

**(2014) 02 DEL CK 0064**

**In the Delhi High Court**

**Case No :** Criminal A. No. 445 of 2007 and Criminal A. 614 of 2006

Marubeni India P. Ltd.

APPELLANT

Vs

The Special Director of Enforcement <BR> Ericsson India P.  
Ltd. Vs Directorate of Enforcement

RESPONDENT

**Date of Decision :** 11-02-2014

**Acts Referred:**

Foreign Exchange Regulation Act, 1973 — Section 50 8(1) 8(1)(b) 9(1)(c)

**Citation :** (2016) 333 ELT 270

**Hon'ble Judges :** S. Muralidhar, J

**Bench :** Single Bench

**Advocate :** P.V. Kapur and Mr. Vijay Nair and Mr. Rajat Juneja, in Criminal A. Nos. 612, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, Mr. Parag P. Tripathi and Ms. Rohini Musa, in CrI.A. 614 of 2006, Mr. Amit Bansal in Criminal A. No. 621 of 2006, Mr. Nishant Joshi and Ms. Suman Kukrety, in Criminal A. No. 630 of 2006, for the Appellant; Ashok Kumar Panda and Mr. Naveen Kumar Matta, for the Respondent

**Final Decision :** Allowed

## Judgement

S. Muralidhar, J.—These appeals are directed against the impugned orders passed by the Foreign Exchange Appellate Tribunal ("AT") dismissing the appellants' respective appeals against the adjudication orders ("AOs") passed by the Special Director ("SD"), Enforcement Directorate ("ED") holding the Appellants guilty of contravening Section 8(1) of the Foreign Exchange Regulation Act, 1973 ("FERA") and imposing penalty u/s 50 FERA. The Appellants in these appeals are Indian subsidiaries of their respective parent corporations incorporated outside India. Barring the above distinction, the issue that arises in these appeals is similar to the issue that was decided by the Court in its judgment dated 3rd February 2014 in Criminal Appeal No. 40 of 2008 (Mitsubishi Corporation v. Director of Enforcement) and in the judgment passed today in a batch of criminal appeals beginning with Criminal Appeal No. 611 of

2006 (Fuji Bank Ltd. v. Special Director of Enforcement). Both the said sets of cases involved liaison or branch offices of foreign parent corporations.

2. The Court has heard the submissions of learned Senior counsel and counsel for the Appellants and Mr. Ashok Kumar Panda, learned Senior counsel on behalf of the Respondent.

3. In all these cases the challenge before the AT was to the AOs passed by the ED holding each of the Appellants guilty of contravening Section 8(1) FERA and imposing penalty. The AT has, by the impugned orders which have been challenged in these appeals, affirmed the AOs.

4. Mr. Ashok Kumar Panda, learned Senior counsel appearing on behalf of the Respondent sought to distinguish the present set of appeals from those decided in Mitsubishi Corporation and Fuji Bank Ltd. on the ground that the Appellants herein are Indian subsidiaries which are the de facto employers of the expatriate employees seconded to them by the foreign holding company. Mr. Panda referred to the Foreign Exchange Control Manual of 1999 ("FECM") and in particular to Clause 11D.3(i) thereof and submitted that inasmuch as there was a violation of the requirement thereunder, there was a consequential violation of Section 8(1) FERA.

5. The Court notes in the first instance that the allegation in the show cause notices (SCNs) issued in these cases by the ED to each of the Appellants is identical. The purport of the identical allegations by the ED in each SCN is that payments made abroad by the foreign corporation to the expatriate employees in foreign exchange was in effect payments made on behalf of the Indian subsidiary and since that payment was essentially the liability of the Indian subsidiary it could not have been made without the prior permission of the RBI. No other allegation is made to bring home the charge of violation of Sections 8(1) and 9(1) (c) FERA by the Appellants. In other words the SCNs make no reference to violation of any clause of the FECM. Nevertheless, the Court has examined Clause 11D.3 of the FECM which reads as under:

11D.3 (i) Foreign nationals who are not permanently resident in India but are in regular employment with Indian firms/companies on payment of monthly salary, are permitted to make recurring remittances for family maintenance. Authorised dealers may allow such foreign nationals, who are their regular constituents, to make recurring remittances for family maintenance, etc., upto 75% of their net salary (i.e. after deduction of contribution to provident, etc., funds and taxes payable) after verifying that they hold valid employment visas. On request, authorized dealers may also allow remittances in excess of 75% of net salary provided the foreign nationals is in receipt of perquisites in India such as free housing, conveyance and medical facilities and his family (wife and/or children) is resident outside India.

