

Preface

1. ***Author*** has felt when he ***qualified*** as Chartered Accountant (CA) in Year 1985 that ***legal provisions' interpretations*** are ***big challenge*** for legal professionals, govts' officials and public at large ***in India and outside India***.
 2. ***Author*** has ***realized*** that ***something*** should ***be developed to resolve this challenge*** in India and outside India.
 3. ***Author*** has ***started compiling*** Frequently Asked Questions (FAQs) on many subjects where his 100% ***answers are precisely based on Yes or No i.e. white or black nothing is grey***
 4. ***Author*** has ***compiled approximately 150 +(plus) research papers / books with 25 thousand + (plus) pages*** on many prevailing subjects / acts in India and outside India.
 5. ***Author's 1st paper book*** is now ***being published*** under head FAQs on Enforcement Directorate (ED) ***where 571 FAQs are replied*** based on Yes or No i.e. white or black nothing is grey
 6. This ***book*** is also ***containing***
 - (i) Foreign Exchange Management Act (***FEMA***) 1999 and rules / regulations
 - (ii) Prevention of Money Laundering Act (***PMLA***) 2002 and rules / regulations
 - (iii) Fugitive Economic Offenders Act (***FEOA***) 2018 and rules / regulations
 7. This ***book*** is ***published with Sai Kripa and dedicated*** to my father (late) ***Mr. M.R. Agarwal***, Mother ***Mrs. R.D. Agarwal***, wife ***Mrs. Snigdha Agarwal***, daughter ***Ms. Soumya Agarwal***, daughter ***Ms. Sanya Agarwal*** and dedicated team headed by ***Rajat Kumar***
- ***I trust that you will be enriched by reading this book***

With best wishes,
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Author's Profile

Mr. Satish Agarwal (FCA) is heading M/s Satish S Agarwal & Co. Chartered Accountants since 1985 with a team of dynamic young professionals serving clients from various business sectors including public listed companies and government undertakings. Firm was also registered with PCAOB (USA) for undertaking audits and other work of US GAAP.

He is regularly advising on several matters to Institute of Chartered Accountant of India (ICAI) and also to Ministry of Commerce (MoC) for Foreign Trade Agreements (FTAs) and World Trade Organization (WTO) for securing India's best interests.

He is continuously advising on Foreign Investments (FIs) in India and also on Overseas Direct Investments (ODIs) outside India.

He is known for his expertise in incorporating companies in most of countries across the world.

He has written around 150 +(plus) Research papers / books containing 25 thousand +(plus) pages available "freely" on certain portals like:

https://taxguru.in/author/satishagarwal307_1957

Or

www.femainindia.com

Few out of abovementioned Research papers / books are as under:

- 1. Book on Enforcement Directorate (ED) in India- (Book with 617 pages)***
- 2. Director of Revenue Intelligence (DRI) in India***
- 3. Central Bureau of Investigation (CBI) in India***
- 4. National Investigation Agency (NIA) in India***
- 5. Serious Fraud Investigation Office (SFIO) in India***
- 6. Financial Intelligence Unit (FIU-IND) in India***
- 7. Central Vigilance Commission (CVC) in India***
- 8. Narcotics Control Bureau (NCB) in India***
- 9. Research & Analysis Wing (R&AW) in India***
- 10. Economic Offence Wing (EOW) in India***
- 11. Intelligence Bureau (IB) in India***
- 12. Director General of Income Tax Criminal Investigation (DGITCI) in India***
- 13. National Company Law Tribunal (NCLT) in India***
- 14. Security Exchange Board of India (SEBI) in India***
- 15. Prevention of Corruption (PC) Act, 1988 in India***

