approx. ₹1.08 crore for over 7 years as on January 2014.

ED Allegations:

The ED alleged that these transactions are nothing but commercial loans under External Commercial Borrowing ("ECB") requiring prior approval from RBI under Section 6(3)(d) of FEMA. Also, ED contends that GIPL, as a marketing service provider, does not fall under the automatic route for raising ECB and hence requires RBI approval.

GIPL has not obtained any approval from the RBI / Government for availing commercial loan in the form of supplier's credit. Hence, ED imposed a penalty of over ₹ 5 crore on GIPL for alleged violations of the FEMA.

GIPL's Defense:

GIPL, in its defense, contested this interpretation, arguing that –

- the transactions were standard business dealings and did not qualify as foreign exchange borrowings.
- there were no loan agreements, deferred payment terms or interest charges involved which meant the transactions didn't fall under Section 6(3)(d) of the FEMA Act, 1999.
- The provisions of FEMA do not require prior approval, but merely permission / approval.
- Once the permission was granted by the RBI, albeit post-facto, the delay stood regularized, and there was no violation of FEMA.
- Dues were ultimately settled as per the Master Circular on Import of Goods and services dated 01.07.2014.
- ED has no jurisdiction to reinterpret the terms of the agreement between Google Ireland and GIPL.

After that GIPL appealed to the Appellate Tribunal ("Tribunal") under FEMA, against the adjudication order passed by ED; which via its impugned order dated 11.01.2019:

- Stayed the penalties imposed by ED which in fact means, waiver of pre-deposit.
- Stated that GIPL's appeal had a higher likelihood of success than that of the failure and that immediate deposit of penalty amount could cause hardship on GIPL.

The ED subsequently filed a second appeal, leading to the Court's intervention.

ED Submissions before Court:

The ED submitted before the Court that the Tribunal failed to appreciate the following points:

1. There is **no undue hardship** for GIPL if they are ordered to make the pre-deposit amounts, which is a **mandatory compliance** under Section 19 of FEMA. Also, the stay granted by the Tribunal failed to protect the Revenue's interests.
2. Conclusion of the Tribunal that the chances of success of the appeals are more than the failure of the appeals, shall amount to a final conclusion at the interim stage itself, which is clearly untenable.
3. Permission by RBI was granted to the AD Bank, not to GIPL, and thus does not regularize the contravention by GIPL.

HIGH COURT'S KEY OBSERVATIONS & FINDINGS:

The Hon'ble High Court of Karnataka made the following key observations:

The Tribunal is not justified in not ordering the pre-deposit of the penalty amount by GIPL, as mandated under Section 19 of FEMA.

There is no evidence of undue hardship to waive such compliance, and the Tribunal failed to safeguard the interests of the Revenue while granting a stay.

Further, the Tribunal did not take into account the guiding legal principles laid down in the landmark cases of Benara Valves Ltd. and Monotosh Saha. These cases emphasize that a complete stay of penalties could be detrimental to the ED if it succeeds in the final outcome of the appeal.

The Court held that even if the Tribunal chooses to waive the requirement of pre-deposit, it is essential to impose appropriate conditions, such as bank guarantees to safeguard the realization.

The argument that the penalty, if upheld, can be easily recovered from GIPL in the future does not justify an unconditional stay. The Court clarified that such reasoning is not a valid basis for granting full relief from penalties without safeguards.

The Tribunal is bound to follow the interpretation of law as laid down by the Hon'ble Supreme Court, particularly in matters relating to the FEMA.

The decision in the Monotosh Saha case makes it clear that compliance with procedural safeguards, such as conditional relief, is crucial even during the interim stage.

CONCLUSION:

The Hon'ble High Court of Karnataka set aside the impugned order dated 11.01.2019 passed by the Tribunal.

The Court directed the GIPL to furnish bank guarantees equivalent to 50% of the penalties imposed by the ED within 2 weeks. Bank guarantees must be provided in favour of the Assistant Director of the appellant-organization i.e. ED.

These guarantees are to be kept valid until the appeals before the Tribunal are decided. The furnishing of the guarantees is subject to the outcome of the pending appeals.


For more details, refer to the judgement dated 20th March, 2025 passed by Bengaluru Bench of Karnataka High Court (Case No. MSA No. 42 of 2019)


DISCLAIMER: The summary information herein is based on judgement passed by Bengaluru Bench of Karnataka High Court - Miscellaneous Second Appeal No. 42 of 2019 dated 20.03.2025. For details, please refer the relevant provisions. While the information is believed to be accurate to the best of our knowledge, we do not make any representations or warranties, express or implied, as to the accuracy or completeness of this information. Reader should conduct and rely upon their own examination and analysis and are advised to seek their own professional advice. We accept no responsibility for any errors it may contain, whether caused by negligence or otherwise or for any loss, howsoever caused or sustained, by the person who relies upon it.

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