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**(2009) 05 BOM CK 0014**  
**In the Bombay High Court**  
**Case No : FEMA Appeal No. 1 of 2009**

CFL Capital Financial Services Ltd.

APPELLANT

Vs

Appellate Tribunal for Foreign Exchange

RESPONDENT

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**Date of Decision :** 06-05-2009

**Acts Referred:**

Foreign Exchange Management Act, 1999 — Section 49, 49(3)  
Foreign Exchange Regulation Act, 1973 — Section 51, 8, 8(3), 8(4)

**Citation :** (2009) 93 SCL 201

**Hon'ble Judges :** J.H. Bhatia, J;F.I. Rebello, J

**Bench :** Division Bench

**Advocate :** Jay Deep Mitra and D'Lima, for the Appellant; V.B. Tiwari, N.V. Masurkar and Anchan Shetty, for the Respondent

**Final Decision :** Allowed

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## Judgement

J.H. Bhatia, J.—The appellant in this Appeal has challenged the order passed by the Appellate Tribunal, Foreign Exchange, dismissing Appeal No. 1206/2004 challenging the order passed by the Deputy Director, Enforcement Directorate, on 26-10-2004 imposing penalty of Rs. 7 lakhs on the appellant company for failure to furnish evidentiary proof of utilisation of foreign exchange remitted and for contravention of Section 8(3) and 8(4) of Foreign Exchange Regulation Act, 1973 (FERA).

2. According to the appellant, it is a public limited company registered under the Companies Act. Previously it was incorporated as Ceat Financial Services Ltd. with its Corporate Office situated at Nariman Point. One Elbee Services Limited ("Elbee" for brief) requested the appellant to provide hire-purchase finance for importing spare parts required by its subsidiary Elbee Airlines from Hunting Aviation Limited situated in United Kingdom. To facilitate the same, the appellant provided for payment in foreign exchange by way of letter of credit bearing No. 974045 issued by the authorized Dealer, namely, UTI Bank Ltd. The imports were effected in May 1997. Two invoices, a packing List, Authorised Release Certificate/

Certificate of Origin and Airway Bill accompanied the imported items. UTI Bank Ltd. by its letter dated 13-8-1997, requested the C & F Agent of Elbee to deliver the consignment covered by the aforesaid Airway Bill to the appellant. According to the appellant, on 8-10-2004, for the first time, a notice issued by respondent No. 2 was received by the appellant indicating that hearing was fixed on 15-10-2004 and it was the final opportunity of hearing and then the appellant came to know that previously a show-cause notice dated 16-5-2002 was issued at the earlier address of the corporate office of the appellant at Nariman Point, but because the address was already changed the notice was not received. According to the appellant, with effect from 9-3-1998, the office was shifted from Nariman Point to Worli and again with effect from 1-6-2001, the office was shifted to Chembur for which a public notice was issued in "Loksatta" on 14-6-2001. After receipt of the notice, on 8-10-2004, a representative of the appellant appeared before the respondent No. 2 on 15-10-2004 and submitted a letter informing that the appellant had not received any show-cause notice earlier and, therefore, it could not attend. On behalf of the appellant, certain documents were produced and time was sought to file proper reply after consultation with lawyer on the same day the appellant also requested the C & F Agent as also UTI Bank to provide details particularly the bill of entry in respect of imports. However, on 28-10-2004, the appellant received an Order-in-original dated 26-10-2004 showing that the respondent No. 2 had imposed a penalty of Rs. 7 lakhs on the appellant confirming the charges in the show-cause notice issued in 2002.

3. According to the appellant, after the said order was passed, the appellant received several documents from Lufthansa Cargo and Air India, which go to show that the goods covered by the invoice were, in fact, delivered by Lufthansa Cargo by Flight LH8422 on 3-6-1997 and these goods were warehoused at the Heavy Warehouse of Air India under IGM No. 3080 certifying that all the documents pertaining to the same were delivered. Hunting Aviation also confirmed that the documents pertaining to the said letter of credit opened by the appellant had been couriered. UTI Bank also confirmed having made payment pertaining to the said Airway Bill on receiving documents and delivering the imported goods. However, none of these documents were available with the appellant before 15-10-2004 when the appellant appeared before the respondent No. 2 as no opportunity was given to the appellant to secure and produce all these documents and the order dated 26-10-2004 imposing penalty came to be passed. Thus, the appellant could not get sufficient opportunity to prove that the foreign exchange received by it under the letter of credit was, in fact, used for the purpose of import of the spare parts of aircraft on behalf of Elbee Airlines. On 7-12-2004, the appellant preferred Appeal No. 1206 of 2004 before the Appellate Tribunal. The appeal came to be dismissed on 28-7-2008 by the Appellate Tribunal.