16. *Foreign Assets Investigation Unit (FAIU) in India*
17. *Book on International Financial Services Center (IFSC) in India (Book with 290 pages)*
18. *Replacement of Indian Penal Code (IPC) Criminal Procedure (CP) & Evidence Act (EA) in India*
19. *Undisclosed Foreign Income & Asset (UFIA)-Black Money Act, 2015*
20. *Statutory provisions for General Anti Avoidance Rule (GAAR) in India*
21. *Reserve Bank of India (RBI) Act, 1934*
22. *Foreign Exchange Management Act (FEMA) 1999 in India*
23. *Benami Transactions (Prohibition) Amendment Act, 2016 in India*
24. *Advance Pricing Agreements (APAs) in India*
25. *Annual Performance Report (APR) for Investments outside India*
26. *Foreign Trade Agreements (FTAs) executed by India*
27. *Statutory Obligations for Companies Operating in India*
28. *Significant Beneficial Owners (SBO) in India*
29. *Significant Economic Presence (SEP) in India*
30. *Place of Effective Management (POEM) in India*
31. *Liberalized Remittance Scheme (LRS) for residents of India*
32. *Foreign Liability and Asset (FLA) return in India*
33. *FATCA agreement with USA*
34. *Double Taxation Avoidance Agreement (DTAA) with USA*
35. *Foreign Tax Credit (FTC) in India*
36. *Corporate Frauds (CFs) in India*
37. *Export of Goods and Services under FEMA, 1999 in India*
38. *Imports of Goods and Services under FEMA, 1999 in India*
39. *External Commercial Borrowings (ECBs) in India*
40. *Overseas Direct Investments (ODIs) under FEMA, 1999 in India*
41. *Acquisition of Immovable Properties by Non-residents under FEMA, 1999 in India*
42. *Compounding of Contraventions under FEMA, 1999 in India*
43. *Foreign Branch Office (BO) + Liaison Office (LO) + Project Office (PO) under FEMA, 1999 in India*
44. *Annual Information Statement (AIS) in India*
45. *Investments by Non-Residents (NRIs) in India*
46. *Guidance for Doing Business in United States of America (USA)*
47. *Corporate Tax (CT) Law in UAE*
48. *Acquisition & Transfer for Immovable Properties by Non-Residents (NRs) in India*
49. *Foreign Company's Registration in India*
50. *Auditor Checks and Reporting for Indian Companies in India*
51. *Companies Auditor Report Order (CARO) 2020 in India*
52. *Tax Audit Report (TAR) + Accounting Standard (ASs) in India*
53. *World Trade Organisation (WTO) & Benefits for India*
54. *Deposits by Corporate in India*
55. *Expatriates + Foreign Citizens in India*
56. *Book on Foreign Investments (FIs) by Non-Residents of India (Non-RoI) (Book with 346 pages)*



Compounding against FEMA Contraventions in India

INDEX		
<i>S. NO</i>	<i>Particulars</i>	<i>Page No.</i>
<i>1</i>	<i>Contraventions and Penalties</i>	<i>3 to 4</i>
<i>2</i>	<i>Compounding against the Contraventions</i>	<i>4 to 5</i>
<i>3</i>	<i>Transparency in Process of the Compounding</i>	<i>5</i>
<i>4</i>	<i>Powers of the officer of Regional office of the RBI for Compounding</i>	<i>5</i>
<i>5</i>	<i>Powers of the Regional office of the RBI for Compounding</i>	<i>6</i>
<i>6</i>	<i>Powers of the FED CO Cell of the RBI at New Delhi for the Compoundin's</i>	<i>7</i>
<i>7</i>	<i>Powers of the CEFA, of the RBI at Fort Mumbai for the Compounding's</i>	<i>7</i>
<i>8</i>	<i>Monetary limit for the Compounding</i>	<i>7 to 8</i>
<i>9</i>	<i>Application for the Compounding</i>	<i>8</i>
<i>10</i>	<i>Format for Application against the Compounding</i>	<i>8</i>
<i>11</i>	<i>Fee Against the Application for Compounding</i>	<i>8</i>

