

ELECTIVE PAPER 6D: ECONOMIC LAWS

SOLUTION

Case Study 5

ANSWER 1

I. ANSWERS TO OBJECTIVE TYPE QUESTIONS

1. (c) [Hints: Refer Regulation 2 of Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000]
2. (c) [Hint: Refer Section 2 (9) of the Prohibition of Benami Property Transactions Act, 1988. It is not a benami transaction because all statutory dues have been paid and his father knew about the transaction. Therefore, it falls under exempted category. The amount so contributed can be a loan or gift to the son.]
3. (c) [Hint: Refer Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015]
4. (c) [Hint: Refer Regulation 15 of the FEM (Export of Goods and Services), Regulations, 2000]
5. (a) [Hint: Refer Regulation 3 of FEM (Acquisition and transfer of immovable property in India) Regulations, 2000]
6. (d) [Hint: Refer Regulation 7 of FEM (Realisation, Repatriation and surrender of Foreign Exchange) Regulations, 2015]
7. (b) [Hint Refer Regulation 4 the FEM (Export of Goods and Services), Regulations, 2015 which has exempted such export transaction from furnishing of export declaration]
8. (b) [Hint: Section 14 of the Insolvency and Bankruptcy Code, 2016, describes moratorium. It is an order passed by the adjudicating authority (NCLT) declaring a moratorium on the debtor's operations for the period of the Insolvency Resolution Process, during which no action can be taken against the Company or the assets of the Company. This operates as a 'calm period' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.]
9. (b) [Hint: FEMA does not impose any restriction on acquisition of immovable property outside India by a non-resident Indian. Further, when at a future date the person concerned becomes a person resident in India, Section 6(4) even permits him to hold, own or transfer immovable property situated outside India since such property was acquired by him when he was resident outside India]
10. (c) [Hint: As per section 22 of the Insolvency and Bankruptcy Code, 2016, an Interim Resolution professional approved by the Committee of Creditors can be replaced with 75% voting in favour of the decision and approval of the Board.

II. ANSWERS TO DESCRIPTIVE QUESTIONS

1. (i) Section 11(3) of the Foreign Exchange Management Act, 1999 states that where any Authorised person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person, a penalty which may extend to ten thousand rupees and in the case of continuing

contraventions with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Since as per the facts given in the question, the Authorised person, namely, Forex Dealers Ltd., has failed to file the returns as directed by the Reserve Bank of India. According to the above provisions, it has exposed itself to a penalty which may extend to ten thousand rupees and in the case of continuing contraventions in the nature of failure to file the returns, with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

- (ii) According to the provisions of section 2(v) of the Foreign Exchange Management Act, 1999, a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of more than 182 days during the preceding financial year. In the given case, Mr. Shekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2016-2017. Hence, he cannot be considered as a "Person Resident in India" during the financial year 2017-2018 irrespective of the purpose or duration of his stay.
- (iii) Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)]. Section 2 (u) defines 'person' under clause (vii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vii). Accordingly printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by Printex unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

2. Capital Account Transactions: All the transactions referred to in the question are capital account transactions.

Section 6(2) of FEMA, 1999 provides that the Reserve Bank may in consultation with the Central Government specify the permissible capital account transactions and the limit upto which foreign exchange will be allowed for such transactions.

- (i) **Depreciation of direct investments:** According to proviso to section 6(2), the Reserve bank shall not impose any restriction on the drawal of foreign exchange for certain transactions. One such transaction is drawal of foreign exchange for payment due for depreciation of direct investment in the ordinary course of business. Hence this transaction is permissible without any restrictions.
- (ii) **Person resident in USA returning permanently to India:** When the person returns to India permanently, he becomes a resident in India. Section 6(4) provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security, etc. if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. In view of this, the person who returned to India permanently can continue to hold the foreign security acquired by him when he was resident in U.S.A.
- (iii) **Investment in shares of Indian company by non-resident:** Reserve Bank issued Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. Regulation 4(6) of the said Regulations prohibits a person resident outside India from making investment in India, in any form, in any Company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in

construction of farm houses. Hence it is not possible for a person resident outside India to invest in the shares of a company engaged in construction of farm houses as such investment is prohibited.

- (iv) **Acquisition of immovable property by person resident outside India:** Reserve Bank issued Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The regulations specify the classes of capital account transactions of persons resident outside India in Schedule II. Under this schedule, acquisition and transfer of immovable property in India by a person resident outside India is permissible. Hence, the person resident of Canada can acquire the immovable property in Mumbai.

3. (i) Adherence to sanctioned plans and project specifications by the promoter (**Section 14**)

The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

- (1) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person.

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

- (2) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

Hence, in the instant case, reducing the number of rooms does not come under minor additions or alterations. The promoter i.e. Mr. Pankaj Gupta shall not make any additions and alterations in the sanctioned plans, layout plans and specifications within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such buildings.

(ii) No deposit or advance to be taken by promoter without first entering into agreement for sale

According to section 13 of the said Act, a promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

In the instant case, the cost of the flat is Rs. 2 crore and Mr. Shyam put a condition to pay Rs. 50 Lakhs as an application fee before entering into a written agreement for sale with Mr. Vivaan. This is invalid as a promoter can accept only Rs.20 Lakhs (10% of Rs. 2 Crore) as an advance or an application fee without first entering into a written agreement for sale.