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DJM/HC/10082 / 8519 / 10

12th October 2010

The Deputy Director
Directorate of Enforcement (FEMA)
Mittal Chambers, Nariman Point,
Mumbai 400 021

Sir,

Sub: Reply to SCN No. T-4/19-B/ DD(SB)/FEMA/2010 issued to Sh. Lalit Kumar Modi

1. Kind reference is invited to the aforementioned Show Cause Notice, issued to our client Sh. Lalit Kumar Modi.
2. The SCN alleges that the noticee "has contravened the provisions of Sec. 37 of FEMA, 1999, r/w Sec 131(1) and 272-A(1) of the Income Tax Act, 1961 by failure to appear in person by willful disobedience and thereby rendered himself liable to be proceeded against under Sec 13(1) of FEMA, 1999." (Page 5 of the complaint attached to the SCN)
3. The following submissions are made in this respect, which are urged without prejudice to or in alternate to each other, seeking liberty to add, amend, delete as may be required in the interest of justice:-
 - i) The basic thrust of the allegation is that by not appearing before the Investigating officer in response to summons issued under FEMA, 1999, the noticee has violated the cited provisions of law.


BRANCHES :

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It may be kindly appreciated that; in the facts and circumstances of the matter, the noticee has not avoided responses to any of the communications from the department. As brought on record by the complainant himself, the noticee has responded to each and every summons of the department and submitted answers and provided documents in respect of each and every query and direction contained therein. In addition the General Counsel and constituted Attorney of the noticee, Sh. Mehmood Abdi has also been in touch with the Investigating Officer for receiving communications and providing answers and assistance in investigations etc on behalf of the noticee. Reference in this context is also invited to para 4 of the letter dt. 7-9-10 from the said General Counsel and Constituted Attorney addressed to Sh. D.K. Sinha, the Assistant Director and complainant herein. (Copy at S. No. 4 of the Annx. 'A' to the complaint attached to the impugned SCN); wherein it is clearly recorded that the said officer had been in touch with him (i.e. Sh. Abdi) over the phone as well. In fact, the Investigating Officer (and the Complainant herein) had also served summons meant for the noticee on the said Constituted Attorney Sh. Mehmood Abdi as seen from his letter dt. 2/8/10. Thus, it cannot be the grouse of the department that the noticee has not been available for receiving communications and furnishing answers to the queries and directions.

- ii) (a) What would appear to be the complaint of the department is that the noticee has not been able to make himself available personally before the Investigating officer. It may be kindly appreciated that the reason for the same has already been furnished to the investigating officer. It is the serious threat perception to the life and liberty of the noticee and his family members that he has decided not to return to India till such time that such a threat subsides. Copies of detailed correspondence in this regards with the Police Authorities have already been furnished to the

department and forms part of the department's complaint under adjudication in the Impugned SCN. It appears, from the departmental complaint, that all the voluminous and factual documentation has not been able to convince the Investigating Officer that the noticee does have a serious risk to his life and liberty despite the fact that the Police department has provided security to him and his family members apart from permitting him to hire appropriate private security.

- (b) It is submitted; with due respect, that an investigating officer under FEMA cannot be a proper authority to judge and decide upon the seriousness of perceived security perception of a person. Hence, with due respect, his comments in the complainant about the noticees alleged public appearances and participations in crowded functions on its pages 3 & 4 etc will have no relevance to the security threats as are perceived by the person concerned (i.e. the noticee herein) and police authorities. It is, therefore, also not for the said officer to decide that the "documents furnished by him do not indicate any compelling reasons for his travel outside India." (Last para of page 3 of the Complaint). Similarly, the observations of the Ld. Investigating Officer in the same vein that "it is understood that Sh. Modi left India only after the alleged irregularities committed in the conduct of the IPL came to surface and investigations were intensified by the agencies of the Government in respect of alleged violations committed by him under difference statutes" have no relevance whatsoever for investigations under FEMA and are uncalled for. It is not that the reason of security threat has been cited for non-appearance before FEMA authorities alone but has been communicated to various other appropriate authorities too as may have been required. Any alleged irregularity, if any, has been dealt with through lawyers therefore avoidance of inquiry is mere presumption by the Complainant. Hence, the complainant's observations in this

regard in the same vein is not correct and has no basis whatsoever for his assumption therein that the –*“failure to appear before the undersigned is without any valid reason”*

- (c) It is further submitted in this context that the Ld. Investigating Officer; before proceeding to analyze the threat perception himself, ought to have consulted the appropriate authority in this respect viz. the Police department of Mumbai. No such attempt has been brought on record. In fact, the noticee himself, vide his letter dt. 23/8/10 to the Investigating Officer, had suggested verification on this count from the office of the Joint Commissioner of Police (Crime Branch), Mumbai. A reference to this letter has been made in the complaint on page no. 2 (middle para) though a copy of the same was not provided by the Ld. Investigating Officer to the Ld. SCN issuing authority. It is therefore, also kindly submitted that complete facts were not placed before the SCN issuing authority for proper appreciation of the matter and therefore, to that extent the SCN issued and under adjudication would suffer from non-application of mind and deserves to be quashed for that reason alone.