12	<i>Information's/Details for the Compounding</i>	<i>8 to 11</i>
13	<i>Pre-Requisite for the Compounding Process</i>	<i>11</i>
14	<i>Process for Approval against compounding by the RBI</i>	<i>12</i>
15	<i>Classification of the nature of Contravention</i>	<i>13</i>
16	<i>Personal Hearing before an Authority</i>	<i>13</i>
17	<i>Personal Hearing through an Authorized Representative (AR)</i>	<i>13</i>
18	<i>Completion of the Compounding Process and Appeal</i>	<i>13 to 14</i>
19	<i>Failure of Payment of the Penalty</i>	<i>14</i>
20	<i>Role of the Directorate of Enforcement (DOE)</i>	<i>14 to 15</i>
21	<i>Conclusion on the Compounding Process</i>	<i>15 to 16</i>



Compounding against FEMA Contraventions in India

1. Contraventions and Penalties

(i) Type of the Contraventions under the Section 13 of the FEMA, 1999

- (a) Under **all** provisions of the FEMA, 1999 **except** under the Section 3(a)*
- (b) Or under all rules, regulations, notifications, directions, orders or conditions of the FEMA, 1999.*
- (c) These contraventions are liable for penalty and compounding where these are **material** in nature. However **persecution** is not permitted against the contravention under the Section 13.*
- (d) RBI is also permitted to refer to **DOE** for taking necessary action where contravener is failed to pay penalty within 15 days from the date of conclusion of compounding proceedings beside the contraventions are under the section 13 of the FEMA, 1999*

(ii) Type of the Contraventions under the Section 3(a) of the FEMA, 1999

- (a) Where contravener is engaged in hawala transaction, money laundering, national and security concerns or involving in serious infringement of regulatory frame work etc.*
- (b) Compounding is **not** permitted by the RBI where the contraventions are under the section 3(a) of the FEMA, 1999. These matters are to be referred by the RBI to the Director of Enforcement (**DOE**). Hence DOE is permitted to deal against these contraventions where penalty and/or prosecution or both may be levied through Adjudicating Authority for Adjudication (court of DOE)*

(iii) Maximum Quantum of the Penalties

- (a) **Maximum** penalty is **300%** on sum as involved in contravention where amount is **quantifiable***

(b) Or **maximum** penalty of Rs. 2 lac where sum as involved in the contravention is **not quantifiable**

(c) And also **additional** maximum penalty is 5 thousand per day till contravention is continued

(iv) **Minimum (Actual) quantum of the penalties**

RBI has prescribed fixed plus variable amount of penalties for the compounding's which are **normally** applied by the RBI. However minimum (**actual**) amount of penalty may be higher as depend on the case and circumstances.

2. Compounding against the Contraventions

(i) **Power of the Compounding under the Section 15**

Any contravention as specified under the section 13 is to be compounded by the RBI within 180 days from the date of receipt of application from the contravener.

(ii) **Process of the Compounding**

(a) Compounding is process of voluntarily admitting a contravention by the contravener

(b) And also pleading guilty and seeking redressal (both) to avoid levy of **maximum** penalty

(iii) **Role of the RBI in Compounding**

(a) **CEFA** (Cell for Effective Implementation of the FEMA, 1999) is working in Foreign Exchange Department of the RBI at Central Office, Mumbai who is controlling the matters relating to all compounding's.

(b) **All** Regional offices and FED CO CELL, New Delhi both are independently delegated to deal with the compounding applications for technical and **material** in nature of the contraventions.

(c) **CEFA** is also to deal with the compounding applications which are **not delegated** to the Regional offices and to FED CO CELL, New Delhi

(v) **Application for the Compounding**

(a) Application for compounding is to be submitted to the RBI through its respective Regional office or FED CO CELL, New Delhi against contravention committed under the section 13 and 3(a) (**both**) of the FEMA, 1999

- (b) Application for compounding as submitted to the RBI is to be referred to the **DOE** against the contraventions as committed under the section 3(a) of the FEMA, 1999 for levy of penalty or/and prosecution or both through Adjudicating Authority for Adjudication.