(ii) Salaries to the employees deputed by foreign companies to their India offices/branches/subsidiaries/joint ventures may be paid abroad to the extent of 75% of

the net salary (tax to be paid for the full amount in India) and balance amount of salary may be paid in India.

6. In the first place it must be noticed that the foreign nationals in these cases are not employees of the Indian subsidiaries but have only been seconded to them. The foreign holding company continued to pay the salaries of the expatriate employees abroad in foreign exchange. The Indian subsidiary only paid in Indian rupees a portion of the salary that was necessary to sustain the living of such expatriate employee in India. This is evident from the replies sent by the Appellants to the ED in response to the SCNs issued to them. Illustratively, the stand of Sony India Limited in reply to the SCN issued to it was under:

From the enclosed details, it can be seen that these employees were getting the following emoluments in and outside of India:

#### Paid in Japan

- a. Base Salary (continuation pay as it may be called) paid to maintain the continued employment of these employees with Sony Corporation;
- b. Japanese Salary paid as per their entitlement;
- c. Year end Bonus paid only to Mr. Yoshio Kubo, as per company policy;
- d. Hardship Allowance paid to compensate these employees to relocate to India;
- e. Education Allowance paid only to Mr. Nobuyuki Norimatsu as his children were pursuing education outside India;
- f. Leave Travel Assistance paid to meet the cost of travel of these employees from India to their home country and back.

We confirm that these were paid by Sony Corporation, Japan, our parent company. Please note that these numbers have been stated in Japanese Yen. As the exchange rate varies on a daily basis these numbers in rupee equivalent would vary from month to month.

#### Paid in India

In India these employees were entitled to the following emoluments in India provided by Sony India;

- a. Fixed monthly salary paid to sustain their living in India;
- b. Perquisites (non-monetary)
  - i. Rent free furnished accommodation.
  - ii. Car with driver
  - iii. Watchman

- iv. Medical assistance
- v. Food assistance
- vi. Utilities, viz. Electricity & water
- vii. Membership of Japanese Association in India

7. Sony India Limited further clarified on 28th May 2002 as under:

At the outset we state and confirm that no salaries have been paid outside India by Sony India Pvt. Ltd. to expatriate employees working in India. Therefore, since no remittance of Foreign Exchange was involved, we were not required to make any application to RBI for approval.

...

...

We once again reiterate that all Salaries/Perquisites paid by Sony India Pvt. Ltd. have been paid in Indian Rupees and no Foreign Exchange has been remitted outside India. Also all taxes applicable under Indian Income Tax Act" 1961 have been paid by Sony India Pvt. Ltd. and requisite returns have been filed with Tax Authorities.

8. Mr. Panda was candid that no facts have been found by the ED to counter the above assertions. It is, therefore, plain that even according to the ED in none of these cases was there any allegation that an expatriate employee of the Indian subsidiary was seeking to remit abroad in foreign exchange monies paid to him in India in Indian rupees. In the circumstances, the Court fails to appreciate how Para 11D.3 FECM would apply at all. The case of violation of the requirement of that clause of the FECM by the Appellants is misconceived.

9. Also, in light of the ED being unable to counter the factual position explained in the above replies to the SCNs, it is evident that there was a basic misconception on the part of the ED that the expatriate employees of the foreign holding companies upon being seconded to the corresponding Indian subsidiary ceased to be the employees of the respective foreign company and further that the payments made by the foreign holding company to its employees abroad were on behalf of the Indian subsidiary. There was absolutely no basis for the ED to make such an assumption.