4. Heard the learned Counsel for the parties.

5. On behalf of the appellant, it was urged that the respondent No. 2 had taken cognizance of the alleged violation of the provisions of FERA after expiry of more than two years after the repeal of the said Act, in violation of Section 49 of Foreign Exchange Management Act, 1999 ("FEMA"). Secondly, it is contended that the appellant had never received the show-cause notice in 2002 and for the first time, the appellant received the final opportunity notice on 8-10-2004 and thereafter in spite of the request of the appellant, no opportunity was given to produce necessary documents and evidence in support of its contention and the respondent No. 2 had passed the order imposing penalty hastily.

6. On perusal of record, it appears that the respondent No. 2 had issued the first show-cause notice on 16-5-2002 alleging that there was violation of the provisions of Section 8 of FERA by the appellant. The FERA was repealed and FEMA came into force with effect from 1-6-2000. Section 49(3) of FEMA provided that no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the FERA after the expiry of a period of two years from the date of the commencement of FEMA. The adjudicating officer could take notice of contravention of Section 51 of the FERA within 2 years from 1-6-2000 i.e., up to 31-5-2002. As in the present case, the show cause notice was issued on 16-5-2002, it may be said that respondent No. 2 had taken notice of the alleged contravention before the expiry of 2 years and therefore the action cannot be said to be illegal or barred u/s 49(3) of FEMA.

7. On perusal of the record, prima facie, it appears that the corporate office of the appellant was initially at Nariman Point and the address of the said office was changed. A public notice issued in the Lok Satta dated 14-6-2001 revealed that the corporate office of the appellant was shifted to Chembur. The notice was issued by the respondent No. 2 in 2002 at Nariman Point address and, therefore, there is reason to believe that the said notice must not have been received by the appellant and, therefore, the appellant could not appear in response to that notice. The notice dated 8-10-2004 from the respondent No. 2 was addressed to the appellant at its Chembur address and it was received. As per this notice, the next date of hearing was fixed on 15-10-2004 and it was the last chance. The record also reveals that a representative of the appellant appeared before the respondent No. 2 on 15-10-2004 and submitted a letter dated 14-10-2004 stating that had not contravened any provisions of FERA. A request was made for adjournment. The record also reveals that on 15-10-2004 itself the appellant addressed letters to the different persons including the Branch Manager, UTI Bank Ltd., M/s. Mayekar & Sons, etc. to supply different documents in respect of the said import. However, the impugned Order-in-original was passed on 26-10-2004 even before the appellant could collect the relevant documents. It appears that later on the appellant received several documents which may prove the contentions of the appellant about the imports and which may establish that there was no contravention of the provisions of FERA. However, as due opportunity was not given to the appellant, these documents could not be

produced by the appellant and could not be considered by the respondent No. 2. As these documents were not considered by the respondent No. 2/the adjudicating officer, they were also not considered by respondent No. 1/the Appellate Tribunal.

8. Taking into consideration the material before us, we are satisfied due opportunity was not given to the appellant to defend itself. Therefore, it would be in the interest of justice to set aside the impugned orders passed by the authorities below and to remand the matter back to the respondent No. 2 to hear the appellant on show-cause notice afresh after giving due opportunity of hearing and producing necessary documents in support of its contentions.

9. For the aforesaid reasons, the Appeal is allowed. The impugned orders passed by the respondent No. 2 as well as by the Appellate Tribunal, respondent No. 1, are hereby set aside and the matter is remanded to the respondent No. 2 for de novo hearing and adjudication of the show-cause notice issued to the appellant after giving reasonable opportunity to the appellant to produce the necessary evidence in support of its claim and to pass appropriate orders as per law. The appellant to appear before the respondent No. 2 on 10-6-2009.