3. Transparency in Process of the Compounding

(i) Public Disclosure of the Compounding Orders

All compounding orders as passed by the RBI w.e.f June 01, 2016 are available for viewing on www.rbi.org.in on monthly basis

(ii) Public Disclosure of the guidelines for an amount is to be levy as penalty

- (a) **Maximum** amount of penalty is **300%** on sum involved in the contravention
- (b) However **minimum** (actual) amount of penalty is based on the guidance note as is available on www.rbi.org.in
- (c) **Minimum** (actual) amount of penalty is varied as depend on the guidance note and also depend on the circumstances of each case individually like Corona – 2019 etc.
- (d) Normally **minimum** (actual) amount of penalty is based on the **minimum** fixed amount plus variable amount vide RBI Circular No. 73, dated May 26, 2016

4. Powers of the officer of Regional office of the RBI for Compounding

■ Where Contravention is Quantifiable

- (i) **AGM** of the RBI is permitted to compound where an amount of contravention is **maximum 10 Lac**
- (ii) **DGM** of the RBI is permitted to compound where an amount of contravention is **up to 40 Lac**
- (iii) **GM** of the RBI is permitted to compound where an amount of contravention is **up to 100 Lac**
- (iv) **CGM** of the RBI is permitted to compound where an amount of contravention is **minimum 100 Lac**
- (v) **No Compounding** is permitted by AGM, DGM, GM or CGM where contravention is **not Quantifiable**. Hence FED Co CELL, New Delhi is permitted where contravention is **not quantifiable**

5. Powers of the Regional office of the RBI for Compounding

■ Where Contravention is Quantifiable

- (i) For delay in reporting against inward remittance received for the issue of shares
- (ii) For delay in filing of form FC-GPR **after** the issue of shares
- (iii) For delay in filing of Annual Return for the Foreign Liabilities and Assets (FLAs)
- (iv) For delay in issue of shares or refund against the share application money received beyond 180 days from the date of receipt.
- (v) For violation of **pricing** guidelines against issue of shares
- (vi) For issue of **ineligible** instruments like
 - (a) **Non** convertible debentures
 - (b) **Partly** paid shares,
 - (c) Shares with optionality clause etc.
- (vii) For issue of shares **without** approval of the RBI or FIPB /Govt. wherever is required.
- (viii) For delay in submission of form FC-TRS against transfer of the shares from a resident to **non-resident**.
- (ix) For delay in submission of form FC-TRS against transfer of the shares from a **non-resident** to resident.
- (x) For taking on record a transfer of shares **without** having a certified form FC-TRS
- (xi) For delay in reporting to the Secretariat for Industrial Assistance, DIPP for a downstream investment by an Indian entity in another Indian entity which are known as an indirect foreign investments (FIs).
- (xii) (a) For delay in reporting against receipt of consideration or subscription money for the **Capital** contribution in company or in LLP
 - (b) Or for delay in reporting against receipt for **disinvestment** or transfer of capital Contribution from a resident to non-resident and also vice versa
- (xiii) For delay in reporting against **gift** of the capital instruments from a resident to non-resident **without** approval of the RBI

6. Powers of the FED CO Cell of the RBI at New Delhi for the Compounding's

- (i) For the **FEMA** contraventions relating to the acquisition and transfer of the immovable property as located **outside India** by the contravener*
- (ii) For the **FEMA** contraventions relating to the acquisition and transfer of immovable property as located in India by the contravener*
- (iii) For the contraventions relating to an establishment in India like:*
 - (a) Branch Office (BO) of the foreign entity in India*
 - (b) Liaison Office (LO) of the foreign entity in India*
 - (c) Project Office (PO) of the foreign entity in India*
- (iv) For the contraventions falling under Foreign Exchange Management (Deposit) Regulations, 2000*
- (v) For the contraventions where amount involved is **not quantifiable***
- (vi) Hence these abovementioned powers are not delegated to the **Regional offices** of the RBI*

7. Powers of the CEFA, of the RBI at Fort Mumbai for the Compounding's

- *CEFA, Mumbai has power for the compounding's against the contraventions those are **not permitted** by the Regional offices or FED CO Cell, New Delhi.*