It is to be submitted further in this context that all the alleged conjectures and surmises of the Ld. Investigating Officer regarding alleged free movements of the noticee allegedly going against his perceptions of security-threat refer to some earlier events of the past. As indicated in the said letter dt. 23-08-10 of the noticee; such perceptions keep changing with time. As indicated therein; the Times of India had also reported as late as on 18-07-2010 that the Mumbai Police had “confirmed” the existence of a life threatening risk from the underworld for the noticee. It may, therefore, be kindly appreciated the seriousness of the situation in such matters cannot be made subject matter of conjecture and assumptions and should be best left to the concerned person and/or as may be

advised to him including by appropriate professionally competent persons in this respect or by family members.

It is, therefore, submitted that the ground taken by the Ld. Investigating Officer that the noticee did not have a valid ground for not appearing before him is not well founded and is incorrect. If such a situation is not considered to be valid and enough ground; it is wondered as to what else could be considered to be an appropriate and valid situation. The Ld. Investigating Officer; as already indicated ought to have consulted the Police authorities before making such a serious charge and referring the matter to Ld. Adjudicating Authority for penalization as per provisions of the law quoted in the complaint.

- (iii) Without prejudice to the aforesaid, a detailed security analysis done about our client's security threat perception / status, by a highly acclaimed agency viz. Page Group Limited, confirming what our client has asserted all along will be submitted to you shortly.

- (iv) It is kindly submitted that the provisions of law quoted vide section 131(1) & 272-A (1) of the Income Tax Act, 1961 & relied upon in the complaint have to be read and interpreted in proper perspective. The failure to attend the office as indicated therein would evidently mean a willful, deliberate or intentional failure on part of the noticee. As submitted herein above and seen from the circumstances and facts narrated in the complaint and the documents attached herein too, no such attempt has been made by our client. He and his Constituted Attorney have been in constant touch with the Ld. Investigating Officer of the department and have rendered full co-operation and provided all required information and documents. The noticee offered vide letter dt. 8-09-2010 to the Investigating officer to appear in person before any officer of the FEMA or of the Indian High Commission in London. The



whereabouts of the noticee were always disclosed to the department. Alternatively video conference was also offered by the noticee in the same letter. Hence with due respect, these provisions of law will have no applicability at the present junction of proceedings. There are evidently mitigating and extenuating circumstances on record compelling the noticee not to return to India for the time being.

It is submitted in this context that even the Section 131(1) of the Income Tax Act, 1961, itself provides in its para (d) for "issuing commissions" by the Investigating Officer. Similar provisions exist in other appropriate laws pertaining to investigations viz. Cr. P. c. etc. too. It is evidently to take care of situations such as the concerned persons not being able to appear in person for valid reasons. Therefore, the Ld. Investigating Officer could have always considered taking resort to such a procedure as per permissible in law. On his part the noticee herein is willing to co-operate in this regard should it be felt by the department to be an appropriate course in the facts and circumstances taking care, however, of his threat / security perceptions. It is therefore suggested that the General Counsel and Constituted Attorney could be approached for this purpose for appropriate action in this respect so as to make the investigations to reach their logical conclusion for charting out appropriate chores keeping in view the extenuating circumstances pertaining to threat perceptions etc.

- (v) It is further submitted that the Ld. Complainant's resort to provisions of Section 13(1) of FEMA, 1999, once resorted to Sections 131 & 272-A of the Income Tax Act has been made is not appropriate, relevant and therefore not applicable to the matter and alleged contravention under adjudication. The nature of alleged contravention is such that it can be covered only under the said




provisions of the Income Tax Act r/w Sec 37 of FEMA, 1999 and not under the provision of Sec 13(1) of FEMA, 1999.

Without prejudice, it is further submitted in this respect that in situations where more than one provision of law could become applicable for the same sets of circumstances and alleged violations; the one least penal in nature should be made applicable keeping in view the harmonious construction and interpretation of statutes and various legal pronouncements on this count. Hence; without prejudice and not admitting to the alleged contraventions, what should be applicable are only Sec 131(1) and 272-A (1) of the Income Tax Act r/w Sec 37 of FEMA, 1999, and not Sec. 13(1) of the latter Act viz. FEMA, 1999.

4. In the facts and circumstances as indicated and submitted above, the Impugned SCN is requested to be dropped. Further, appropriate Order with regard to finalizing the investigations keeping in view the submissions and circumstances may also kindly be considered to be issued as may be felt appropriate in law and circumstances.
5. In the event of any adverse decision being taken in the matter it is kindly requested that an opportunity of personal hearing may be afforded.

Thanking You

Yours faithfully,
For Wadia Ghandy & Co.



Partner