10. This Court does not wish to repeat what has already been held by it in Mitsubishi Corporation and Fuji Bank Ltd. However, the following portions of the judgment in Mitsubishi Corporation in the context of expatriate employees of foreign corporation being seconded to Indian liaison offices (LOs) would equally apply to the present appeals as well:

17. In order to appreciate the above submissions, an analysis is proposed to be undertaken of Section 8(1) of the FERA, which reads as under:

Except with the previous general or special permission of the Reserve Bank, no person other than an authorized dealer shall in India, and no person resident in India other than an authorized dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorized dealer, any foreign exchange...

18. u/s 8(1) (b) FERA, there is a prohibition on a person "other than an authorized dealer" purchasing, acquiring or borrowing or selling or otherwise transferring or lending or exchange with any person not being an authorized dealer, any foreign exchange either in India or outside India. The question that then arises is whether on the facts of the present case, the Appellant can be said to have "purchased or otherwise acquired or borrowed" any foreign exchange in India.

19. The AT has proceeded on the basis that the employees of the parent corporation, seconded to the Appellant, are its "borrowed employees". The fact of the matter is that the expatriated employees of the HO, are posted in India with the LO, continue to be employees of the parent corporation. The salaries payable to them by the parent corporation were partly paid in India, and for that limited purpose, the funds were remitted by Mitsubishi, Japan which were then disbursed by the Appellant to such seconded employees. By no means, could it be said that the expatriated employees upon being seconded to the Appellant ceased to be the employees of the parent corporation. They were only seconded to the Appellant. They could not be termed as "borrowed employees" of the Appellant. The liability to pay their salaries continues to be that of the parent corporation. Since there was no privity of contract between the Appellant and the expatriated employees of the HO, there was no liability on the Appellant to pay their salaries. In the circumstances, the question of the Appellant "acquiring" any foreign exchange as a result of Mitsubishi Japan remitting funds to the Appellant for disbursement of the salaries of the employees seconded to it does not arise. Further, the question of the Appellant "repaying" Mitsubishi, Japan the sum paid as salaries also does not arise.

11. In the present appeals, the ED has not been able to counter the factual position that no salaries were been paid outside India by the Indian subsidiary to expatriate employees working in India. There was, therefore, no remittance of foreign exchange involved. The question of taking the approval of the RBI for making payment in Indian rupees to the expatriate employees in India did not arise. Also all taxes applicable under the Indian Income Tax Act, 1961 have been paid by the Indian subsidiary and requisite returns have been filed with tax authorities. The mere fact that income tax has been paid by the Indian subsidiary does not ipso facto attract Section 8(1) FERA. In any event, that is not even the allegation in the SCNs issued to the Appellants. It is not open to the ED to justify the AOs on a ground other than that stated in the SCN. In fact, the AT itself rejected the plea raised on behalf of the ED that it should address questions that did not form the subject matter of the SCNs which led to passing of the AOs.

12. With the AOs in each of these cases holding that the case of the ED regarding violation by the Appellants of Section 9(1)(c) FERA was not made out, the case regarding violation of Section 8(1) FERA was untenable since the SCNs in all these cases set out the same allegations to justify the case under both provisions. The question of the Appellants "acquiring" or "otherwise transferring" any foreign exchange as a result of the foreign holding company remitting funds to the Appellants for disbursement of the salaries of the employees seconded to them did not arise. Further, the question of the Appellants having to repay the foreign holding company the sum paid abroad also did not arise. Factually, there was no attempt made by any of the Appellants to repay any such amount to the foreign holding company.

13. Also, no reasons have been given in any of the AOs for the penalty imposed in terms of Section 50 FERA. Consequently, in all these cases, the determination of the penalty amount by the AOs is also held to be untenable in law.

14. In light of the decisions in Mitsubishi Corporation and Fuji Bank Ltd. and for the reasons explained above, the impugned AOs to the extent they hold the Appellants to be in violation of Section 8(1) FERA and impose penalty, and the impugned orders of the AT upholding the said AOs, are hereby set aside. The appeals are allowed in the above terms with costs of Rs. 10,000 in each appeal which will be paid by the Respondent to each of the Appellants within a period of four weeks from today. It is further directed that any amount deposited pursuant to the AO or the impugned order of the AT shall be refunded to each of the Appellants, together with interest, if any, accrued thereon, within a period of eight weeks from today in accordance with law. Further the bank guarantees if any furnished by the Appellants shall stand discharged.