8. Monetary limit for the Compounding

- (i) **No** maximum monetary limit is fixed for the compounding*
 - (a) By the CGM of the Regional Offices*
 - (b) By the FED CO Cell at New Delhi*
 - (c) By the CEFA at Fort Mumbai*
- (ii) However following Regional Offices are having limited power of the compounding like*
 - (a) Kochi*
 - (b) And also Panaji (both) are permitted to compound where contravention is **below 100 Lac** only*

(iii) Regional offices at Mumbai and at Thiruvananthapuram are permitted to compound the contraventions of Panaji and Kochi respectively where amount of contravention is **minimum** 100 Lac

9. Application for the Compounding

- (i) Application for the compounding may be submitted suo-moto by the contravener
- (ii) Or **after** receipt of notice by the contravener from the RBI or FIPB/Govt. or any other statutory authority.
- (iii) Or **after** receipt of information by the contravener from the statutory auditors

10. Format for Application against the Compounding

- (i) Format for application is available in the Foreign Exchange (Compounding Proceedings) Rules, 2000
- (ii) Or same form may be downloaded from the RBI's website by clicking www.rbi.org.in/script/BS-Ap_circulars_display.aspx

11. Fee Against the Application for Compounding

- (i) Application in prescribed format along with necessary documents is to be submitted to the respective office of the RBI where compounding application is to be filed at :-
 - (a) Respective Regional Office
 - (b) or FED Co CELL, New Delhi
 - (c) or CEFA, Fort Mumbai
- (ii) And also demand draft (DD) for 5 thousand as drawn in favor of the RBI is be sent along with application for the compounding process purpose

12. Information's/Details for the Compounding

- (i) **General Information's for the Contraventions**
 - (a) ■ Relating to Foreign Direct Investments (FDIs), External Commercial Borrowings (ECBs) or Overseas Direct Investments (ODIs)

- *Relating to Branch Office (BO) in India*
 - *Relating to Liaison Office (LO) in India*
 - *Relating to Project Office (PO) in India*
- (b) *Undertaking is to be submitted that no investigation is pending before any Agency i.e. DOE or CBI etc.*
- (c) *Copy of Memorandum and Article of Association of the Indian company, if any is to be submitted*
- (d) *Copy of latest audited balance sheet of the Indian company is to be submitted*
- (e) *Information about enquiry, investigation or adjudication proceedings if any initiated Against the applicant **after** date of filing the compounding application but **before** Issue of compounding order*
- (f) *Applicant is also required to inform to the compounding authority about the change in address, contact details, if any during pendency of proceeding of the compounding.*

(ii) Specific Information's for the FDIs

- (a) *Name of Applicant*
- (b) *Date of Incorporation of the Indian company*
- (c) *Nature of the Activities of the Indian company*
- (d) *Brief particulars of the foreign investors*
- (e) *Details of the foreign inward remittances*
- (f) *Latest audited Balance sheet of the Indian company*
- (g) *Nature and reason of the contravention*

(iii) Specific Information's for the ECBs

- (a) *Name of Applicant*
- (b) *Date of Incorporation of the Indian company*
- (c) *Nature of the Activities of the Indian company*
- (d) *Brief particulars of the foreign lenders of the Indian company*

- (e) Shareholding of lender at time of signing of loan agreement*
- (f) Date of Loan agreement*
- (g) Amount in the foreign currency and in Indian rupee*
- (h) Rate of Interest*
- (i) Period of loan*
- (j) Particulars of Repayment*
- (k) Details of drawdown*
- (l) Details of Utilization of ECB*
- (m) Nature and Reason of contravention*

(iv) Specific Information's for the ODIs

- (a) Name of Applicant*
- (b) Date of Incorporation of the Indian company*
- (c) Nature of the Activities of the Indian company*
- (d) Name of Overseas entity*
- (e) Date of Incorporation of overseas entity*
- (f) Nature of activities of overseas entity*
- (g) Nature of entity i.e. WOS or JV*
- (h) Details of remittance sent*
- (i) Date of remittance*
- (j) Amount in the foreign currency and in Indian rupee*
- (k) Details of other 'financial' commitments*
- (l) Detail of UIN as applied and received*
- (m) Date of receipt of share certificate*
- (n) Approval of other regulator, if any needed*
- (o) Details of the APRs submitted*

- (p) Nature and reason of the contraventions*
- (q) **All** relevant supporting documents are to be submitted*

(v) Specific Information's for the BO or LO

- (a) Name of Applicant*
- (b) Date of Incorporation in India*
- (c) Date of approval for opening of LO or BO (d) Validity period of approval*
- (d) Nature of the Activities*
- (e) Income and Expenditure of LO or BO*
- (f) Date of submission of Annual Activity Certificate (AAC)*
- (g) Nature and reason of contravention*
- (h) **All** relevant supporting documents are to be submitted*

13. Pre-Requisite for the Compounding Process

- (i) (a) **No new** compounding is **permitted** where **similar** contravention is already compounded with in an immediate period of **3(three) years***
 - (b) Hence **new** compounding is permitted for **similar** contravention **after expiry** of the **3 (three) years***
- (ii) **No** compounding is permitted **without** regularization of the contravention from the RBI, Govt./ FIPB or any statutory authority **before** compounding order is to be passed*
- (iii) **No** compounding is permitted where contravention involve any **money laundering** activity as defined under the Section 3(a) of the FEMA, 1999*
- (iv) **No** compounding is permitted where contravention involve any **national and security** concerns involving serious infringement of regulatory frame work etc. as defined under the Section 3(a) of the FEMA, 1999*
- (v) **No** compounding is permitted against **sensitive** or **serious** nature of contravention as defined under the Section 3(a) of the FEMA, 1999*
- (vi) **No** compounding is permitted where **appeal** is pending before appellate authority against order of the Authority for Adjudication*

14. Process for Approval against compounding by the RBI

- (i) The RBI is required to verify that the details and documents are *prima-facie* in order
- (ii) (a) The RBI is permitted to return the application where details are **not** completed
(b) Or where contravention is **not** admitted/accepted
- (iii) The RBI is required to examine and to decide the nature of contravention like :-
 - (a) Technical
 - (b) Material
 - (c) Sensitive or serious in nature
- (iv) **Technical in Nature**
 - (a) The RBI is required to issue **cautionary advice** where contravention is **technical** in nature.
 - (b) Hence compounding is **not** required where contravention is technical in nature
 - (c) Therefore **no penalty** is to be levied on the contravener.
- (v) **Material in Nature**
 - (a) The RBI is required to compound by **imposing a minimum penalty**
 - (b) And also the RBI has **discretion** to give an opportunity to contravener to personally appear before compounding authority for personal hearing where contravention is material in nature. Hence compounding is required where contravention is **material** in nature.
 - (c) Therefore **penalty** is to be levied on the contravener. However prosecution is not permitted against the contravener
- (vi) **Sensitive or Serious in Nature**
 - (a) The RBI is required to refer to DOE where contravention is **sensitive** or serious in nature.
 - (b) Hence the RBI is **not** permitted for Compounding where contravention is sensitive or serious in nature.
 - (c) **DOE** is to decide the quantum of penalty or/and prosecution or both independently without any intervention on the RBI through Adjudicating Authority for Adjudication.

15. Classification of the nature of Contravention

- (i) The RBI is permitted to decide **based on the merits** as technical, material or sensitive/serious in nature
- (ii) Contravener is **not** permitted to decide himself based on any kind of 'external' advice as technical, material or sensitive / serious in nature
- (iii) Hence contravener is required to submit an application directly to the **RBI** for compounding where contravention is happened without any **delay**. Contravener is not required to submit an application directly to **DOE** where contravention is although **sensitive** or serious in nature. Hence RBI will refer to DOE.

16. Personal Hearing before an Authority

- (i) The RBI is **not** mandatory required to allow for personal hearing.
- (ii) However the RBI is required to give an opportunity to the contravener to submit **additional** facts and documents.

17. Personal Hearing through an Authorized Representative (AR)

- (i) AR is permitted to attend personal hearing based on the proper **written** authority of the contravener
- (ii) However contravener to ensure that AR is conversant with the nature of contravention and facts of the related matter

18. Completion of the Compounding Process and Appeal

- (i) Compounding authority RBI is required to issue an order indicating detail of contravention and section of the FEMA, 1999 as contravened
- (ii) Amount of **minimum** fixed plus variable penalty is to be written in the compounding order
- (iii) Compounding process is to be treated as complete where payment of penalty is made by the contravener within **15** days from the date of order through demand draft in favor of RBI
- (iv) The RBI is required to issue a certificate for completion of the compounding process where penalty is paid by the contravener

- (v) *No second adjudication is permitted by the RBI.*
- (vi) *No separate proceeding is to be initiated or continued against contravener where contravention is already compounded and also penalty is paid by the contravener.*
- (vii) *No appeal is permitted against order of compounding as compounding process is based on the 'voluntary' admission and disclosure*

19. Failure of Payment of the Penalty

- (i) *Compounding order is to be **treated as cancel** where penalty is **not** paid within 15 days by the contravener.*
- (ii) ***And also this case is to be referred by the RBI***
 - (a) *To the **DOE** for necessary action beside that the contravention was **not** sensitive or serious in nature or*
 - (b) *To the Authority as instituted for implementation of the Prevention of Money Laundering Act (**PMLA**) 2002 or*
 - (c) *To Any **other** agency like CBI etc. as RBI deemed fit.*

20. Role of the Directorate of Enforcement (DOE)

- (i) ***DOE** is permitted to **investigate** the cases as referred by RBI where contraventions are of serious or sensitive in nature under the FEMA, 1999*
- (ii) *And **DOE** is also to conclude the case through the Adjudicating Authority for Adjudicating the contravention under the section 3(a) of the FEMA, 1999 where the contravention is serious or sensitive in nature.*
- (iii) *RBI is **not permitted** to compound any contravention till the matter is pending before the Adjudicating Authority for Adjudication or pending in **appeal** against order of the Adjudicating Authority for Adjudication.*

(iv) **DOE** is also permitted to **investigate** the matter where contravener is failed to **pay** amount of penalty against the RBI's order for compounding. In this circumstance RBI is referring the case to the DOE.

(v) **Maximum** Penalty and Prosecution

(a) **DOE** is permitted to conclude the case of contravention through appropriate Adjudication Authority which is an own court of DOE.

(b) Own court of DOE is permitted to impose a maximum penalty @ 300% of the some involved in contravention or/and imprisonment of maximum 7 years or both

21. Conclusion on the Compounding Process

(i) The RBI is permitted for Compounding against **material** in nature contravention only through

(a) Respective Regional office or

(b) FED CO Cell, New Delhi or

(c) CEFA at Fort Mumbai

(ii) **No** Compounding is required by the RBI against contravention of **technical** in nature

(iii) **No** Compounding is permitted by the RBI against contravention of **sensitive** or serious in nature. **DOE** is required to conclude the quantum of penalty or/and prosecution or both through the Adjudicating Authority for Adjudication

(iv) (a) **Maximum** penalty is **300%** against quantifiable amount, Rs. **2** Lac against **Unquantifiable** amount and also Rs. 5000 per day till contravention is continued

(b) **Minimum** (actual) of penalty against quantifiable amount is determined by the RBI based on certain criteria's for **fixed** Plus **variable** amount of penalty vide AP (DIR Series) circular no. 73 dated May 26, 2016

(v) The RBI is permitted for deciding the **nature of contravention** like:

(a) Technical

(b) Material

(c) Sensitive or serious

- (d) And also for fixing of **minimum** (actual) penalty based on **fixed** plus **variable** criteria not based on **maximum** penalty like 300% for **quantifiable** amount of the contravention.
- (vi) (a) **No** prosecution is **initiated** by the RBI for the contraventions as defined under the Section 13 of the FEMA, 1999 where compounding is permitted
- (b) However prosecution is **initiated** by the DOE through the Adjudicating Authority for Adjudication for a contravention as defined under the section 3(a) of the FEMA, 1999 as sensitive or serious where compounding is also **not** permitted.

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